Dockets: 2011-4111(CPP)
2011-4112(EI)

BETWEEN:

YORK REGION SLEEP DISORDERS CENTRE INCORPORATED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on January 31 and February 1, 2013, at Toronto, Ontario
Before: The Honourable Mr. Justice Randall Bocock

Appearances:

Counsel for the Appellant:	Christine Ashton
Counsel for the Respondent:	Lindsay Beelen Roxanne Wong

JUDGMENT

The appeal pursuant to section 28 of the *Canada Pension Plan* is dismissed, and the ruling of the Minister of National Revenue on the appeal made to the Appellant under section 27 of the *Plan* is confirmed.

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed, and the ruling of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* is confirmed.

Signed at Ottawa, Canada, this 16th day of April 2013.

"R.S. Bocock"

Bocock J.

Citation: 2013 TCC 108
Date: 20130416
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2011-4112(EI)

BETWEEN:

YORK REGION SLEEP DISORDERS CENTRE INCORPORATED,

Appellant,

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REASONS FOR JUDGMENT

Bocock J.

I. Nature of Appeal

[1] These two appeals, one in respect of the *Employment Insurance Act* (the "*Act*") and the other under the *Canada Pension Plan* (the "*Plan*"), again place before the Court the well litigated question of whether ancillary health care providers are employees or independent contractors.

II. Facts

a) Summary of Agreed Facts

[2] The following relevant facts were not in dispute:

i) The Appellant is a for profit business which operates a sleep disorder monitoring, analysis and treatment centre ("Sleep Clinic").

ii) The monitoring activities include undertaking controlled studies of patients during sleep and recording various data collected through electroencephalograms, electrocardiograms and related vital, bodily measurements ("Sleep Studies").

iii) The analysis occurring after and distinctly from the Sleep Studies, tabulates, scores and qualifies the data using standardized data and statistical analysis ("Scoring").

iv) Polysomnographic technologists ("PSGTs") are specially trained to execute Sleep Studies and Scoring as sleep specialists ("Sleep Specialists").

v) Sleep Specialists may attain additional professional health care accreditation through further education, study and periodic re-qualification which allows a successful student to become a registered Polysomnographic technologist ("RPSGT").

vi) All of the nine workers in issue (the "Workers" or "Worker") at the Sleep Clinic were PSGTs (or Sleep Specialists).

vii) Six of the Workers were RPSGTs.

viii) The Minister assessed the facts related to a sample of five Workers and determined that the sample Workers were employees and their employment was both insurable under paragraph 5(1)(*a*) of the *Act* and paragraph 6(1)(*a*) of the *Plan* for the 2008 and 2009 taxation years (the "Relevant Period").

ix) The Sleep Clinic is an independent health facility regulated under provincial legislation which requires the creation or establishment of certain designated individuals and committees in order to ensure quality treatment and compliance with professional standards.

x) The Sleep Clinic is professionally overseen by the College of Physicians and Surgeons of Ontario ("CPSO") which mandates compliance with a standards guide.

xi) In turn, in order to ensure its compliance with the standards guide the Clinic promulgated and requires all staff (including the Workers) to adhere to a Policies and Procedure Manual ("Manual").

xii) All staff perform their duties under legislation, standards guides and Manual, are considered technical staff and are overseen by the Quality Advisor/Medical Director ("Medical Director") and the Manager/Technical Director ("Technical Director") of the Clinic. The Workers have no written contracts.

xiii) The Workers all provide less the usual "full-time" hours per week. Those workers providing full-time hours were classified and treated as employees ("Full-Time Employees") by the Appellant.

b) Testimony at Trial

[3] Two witnesses testified on behalf of the Appellant: Mr. Ilya Dumov, the Technical Director and Mr. Haris Sabanadzovic, a Worker at the Clinic. For the Respondent Mr. Elvin Mopera and Mr. Yan Fai Chow, both Workers, testified as adverse witnesses.

