File No. YM2707-3667

IN THE MATTER OF:

A wage recovery appeal under Division XVI - Part III, Section 251.11 of the *Canada Labour Code*, R.S.C. 1985, c. L-2,

- and -

A hearing of the said appeal,

BETWEEN:

Lipsett Cartage Ltd.,

APPELLANT,

- and -

Dean William Jacob Elias,

RESPONDENT.

REFEREE'S DECISION
January 6, 2017

T. F. (TED) KOSKIE,
B.Sc., J.D.

REPRESENTATIVES:

Neil Tulloch & Tyler Fulkerth, for the Appellant, Lipsett Cartage Ltd.

Respondent, Dean Elias, Self Represented

TABLE OF CONTENTS

I. INTRODUCTION

[1] Dean William Jacob Elias ("Elias") lodged a complaint[1] ("Complaint") dated March 2, 2015, pursuant to section 251.01 of the *Canada Labour Code*[2] ("*Code*") alleging that Lipsett Cartage Ltd. ("Lipsett") failed to pay him wages or other amounts owing under the *Code*.

[2] The Inspector was of the view the Complaint was well founded and issued a Payment Order[3] ("Order") on March 21, 2016, ordering Lipsett to pay five thousand five hundred and twenty-five dollars and thirty cents ($5,525.30) to the Receiver General for Canada, on account of Elias, comprising:

a) eight hundred and seventy-eight dollar and eighty-one cents ($878.81) for overtime pursuant to section 174 of the *Code*;

b) one thousand one hundred and eighty dollars and sixty-three cents ($1,180.63) for general holidays when you do not work pursuant to section 196 of the *Code*;

c) five hundred and seventy dollars and twenty-two cents ($570.22) for general holidays when you do work pursuant to section 198 of the *Code*; and

d) two thousand eight hundred and ninety-five dollars and sixty-four cents ($2,895.64) for pay in lieu of notice pursuant to section 230(1) of the *Code*.

[3] Lipsett appealed[4] ("Appeal") the Order on March 31, 2016.

[4] The Minister of Labour (Canada) appointed me to hear and determine the

---

[1] Exhibit H-1, Elias Complaint dated March 2, 2015

[2] RSC 1985, c L-2

[3] Exhibit H-2, Payment Order dated March 21, 2016

[4] Exhibit H-3, Appeal dated March 31, 2016

Complaint.

II. FACTS

[5] Lipsett is a trucking company based in Regina, Saskatchewan. It transports products such steel, aluminum coil, building materials and machinery. It described its services as "flat deck hauls."

[6] Lipsett has been in business for approximately fifty (50) years. It's President and Manager, Glenn Albert Patrick Lipsett ("Glenn") testified Lipsett had:

a) ten (10) employees, comprising a dispatcher, shop people and a bookkeeper;

b) thirty-five (35) "Leased Operators"; and

c) eight (8) "Contract Drivers."

[7] Glenn described Leased Operators as individuals:

a) that owned their own truck; and

b) if pulling a trailer owned by:

    i) Lipsett, were paid seventy-five percent (75%); or

    ii) themselves, were paid eighty-five percent (85%);

    of what the load paid.

[8] Glenn described Contract Drivers as individuals that operated a truck owned by Lipsett, pulling a trailer also owned by Lipsett. Lipsett paid these individuals twenty-two percent (22%) of what the load paid. Lipsett paid them a two percent (2%) bonus every

quarter (¼) if there were no claims, tickets or the like attributable to the individual.

[9] Lipsett does not consider Leased Operators and Contract Drivers to be employees. When asked why it used Contract Drivers, Glenn said:

a) paying a percentage of what the load paid was good for both the driver and Lipsett–it creates an incentive for the driver to get more freight;

b) if Lipsett were paying drivers by mileage, there would be no such incentive;

c) freight rates changed recently and, if Lipsett paid drivers hourly or by mileage it would need to renegotiate with everyone and that would hurt, or put it out of, business;

d) he does not know of any company in the industry that pays drivers by the hour; and

e) there would be a huge issue if Lipsett paid drivers by the hour:

    i) it would kill incentive; and

    ii) how would you deal with matters such as overtime–what is it and how do you track it.

