Dockets: 2019-3371(EI)
2019-3372(CPP)

BETWEEN:

CANADIAN SECURITY &
MOBILE PATROL SERVICES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on March 13, 2023 at Toronto, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

Agent for the Appellant:	Hasan Shahid
Counsel for the Respondent:	Amin Nur

JUDGMENT

The appeals made under the *Employment Insurance Act* ("EI Act") and the *Canada Pension Plan* ("CPP") are dismissed and the decision rendered by the Minister of National Revenue on June 13, 2019 is confirmed on the basis that the workers were employees of the Appellant during the years 2016, 2017 and 2018 within the meaning of paragraphs 5(1)(a) of the EI Act and 6(1)(a) of the CPP, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 22nd day of March 2023.

"Patrick Boyle"

Boyle J.

Citation: 2023 TCC 34
Date: 20230322
Dockets: 2019-3371(EI)
2019-3372(CPP)

BETWEEN:

CANADIAN SECURITY &
MOBILE PATROL SERVICES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The Appellant corporation, Canadian Security & Mobile Patrol Services Ltd. ("CSS") is appealing Employment Insurance and Canada Pension Plan assessments in respect of 2016 through 2018. The sole issues are whether the corporation's workers were engaged in insurable employment and pensionable employment as defined in the EI and CPP legislation. These questions require the Court to decide if the workers were employees or were independent contractors in providing their services to CSS.

[2] CSS is in the business of providing security guard services to its clients in the construction, retail, warehousing and trucking sectors. It had a history of being a subcontractor to a large security services firm. CSS carries on business as Canadian Security Services. In the years in question, Mr. Hasan Shahid was the company's sole shareholder and director. Mr. Shahid represented CSS in these appeals and was the only witness.

I. Applicable Law.

[3] I have summarized the relevant law in *Loving Home Care Services* v. *M.N.R.* 2014 TCC 71 (affirmed 2015 FCA 68) as follows:

[3] The applicable law in appeals such as these is fully and clearly set out by the Federal Court of Appeal in *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85. I will not reproduce all of paragraphs 23 and 33 through 41 of Justice Mainville's reasons.

[4] The legal issue to be decided is simply whether an individual worker is performing her personal care worker services as her own business on her own account.

[5] This requires me to first decide whether subjectively, based upon the facts, circumstances and evidence in the particular case, there was a mutual understanding or common intention between the parties regarding their relationship as either employment or independent contractor.

[6] At this stage, a Court can consider, among other things, the extent to which a worker understood the differences between an employment or independent contractor relationship, the relative bargaining position strengths and weaknesses, and the extent to which such evidence, which can typically be expected to be self-serving, is corroborated by and consistent with the other evidence placed before the Court.

[7] The answer to this question is not determinative. The parties can not agree to the correct legal characterization of their work relationship as if it were just another term or condition of their work relationship rights, obligations, duties and responsibilities. A declared and agreed intent to a particular characterization of the work relationship as employment or independent contractor must, in fact, be grounded in a verifiable objective reality.

[8] If the parties have a common agreed intended characterization of their relationship, this Court must determine if the overall objective reality of their working relationship sustains, and is consistent with, their subjective intent.

[9] This second step requires the Court to consider and weigh the traditional *Sagaz/Wiebe Door*[1] factors of control over the work and the worker (including the extent of subordination of the worker), the provision of tools, material, credentialing and equipment needed for the worker to do the work, and the extent of the worker's financial upside and downside risks regarding the services provided by her.

[10] In this second step, the Court may again consider the parties' intent, along with the actual behaviour of the parties and any written agreement between them. In *Royal Winnipeg Ballet* v. *M.N.R.* (F.C.A.)[2] the Federal Court of Appeal had similarly said the traditional *Sagaz/Wiebe Door* factors must be considered "in the light of the parties' intent."

> [11] This second step is otherwise the same as how the Court would proceed in cases where there is no common shared intention regarding the characterization of the work relationship by the parties.