[4] Although there were minor differences in some testimony during the Hearing, by and large, consistency prevailed. All witnesses were definitive that the intention of the parties, admittedly not reflected in a written agreement, was that the business relationship was one of independent contractor an not that of employee. As to concurrent examples, in other sleep centres there was evidence that Workers were treated as both employees and independent contractors.

[5] Additionally, the factual findings of the Court from testimony, identified below by those headings (consistently chosen by counsel during the course of questioning both in direct and cross-examination and corresponding to the four in one factors referenced below) may be summarized as follows.

i) Control

a) Scheduling of Hours and Work

[6] The Workers would provide their schedule preferences for the nights and days for Sleep Studies and Scoring. Generally, Sleep Studies were conducted during the night-time. This was determined by the human condition. Patients who worked shift work would occasionally undergo Sleep Studies during the daytime. When a Worker attended during a daytime work period, he or she was required to conduct a severe Sleep Study (where a patient suffered from urgent sleep apnoea or similar affliction). Scoring could be undertaken at any time. Factually, most Workers consistently worked the same preferred scheduled days each month. If during an evening Sleep Study patients cancelled or failed to attend, the Workers were allowed to determine among themselves who would leave. Full-Time Employees, if any were present, stayed and engaged in Appellant assigned administrative duties. Workers were required to attend monthly staff meetings where updated policies, staff changes and procedures were discussed.

b) Reimbursement of Expenses

[7] Generally, all Workers bore all expenses of service delivery whereas the Full-Time Employees received some allowances in the form of the provision of uniforms and the like. The occasional provision by the Appellant of "free of charge" continuing medical training to the Workers did occur.

c) Payment of Workers

[8] Generally, Workers were paid by a formula directly related to a uniform amount calculated on the basis of a fixed work shift per evening for Sleep Studies. Scoring was paid on the basis of piece work. Each month, a Worker would complete an Invoice-Time Sheet, which during the Relevant Period, required Workers to complete information under the headings: "Employee Name", "Hours", "Hourly Rate" and "Total". Invoice-Time Sheets were approved by the Technical Director. From time to time, during the Relevant Period both Workers and Full-Time Employees used the same Invoice-Time Sheets. Some evidence suggested vacation pay was occasionally claimed by the Workers. In later years, after the Relevant Period, invoices became more refined, referenced Sleep Study numbers and left incomplete information under the "Hourly Rate" column.

d) Supervision

[9] A Worker conducting Sleep Studies would direct any inquiries to the Technical Director or supervising physician. This was consistent with the professional standards and the Manual. Ultimately, if problems arose, no disciplinary action would be taken, but problems were relayed to the Worker. If problems persisted, a Worker's contract would simply have been terminated. No Worker or Full-Time Employee was ever terminated or disciplined during the Sleep Clinic's history. Generally, whether a Sleep Study or Scoring was conducted by a Worker or Full-Time Employee, all final reports needed to be approved and signed by a medical doctor. Work was never refused by Workers. The critical motivation cited by Workers in working less than full-time hours was the potential ability to gain other work with other sleep clinics and centres, which some did. Workers never arranged the provision of a Sleep Study directly with a patient. Annual evaluations with Workers were conducted. Rate increases or discussion of same emanated from these annual reviews.

ii) Ability to Hire Replacement Workers

[10] If a Worker needed to cancel a regularly scheduled Sleep Study, he or she would contact the Sleep Clinic. No evidence was adduced to suggest Workers replaced themselves, either by contacting another Worker directly or by sub-contracting with another Sleep Specialist. The Technical Director confirmed that from the Appellant's perspective direct replacement with another Sleep Specialist by the Worker was not acceptable and had not occurred.

iii) Tools

[11] Aside from the Worker's uniforms (medical scrubs), all other tools, computers, software and medical equipment were supplied by the Appellant. No access to software or data files was permitted or occurred remotely by the Workers. There was no charge to the Workers for the use, rent or repair of equipment or for use of the premises.