[10] Cumulatively, Glenn and Zoe Elizabeth Lipsett ("Zoe") testified:

a) Lipsett has no written agreement with Contract Drivers–a verbal agreement has been in place for approximately thirty-four (34) years and is the same for all drivers;

b) Lipsett supplies a master binder that includes a "safety manual" and "forms" to Contract Drivers at the time they are engaged–it includes rules concerning

safety;[5]

c) Contract Drivers are eligible to participate in Lipsett's "health plan";[6]

d) Lipsett encourages, but does not require, Contract Drivers to be available Monday to Friday of each week;

i) there is no requirement for Contract Drivers to be in Regina;

ii) Contract Drivers are not punished for not taking a load;

iii) it is best for Contract Drivers to come early–it is a "first come, first served" basis to get a load;

iv) if there were no loads, one may have to wait until the next day; and

v) when a Contract Driver picks up a load, Lipsett tells him or her when and where it needs to be delivered;

vi) once the Contract Driver leaves the company yard:

- the Contract Driver is in charge
- Lipsett likes, but does not require, the Contract Driver to call in and advise where he or she is;
- Lipsett rarely hears from a Contract Driver, unless there is a breakdown;

---

[5] Lipsett did not produce a copy of this manual or any part of its contents.

[6] Lipsett did not produce a description of the health plan and its terms.

- Lipsett cannot stop a Contract Driver from doing what he or she wants to do–it just want the load delivered;

- does not manage or direct the timing and frequency of breaks;

e) there are Contract Drivers that "do other stuff on weekends" and Lipsett:

i) has "no control to stop" that; and

ii) does not penalize them if they do so;

f) Lipsett required Contract Drivers to supply and have their own GPS, cellular telephone and safety clothing/equipment, such as hard hat, vest, boots, etc.;

g) Lipsett supplied the truck and trailer to Contract Drivers and paid for the fuel;

h) the federal government regulates drivers;

i) Lipsett directs Contract Drivers to follow the rules–they will lose their bonus if they do not;

j) Contract Drivers pay for any tickets issued against them; and

k) Contract Drivers pay for their own meals and lodging.

[11] Zoe testified that Lipsett uses "Axon" software (the "Software"). This is software for the trucking industry that has an accounting component integrated within it. Zoe testified:

a) the Software cannot be modified; and

b) the Software does not allow Lipsett to describe a Contract Driver as an

independent contractor–it "just says a driver."

[12] Zoe testified that CRA instructed Lipsett to:

a) deduct and remit "withholdings" from moneys due to Contract Drivers; and

b) generate T-4s.

She said CRA said Lipsett was to do this because Contract Drivers "often don't pay."

[13] Elias' Complaint says his:

a) first day of work was March 3, 2014; and

b) last day of work was February 2, 2015.

This would be eleven (11) months.[7] However, Zoe testified Elias began in February 2014 and was there thirteen (13) months.

[14] Glenn does not recall Elias applying to work at Lipsett and/or meeting with Elias before and when he started working with Lipsett. However, he testified it was his standard practice to meet with drivers to:

a) explain the "pay schedule";

b) discuss preventable accidents, customer relations, fines, tickets and his experiences; and

c) say "if you don't follow the company line, you would not work."

---

[7] This is consistent with Elias' testimony in Chief.

[15] Elias testified in Chief that:

a) he talked with Lipsett's Operations manager, Richard Sandstra ("Sandstra"), about working for Lipsett;

b) it was Sandstra that hired him; and

c) he did not meet Glenn face to face until he reported for work in Regina.

[16] Glenn testified Elias' father worked for Lipsett upon the same terms and conditions as Elias.

[17] Elias testified:

a) his father recommended he apply to work for Lipsett; and

b) his father left Lipsett before his commencement of work there.

[18] Glenn testified Elias was "often off" on Friday or Monday. He said Elias was taking his wife to the doctor. Glenn said this was a "major problem, particularly with dispatch" because:

a) "with Elias needing to be home, it was difficult to arrange to get him back";

b) Elias was not available "numerous days"; and

c) often a truck needed to go out of the way to accommodate Elias.