II. Intention

[4] Mr. Shahid's evidence is that both CSS and its workers intended for the workers to be independent contractors. He relies upon the company's Subcontractor Service Agreement in which workers make such an acknowledgement.

[5] In this case I am unable to discern whether or not there was a common shared intention. A party's intentions are inherently subjective, although courts are generally also interested in whether a person's stated intentions are consistent with the objective evidence. In this case, none of the workers testified, so I don't know what they intended, what they understood was in the contract, or what they understood their acknowledgement and pledge in that the agreement covered. Given the material inconsistencies and ambiguities within CSS's standard form contract, as described below under Control, and absent the testimony of any workers - including Mr. Shahid's relatives, I do not have sufficient, consistent, credible evidence to conclude that, on a balance of probabilities, the workers intended to be independent contractors.

[6] I will therefore proceed to the next stage of considering and weighing the relevant factors from *Sagaz/Wiebe* of control over the work and worker, provision of tools/supplies and the extent of the workers' financial upside and downside risks regarding their services.

III. Control

[7] As in many cases the issue of the payor's control of the work and of the workers is a very significant factor in this case.

[8] On its website, CSS offers its clients the ability to "hire highly trained security guards", that they "provide meticulous training and ensure that our guards are fully bonded, insured and licenced", and that this includes "training of new licenced applicants and security officers to meet or exceed Ministry standards", "frequent training to improve employee performance" and "quarterly performance

assessments". The CSS also said "posting of open position is a way of informing employees and potential applicants of available positions within the company".

[9] Mr. Shahid did not respond to these parts of its website by saying it reflects current practice but not how CSS operated in 2016 to 2018. Instead, he said these references to training and the monitoring of performance were mistakes by his media consultants, and were just media statements, and restated that in fact CSS has never provided training. The only requirement was that guards had to be properly licensed by the province before being hired. I have no idea what, if any, training is involved in obtaining a licence. This gives rise to overall concerns about the witness' description of CSS' operations and involvement with its guards.

[10] CSS's Subcontractor Service Contract includes the following:

- A requirement that the worker cannot leave their assigned post or job site during scheduled work
- Paid breaks during work hours
- It refers to the agreement as a "collective agreement"
- It has two paragraphs headed Immigration Law Compliance
- It has a ninety day probationary period, which allows for termination without notice
- Failure to comply with minimum notice requirements leads to Disciplinary Action
- In the section specifying that there is no overtime day, it is tied to the 44 hour provincial threshold for employees and suggests workers should subcontract any work over 44 hours to another worker
- It includes reference to Termination Pay Cheque which shall be "disbursed according to provincial and/or federal law"

- It specifies that the company must be informed at least thirty days in advance of vacation, and that approval is required and is at the discretion of the company, and limits the number of those unpaid vacation days to sixty per year

- It provides that the costs of uniform and equipment provided will be paid by pay cheque deductions
- It provides for Holiday Pay, which was described by Mr. Shahid as the higher rate of pay for statutory holiday under Ontario employment legislation
- In his testimony, Mr. Shahid said that the company assumes Ontario minimum wage laws applied to its subcontractors
- It has a complex Harassment Policy and Violence Policy that contemplate an Investigation, Formal and the Informal Grievances, Corrective Actions, Disciplinary Action, Suspension and Suspension Periods, and possible Termination.

[11] All of the above appear to reflect somewhat the type of control that is more expected in employment situations than in independent contractor situations.

[12] The Subcontractor Service Contract clearly contemplates that a worker may work for others, including other security services firms, as long as it complies with the agreement. In the case of security guard workers, this does not appear inconsistent with many types of employment such as restaurants servers, retail workers, etc. at the minimum wage range level. I do not find this a helpful consideration in this particular case.

[13] Mr. Shahid confirmed that he gave a description of the work, that he outlined the work expectations for shifts offered at clients' sites, that he gave the workers guidelines on how to accomplish their tasks, and that he gave workers follow-up and feedback on their work from the view of both CSS and its clients.