iv) Risk of Loss and Investment

[12] Testimony consistently revealed that no Worker had any investment, financial exposure or operational liability related to the operation of the Sleep Clinic or Worker activity undertaken there. None had any capital investment or debt advanced to any related business or to the Sleep Clinic.

v) Opportunity to Profit

[13] None of the Workers who testified had a distinct business name, business identification number, business cards or referenced activity marketing their skills. Collectively, from the testimony, the sole opportunity to profit for the Workers was the ability to work for the other service providers within the field because of the less than full-time hours worked at the Sleep Clinic.

III. Submissions of Counsel and Minister's Assumptions

[14] Although not always greatly of assistance in these matters, certain of the Minister's assumptions of fact contained in the Replies to both matters bear repeating. Of relevance are the following:

Control

(r) on a monthly basis, the Workers advised the Appellant of the nights they were prepared to work at the sleep clinic;

(s) the Appellant created a monthly work schedule for the clinic;

(t) the Appellant did not guarantee a certain number of shifts per month for any of the Workers;

(u) most of the Workers worked between 8 to 10 nights each month at the Appellant's sleep clinic;

(v) each shift was 10 hours in duration;

(w) the Workers were not normally supervised directly while monitoring patients during the sleep studies;

(x) the Workers were supervised by the Appellant's [Technical Director], who oversaw the work that they performed;

(y) the Appellant provided the Workers with training on how to perform their duties;

(z) the Workers were required to comply with the Appellant's policies, procedures and protocols;

(aa) the Appellant implemented quality control procedures to ensure the Workers were performing their services properly;

(bb) the sleep studies were reviewed by the Appellant and the Workers were asked to make any necessary corrections;

(cc) the Workers prepared detailed reports in accordance with the Appellant's established policies and procedures;

(dd) the Workers were trained by the Appellant on the use of the Appellant's software;

(ee) the sleep study reports prepared by the Workers were signed by the physicians;

Provision of Tools and Equipment

(ff) the Workers usually performed their services at the Appellant's premises;

(gg) the Appellant provided the Workers with the tools and equipment required to conduct the sleep studies including electromyogram, electroencephalogram, Electro-oculogram, electrocardiogram, nasal air flow sensor, audio/video equipment, and snore microphones, at no cost to the Workers;

(hh) the Workers did not provide any of the tools and equipment needed to complete the work;

Subcontracting work and hiring assistants

(ii) the Workers were required to perform their services personally;

(jj) the Workers could not subcontract their work or hire assistants;

(kk) the Workers were responsible for finding a replacement worker in they were unable to work a scheduled shift;

(ll) replacement Workers were approved and paid by the Appellant;

Chance of Profit and Risk of Loss

(mm) the Workers were remunerated by the hour;

(nn) the rates of pay were determined by the Appellant and varied between $18 and $25 per hour, depending on a Worker's experience;

(oo) the Workers recorded the hours worked each shift on a combined invoice and timesheet that was developed by the Appellant;

(pp) the Workers were paid on the 15th and 30th day of each month;

(qq) the Appellant did not provide the Workers with any benefits;

(rr) the Workers did not incur any expenses personally in performing their services for the Appellant;

(ss) some of the Workers performed similar services for other sleep clinics, for which they received employment income and T4 slips;

Intention

(tt) the Workers did not have their own clients; the clients were those of the Appellant;

(uu) none of the Workers, with the exception of Mohammad Ali and Haris Sabanadzovic, had a business number from the Canada Revenue Agency;

(vv) none of the Workers had a registered business style;

(ww) the Workers did not manage their own staff;

(xx) most of the Workers reported the earnings they received from the Appellant as business income on their personal income tax returns; and

Other Relevant Information

(yy) the Appellant considered sleep specialists, that provided their services on a regular, full-time basis, to be employees of the sleep clinic.

