

Asare-Quansah v MNR, 2012 TCC 226

Is a Sessional Lecturer an Employee?

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The issue was whether pursuant to subsection 103(1) of the [Employment Insurance Act the worker was engaged in insurable employment](#).

The Taxpayer worked at the School of Continuing Studies at the University of Toronto. He claims he was self-employed as a sessional lecturer, and that he did not intend to be an employee and always considered himself an independent contractor.

The Court concluded that cases requiring the determination of the relationship as either employment or independent contractor are highly fact specific, such that even a small tweaking of the facts can alter the nature of the relationship. With regards to sessional instructors, little may be required to tip the balance either way. In this case, the court held that the taxpayer was a professional who gave back to his professions the benefits of knowledge and experience over and above his working life.

The court stated that the application of the four pronged test in *Wiebe Door Services Ltd. v. Canada*, massaged slightly by comments of the Supreme Court of Canada in the 671122 *Ontario Ltd. v. Sagaz Industries Canada Inc*, [2001 SCC 59](#). case and by recent decisions of the Federal Court of Appeal (see *The Royal Winnipeg Ballet v. M.N.R.*, [2004 TCC 390](#), aff'd [2006 FCA 86](#) for example) is easily stated, it is not easily applied. In this case, the court held that the taxpayer was in independent contractor.

The court identified the indicia or a working arrangement as control, ownership of tools, change of profit and risk of loss, and stated that the intention of the parties is only a factor to be considered where the intention was mutual among the parties.

The court stated that since UoT could not identify the rationale for their policy of treating sessional lecturers as employees, it was of no assistance in the case.

CONTROL

The court began by looking at control and noted that this is mostly the decisive factor. Justice Miller stated as an aside that the difference of on-line vs in class lectures formats are not determinative.

The CRA relied on what is called control features in the Handbook the university provided in combination with the agreement signed by the taxpayer acknowledging that he would be bound by those controls. The Court disagreed and held that the handbook was not a controlling factor, and stated that it could not be relied on as proof of an employment arrangement because:

- the university representative stated that the Handbook itself is guide to assist instructors
- the Handbook itself says that it applies to employees and independent contractors
- the consequence for the failure to comply was the potential not to get another contract

The court also noted that:

- although the university sets the date for courses, it does so with instructor input
- the instructor had changed the schedule to accommodate his work
- the majority of the work was preparation and making, which was done wherever and whenever the instructor chose
- no one from UoT reviewed the instructor's syllabus, attended lectures, and other than student evaluations provided comments on his performance
- minimum and maximum number of students were set by the school, but with deference given to the instructor's preference
- Remuneration was a base amount plus an amount per student, and the school saw instructors as sharing in the revenue as partners

In the end there were little control factors to point towards employment, and several factors of independence to point towards independent contractor.

TOOLS

The court dealt with the "tools" factor. The instructor covered his own expenses of his home office. The School provided the classroom and online software as well as a resource centre (with very few resources).

The court noted that knowledge was claimed by the taxpayer as the main tool, but did not feel it needed to deal with this argument as the indicator of this factor was neutral.

Chance of profit - Risk of Loss

There were two remuneration systems among which an instructor could choose (flat fee or per student), and the instructor could also negotiate. The taxpayer here had chosen a per-student remuneration basis. The court noted that the reputation of the instructor and his teaching style, as well as the number of hours he devoted to preparation and making, all could lead to different rates of remuneration, which favoured independent contractor finding.

There was little risk of loss, absent the materials and preparation time, and this was seen as a neutral factor by the court.

CONCLUSION

The court referred to cases:

Heritage Baptist College v. Minister of National Revenue: instructors required to answer questions, dean determined who would be invited back, and payment was flat fee irrespective to

the number of students. The court distinguished this case and *Lopez v. Minister of National Revenue* as they were different on the facts.

The court noted that with sessional lecturers little may be required to tip the balance as between employee and independent contractor. These cases are very fact specific and even a small tweaking of the facts can change the nature of a relationship.

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