[19] Elias testified:

a) his wife was not pregnant when he first started working at Lipsett–therefore, there was no need to discuss time off at that juncture;

b) his wife subsequently became pregnant, was suffering from diabetes and ill;

c) his wife has no driver's licence;

d) there were a variety of occasions that he needed to drive her to see her doctor–at first once per month and then later every two (2) weeks;

e) sometimes his wife would have up to three (3) appointments with doctors on a single trip;

f) he and his wife tried to schedule doctors' appointments on Fridays, so he could be on the road Sundays to get to where he was supposed to be; and

g) he would let dispatch know, in advance, when he needed time off to take his wife to doctor appointments.

[20] Glenn testified he could not remember the details of terminating Elias' engagement. However, he said he remembers:

a) Elias was "taking too much time off";

b) Elias was "getting to be too hard to manage"; and

c) Lipsett loses money when a truck is not working.

[21] Zoe testified Lipsett terminated Elias' engagement because:

a) he was not performing to the best of his abilities;

b) he was abusing equipment–he was leaving the truck running for over twelve (12) hours; and

c) of his lack of availability;

i) he was "off a lot"–thirty-nine (39) days over the thirteen (13) months he was there; and

ii) Lipsett could not count on him.

[22] Elias testified:

a) Lipsett was aware of his need to take time off to drive his wife to doctors' appointments;

b) he did leave a truck running one day, but:

i) it was a very cold day (-50° C);

ii) shortly after starting the truck, his wife went into labour and he rushed her to hospital; and

iii) he left the truck running so he would not have trouble starting it when going on the road upon his return;

c) he was surprised when he was terminated; and

d) at the time of termination, he was told he "had done a good job, but they would have to let him go."

[23] Lipsett did not present any evidence that it:

a) advised Elias he was not performing to the best of his abilities;

b) advised Elias it was of the view he was abusing equipment;

c) advised Elias it was concerned with his lack of availability;

d) prepared a performance evaluation of Elias;

e) advised Elias of any broader range of concerns about his performance;

f) gave Elias a time period to correct or improve his performance; and/or

g) told Elias the consequence of not meeting its expectations.

[24] Zoe testified Lipsett:

a) had no written contract with Elias;

b) paid Elias twenty-two percent (22%) of what the load paid;

c) did not pay Elias on an hourly rate;

d) did not pay Elias for meals and lodging;

e) did not pay Elias for overtime and holidays;

f) deducted and remitted "withholdings" from moneys due to Elias; and

g) generated a T-4 for Elias.

[25] Elias testified:

a) he had always considered himself to be an employee;

i) Lipsett never told him he could work elsewhere on weekends;

b) he worked to the best of his ability;

i) he never turned down a load at Lipsett;

ii) never had an incident with a Lipsett load;

c) he knew that if he had to take time off to drive his wife to doctors' appointments, his income would be lower;

d) he was not aware that Lipsett was not going to pay him holiday pay–he understood it would be based upon the percentage he was being paid;

e) he was paid at least one bonus, but cannot remember how it was processed by Lipsett;

f) he gave no thought to overtime pay until it was raised by the Inspector; and

d) had spoken with Zoe about the need to eventually take parental leave–she responded that she would get the necessary materials ready for that.

[26] No evidence was presented that Elias ever:

a) applied for and obtained a GST number; and

b) submitted an invoice for his services to Lipsett.

III. DISPUTE

[27] The issue here is whether Elias was an employee or independent contractor.

IV. DECISION

[28] I find that Elias was an employee of Lipsett.

[29] I dismiss the Appeal.

[30] I confirm the Order.

[31] I direct payment to Elias of any money held in trust by the Receiver General that relates to the within Appeal.

[32] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so.

V. REASONS

A. *ACT*

[33] The relevant provisions of the *Code* are:

> DIVISION I
> Hours of Work
>
> . . .
>
> *Overtime pay*
>
> 174 When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.
>
> . . .
>
> DIVISION V
> General Holidays
>
> . . .
>
> *Holiday pay*

196(1) Subject to subsections (2) to (4), an employee shall, for each general holiday, be paid holiday pay equal to at least one twentieth of the wages, excluding overtime pay, that they earned in the four-week period immediately preceding the week in which the general holiday occurs.