a) Summary of Counsels' Argument

[15] Although there was marked consistency of facts, by contrast, submissions of counsel as to the weight, application and interpretation of those facts were dramatically divergent.

i) Appellant

[16] Generally, Appellant's counsel submitted that emphasis must be given to the clearly expressed direct intention of the parties, borne out by direct testimony which provided that the arrangement was one of service recipient and independent contractor. This, in turn, was embodied in the unwritten, but nonetheless lucid, contract for services. This clear intent should not be ignored, but enhanced through the actions of some of the Workers in consistently classifying the payments as business income, seeking other jobs without the Sleep Clinic's consent and the method and bases of the calculation of payment.

ii) Respondent

[17] The Respondent stated that the Workers simply could not be said to be in business for themselves. The sole business present was that of the Clinic. The only difference between the Workers and employees at the Clinic was that of part-time versus full-time status, respectively. Moreover, intention was not clear, but muddled in this case since there was no written contract or other objective evidence. Accordingly, an analysis of the criteria of the four in one test required. Such an analysis would reveal that the only difference between the Workers and the Clinics' full-time employees was simply the quantum of the hours of work.

IV. Analysis

a) Analysis of Leading Authorities

[18] Reconciliation of the concept of common intention regarding the worker/service recipient relationship with the *Wiebe Door Services Ltd. v. The Minister of National Revenue*, 87 DTC 5025, four in one factors is most currently and appropriately stated in the Federal Court of Appeal decision in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 343 DLR (4^{th}) 100. The leading common authorities cited by both counsel in argument are cited in *TBT Personnel Services Inc.*

[19] Particularly instructive are the following excerpts from *TBT Personnel Services Inc.* which confront squarely the sequencing of analysis to be applied by a trial judge in balancing common intention with the four in one factors;

> 9 In *Wolf v. Canada*, 2002 FCA 96, [2002] 4 F.C. 396 (C.A.), and *Royal Winnipeg Ballet v. Canada (Minister of National Revenue - M.N.R.)*, 2006 FCA 87, [2007] 1 F.C.R. 35, this Court added that where there is evidence that the parties had a common intention as to the legal relationship between them, it is necessary to consider that evidence, but it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention.
>
> 35 Such intention clauses are relevant but not conclusive. The *Wiebe Door* factors must also be considered to determine whether the contractual intention suggested by the intention clauses is consistent with the remaining contractual terms and the manner in which the contractual relationship operated in fact. […]

[20] There exist many decisions of this Court reaching back many decades relating to various allied or ancillary health care providers on the issue of employee versus independent contractor. Counsel for both parties cited many of such cases related to dental hygienists and others concerning dieticians, social workers and legal assistants. By virtue of their sheer number and fact scenario based outcomes, the summarized law and directed process of the more recent and binding authority of *TBT Personnel Services Inc*. are preferred by this Court. Its reconciliation of intention with the four in one factors resolves, clarifies and articulates an overall analytical process to be undertaken by a trial Court in deciding this now somewhat classic issue.

[21] As further justification for this reliance stands the case of *3868478 Canada Inc. v. Minister of National Revenue*, 2006 TCC 444, [2006] T.C.J. No. 334, wherein Chief Justice Bowman recounted throughout his decision the number and variety of decisions concerning dental hygienists and states resolutely that none can be precedent sitting on the issue, since each differs factually:

> 20 I have devoted more time to this than I might otherwise have done because of the apparent differences between members of this court on the question of dental hygienists particularly with respect to the role of the integration test. Each case turns on its own facts. […]

[22] Consistent with the former Chief Justice's view regarding the value as precedent of cases decided at such a fine resolution of factual examination, this Court has deliberately not referenced the ultimate decision *3868478 Canada Inc*. Therefore, the facts in this case (part of which include the intention of the parties) analyzed in the context of the four in one factors will determine the Court's decision.

b) Analysis of Intention as Reflected by Relationships in Fact

[23] The question remains, does an analysis of the factors reveal or even maintain the intention of the parties in this case based upon the manner in which the legal relationship operated in fact? That answer, although more important perhaps, proves somewhat more difficult to find in cases like this where there is no written agreement.