[14] Mr. Shahid stressed that no one from CSS supervised or controlled the work done by the workers or how it was done. Workers were told by CSS who to report to at their client's premises and that a particular person will give them instructions. The effect of the supervision or control of a worker by the payor's client has been previously been considered by the court to reflect relevant control and supervision by the payor in comparable circumstances. In paragraph 46 of *Loving Home Care* it is written:

> [46] With respect to the role of the families in having day-to-day communications about the care needed or provided, consistent with Justice Woods' decision in Dean (Ana's Care & Home Support) v. Canada (National Revenue),

> 2012 TCC 370, it is the ability of Loving Home Care to control and direct how the duties are performed that is most significant, not how often it had to be or was exercised to such an extent. Also, I agree with Justice Woods' observation that in an in-home care giving context, since the workers contracted with Loving Home Care and not with Loving Home Care's clients, any directions given by Loving Home Care's clients which the workers were expected to comply with, amounted to control exercised over her by virtue of her obligations to Loving Home Care.

This applies equally in this case.

[15] CSS also relies on the fact that most of its workers were not regular full-time or part-time workers. The employment contemplated in the definitions of insurable and pensionable employment is not limited to regular workers. It is broad enough to include what may be described as casual employees. Irregular, casual workers may be common in a gig economy, but are not excluded from being casual employees once relevant factors are considered and weighed.

[16] Having regard to the evidence in this case, I believe CSS's control over the work, and the subordination of the workers to CSS, clearly weigh in favor of employment over independent contractor status.

IV. Tools, licensing and supplies

[17] CSS required workers to wear marked security guard uniforms, though at times CSS's clients did not want CSS logos or branding on uniforms or vehicles. Workers used their own cars and, when needed, magnetic decals and security lights identifying them as security were provided by CSS. Again, at times CSS's clients did not want CSS branding on the vehicle, or wanted unmarked vehicles. Workers were required to have their own cell phones while working. In the circumstances, and given the absence of any worker testimony about how and when these were used and who bore their costs etc., I consider tools and supplies, etc. to be a neutral factor in this case. Mr. Shahid's testimony was a little too fluid on these points, and I am not satisfied on a balance of probabilities that the workers paid for their own insurance and bonding etc. from their minimum wage pay cheques without having heard from a single worker. It also remains unclear how much workers actually paid for their CSS uniforms and supplies.

[18] For working at construction sites, workers were required to supply their own hard hats, safety boots and security vest. These are the type of things that might be

required in either independent contractor or employment situations and thus are also neutral considerations.

V. Financial upside opportunity and downside risks

[19] CSS could not identify any financial opportunities or risks for workers from their work that were of a business, commercial or entrepreneurial nature from working for CSS. There was no evidence regarding any worker having any other clients in their security guard subcontracting business. The workers would have needed to testify to that. Workers could accept more hours of work or negotiate a higher hourly rate to be more profitable. Workers might incur a loss if they paid too much for their car or cell phone, or if they damaged the property of a CSS client, or if they became subject to some of the financial penalties set out in the CSS Subcontractor Service Contract.

[20] These are not generally the type of financial considerations that are helpful in deciding whether a worker is truly operating his or her own business or is instead working as an employee for a business carried on by someone else.

[21] In this case I find that the financial considerations of opportunity for profit and risk of loss also weigh in favor of employment over independent contractor status.

[22] It can also be noted with respect to my consideration and weighing of the above factors that nothing changed in regard to these factors after the years in question, after CSS re-characterized the workers as employees and started making all appropriate employee withholdings and remittances of employer and employee amounts following the issuance of the EI and CPP assessments in question. Just as employee versus independent contractor status is not something one can simply choose regardless of the underlying realities, it is also something that cannot simply be re-characterized absent changes in the underlying realities.

[23] On balance, having had regard to, and weighing, the relevant factors, I find that the workers were engaged in both insurable employment and pensionable employment.

[24] The appeals are dismissed.

Signed at Ottawa, Canada, this 22nd day of March 2023.

"Patrick Boyle"

Boyle J.

CITATION:	2023 TCC 34
COURT FILE NO.:	2019-3371(EI) 2019-3372(CPP)
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