Employees on commission

(2) An employee whose wages are paid in whole or in part on a commission basis and who has completed at least 12 weeks of continuous employment with an employer shall, for each general holiday, be paid holiday pay equal to at least one sixtieth of the wages, excluding overtime pay, that they earned in the 12-week period immediately preceding the week in which the general holiday occurs.

First 30 days of employment

(3) An employee is not entitled to holiday pay for a general holiday that occurs in their first 30 days of employment with an employer.

Continuous operation employee not reporting for work

(4) An employee who is employed in a continuous operation is not entitled to holiday pay for a general holiday

(a) on which they do not report for work after having been called to work on that day; or

(b) for which they make themselves unavailable to work when the conditions of employment in the industrial establishment in which they are employed

(i) require them to be available, or

(ii) allow them to make themselves unavailable.

Employment

(5) For the purposes of subsection (3), a person is deemed to be in the employment of another person when they are available at the call of that other person, whether or not they are called on to perform any work.

. . .

Holiday work in continuous operation employment

198 An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

(a) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;

(b) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or

(c) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

. . .

DIVISION X
Individual Terminations of Employment

Notice or wages in lieu of notice

230(1) Except where subsection (2) applies, an employer who terminates the employment of an employee who has completed three consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, give the employee either

(a) notice in writing, at least two weeks before a date specified in the notice, of the employer's intention to terminate his employment on that date, or

(b) two weeks wages at his regular rate of wages for his regular hours of work, in lieu of the notice.

. . .

DIVISION XI
Severance Pay

Minimum rate

235(1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

. . .

Appeal
251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

. . .

Appointment of referee
251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(a) the payment order or the notice of unfounded complaint; and

(b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

. . .

Referee's decision
(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(c) award costs in the proceedings.

. . .

Order final
(6) The referee's order is final and shall not be questioned or reviewed in any court.

B. ANALYSIS

[34] I have reviewed instructive jurisprudence governing this issue.[8] At the outset, I believe it is fair to say there is no one conclusive test that can be applied uniformly to every case to decide whether an individual is an employee or an independent

---

[8] See *Director of Labour Standards* v *Acanac Inc*, 2013 SKQB 21 (CanLII); *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, [2001] 2 SCR 983, 2001 SCC 59 (CanLII); *Canadian Union of Public Employees, Local 3911* v *Athabasca University*, 2014 ABQB 292 (CanLII); *Wood* v. *Enbridge Gas Distribution Inc., et al*, 2011 ONSC 5494 (CanLII); *1022239 Ontario Inc.* v. *MNR*, 2004 TCC 615; *2177936 Ontario Ltd.* v. *MNR*, 2013 TCC 317 (CanIII); *126873 Ontario Limited o/a Autopark Superstore* v. *MNR*, 2007 TCC 442 (CanIII); *Big Bird Trucking Inc.* v. *M.N.R.*, 2015 TCC 340 (CanIII); *Charles Bednar Investments Ltd (c.o.b. Ron Bednar Trucking)* v. *Langille*, [2000] CLAD No. 78; *City Cab (Brantford-Darling St) Limited* v. *MNR*, 2009 TCC 218 (CanIII); *Coloniale Maid Service Ltd.* v. *MNR*, 2010 TCC 115 (CanIII); *Combined Insurance Company of America* v. *Canada (National Revenue)*, 2007 FCA 60 (CanIII); *1392644 Ontario Inc. (Connor Homes)* v. *Canada (National Revenue)*, 2013 FCA 85 (CanIII); *Craigmyle* v. *Minister of National Revenue*, 2011 TCC 128, 2011 CarswellNat 389; *Dewdney Transport Group Ltd.* v. *MNR*, 2009 TCC 569 (CanIII); *KLR Transportation Service Inc.* v. *Kopka*, [2001] CLAD No. 73; *Knetsch* v. *D.C. Lawson Driver Service*, [1996] CLAD No. 122; *Labrash* v. *MNR*, 2010 T.C.C. 399 (CanIII); *Montreal* v. *Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (PC); *Pearman* v. *Crest Realty Ltd.*, [1984] BCJ No. 823 (S.C.); *Royal Winnipeg Ballet* v. *M.N.R.*, [2007] 1 FCR 35, 2006 FCA 87 (CanIII); *Saindon* v. *MNR*, 2014 TCC 172 (CanIII); *Smith* v. *MNR*, 2011 TCC 20 (CanIII); *Vida Wellness Corporation (Vida Wellness Spa)* v. *MNR*, 2006 TCC 534 (CanIII); *R.* v. *Walker* (1858) 27 LJMC 207, 208; *Warren* v. *622718 Saskatchewan Ltd.*, 2004 SKQB 346; *Wiebe Door Services Ltd.* v. *M.N.R.*, [1986] 3 FCR 553, [1986] 5 WWR 450, 46 Alta LR (2d) 83, [1986] 2 CTC 200, 70 NR 214, [1986] FCJ No 1052 (QL), 39; *1329669 Ontario Inc. and DaSilva, Re*, 2002 CarswellNat 6438; *5652210 Manitoba Inc.* v. *Procter*, 2011 CarswellNat 5131; *Elazrag and Dynamex Canada Ltd. (Wage Recovery), Re*, 2016 CarswellNat 3934; *Bushell* v *Farmers of North America Incorporated*, 2011 SKQB 267 (CanLII); *Ace-J Transportation Inc* v *Liu*, 2012 CanLII 19845 (CA LA)