[24] On the issue of control, supervision is somewhat opaque because of the overlay of the professional and regulatory obligations which would apply in any instance. However, the Workers' required attendance at staff meetings, completion of the Appellant supplied Invoice-Time Sheets (presented at the Hearing on a cursory, sample basis only) and the general tenor of the relationship -- reflected in all of scheduling, payment, no ability to conduct professional evaluative analysis of Sleep Study results at a remote location, absence of business expenses and direct supervision while on site -- indicate an employee rather than an independent contractor relationship.

[25] As with most medical and ancillary health service positions, the issue of tools is not particularly determinative; however the lack of any payment of rent or user fees, no obligation to repair borrowed or used equipment and the inability to conduct evaluative work on one's own computer gravitate towards an employee/employer relationship.

[26] As to replacement workers, there was no ability by the Worker to direct hire or sub-contract a qualified professional and pay such person directly at the Worker's discretion. Alternatively, there was no evidence of a roster of pre-approved sub-contractors from whom the Worker could, without Appellant approval, choose a replacement Sleep Specialist.

[27] On the issue of assumption of risk, no evidence was adduced to suggest any financial investment, indemnification provision or direct liability by the Worker since it appears no direct professional/patient relationship, accountability or nexus existed. Such facts suggest an employee/employer relationship.

[28] As to the issue of opportunity to profit, aside from an ability to work more hours and thereby generate more income (whether for the Appellant or another sleep disorder entity), there were no costs to be minimized, profits to be maximized or opportunities to be exploited. In short, the proportion of profit and loss from the Workers' efforts could not be varied through exploitation of variable costs, sub-contracted wage rates, service improvements or innovation. Factually, on the basis of the evidence, all such benefits, if pursued, would have accrued exclusively to the

Appellant's business. Factually, only the Appellant controlled and manipulated these inputs of production (in this present case, services) related to the delivery of the service constituting the business or parts thereof provided at or in respect of the Sleep Studies or Scoring. These inputs were the essential variables of business which afforded profit or loss in this case. The Workers had no opportunity to exploit any of them to their respective benefit or gain.

V. Summary and Decision

[29] The Appellant and Workers were consistently clear in direct testimony that they were mutually seized of a common intention and goal to establish and maintain an independent contractor and service recipient relationship. However, whatever interpretation may be placed upon that adamant, subjective intention of the parties to the relationship; the operational reality, manifested in the objective findings of fact, ought to support or at least compliment such an intention.

[30] In the present case, these factual findings by the Court reflect an operational relationship which:

i) does not disprove in any meaningful way, if at all, the Minister's factual assumptions;

ii) does not buttress factually the assertion that a subjective common intention of independently operating businesses was present; and

iii) fails to establish the presence of an operation or undertaking which could remotely be described as a distinct, collateral or even subordinate enterprise (to that of the Sleep Clinic) owned and/or operated by any Worker.

[31] These three conclusions, based upon the factual findings applied to the four in one factors, instinctively lead the Court to the overall decision that the Workers were employees under part-time contracts of service and were not independent contractors in business on their own account.

[32] The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 16th day of April 2013.

"R.S. Bocock"

Bocock J.

CITATION:	2013 TCC 108
COURT FILE NOS.:	2011-4111(CPP) 2011-4112(EI)
STYLE OF CAUSE:	YORK REGION SLEEP DISORDERS CENTRE INCORPORATED AND M.N.R.
PLACE OF HEARING:	Toronto, Ontario
DATES OF HEARING:	January 31 and February 1, 2013
REASONS FOR JUDGMENT BY:	The Honourable Mr. Justice Randall Bocock
DATE OF JUDGMENT:	April 16, 2013

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