contractor. However, the central question that must be answered in each case is whether the person who is performing services is truly an individual in business on his or her own account.

[35] To answer this central question, we ought to follow a two (2) step process. The first is to decide the intention of the parties in order to ascertain what type of relationship the parties intended to create. The second involves an analysis of the facts of the case to decide if the objective reality reflects that intention. The factors to consider in this second step are control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance accorded to each factor will be dependent upon the facts and circumstances presented in each case.

1. Intention

[36] Lipsett argues:

> 36. In the present matter, there is no written contract to examine that would assist in determining the intention of the parties when they entered into agreement. However, the uncontroverted evidence is that both Lipsett Cartage and Mr. Elias shared a common understanding as to, inter alia, the nature of the work; the way remuneration was to be calculated; and the level of autonomy to be enjoyed by Mr. Elias. Given the testimony of the Lipsetts which was not challenged on cross examination it is clear that Lipsett Cartage doesn't have employees who operate in long haul trucking. In addition, Mr. Elias' own testimony was that he only found out he was an employee when Ms. Thauberger, based on her opinion presumably, told him he was one. Consequently, if he didn't know he was an employee until she told him, he very clearly was "something else" prior to that time. The inescapable conclusion is that he knew he was a contractor. This "intention" is most clear we submit.
>
> 37. Lipsett Cartage submits that it offered Mr. Elias the same terms as are offered to all of its independent professional drivers; that of an independent contractor paid a percentage of the contract for delivery. Mr. Elias agreed to the same. The agreement was the industry standard for independent professional drivers who don't own their own truck, as evidenced by Mr. Elias' testimony regarding his remuneration at other trucking companies. Only well after the fact, when the contract was terminated by Lipsett Cartage, did Mr. Elias, who was upset by the termination of his contract with Lipsett Cartage make the claim months later that he was not an independent contractor. Then, as testified to by Mr. Elias, it was only at the direction of Ms. Thauberger, the Labour Standards Inspector, that a claim was brought forward. With all respect Ms. Thauberger has gone too far in trying to impose her bias on the trucking industry, which by its very nature doesn't have employees for the most part. This fact is reflected in the government issued requirements regarding logbooks and maximum hours of driving, etc., (e.g. 60 hours maximum of weekly driving time), which are uniquely created for the trucking industry,

we submit. The facts of this case speak for themselves and any attempt to "recreate" the same to make them fit into a case for employer/employee relationship should be avoided.

[37] Elias agrees:

a) he had no written contract with Lipsett;

b) he understood the nature of his work, the way his remuneration was to be calculated and the level of autonomy he would enjoy; and

c) his work and remuneration was similar to that of other trucking companies.

[38] However, Elias argues:

a) he had no oral contract to be an independent contractor;

b) from the time he began working at Lipsett, he believed he was an employee;

c) Lipsett made source deductions from its payments to Elias;

d) Lipsett issued a T4 to Elias;

e) after termination of Elias' services, Lipsett issued a Record of Employment ("ROE");

f) he did not just "find out" he was an employee when told the same by the Inspector–the Inspector simply explained his entitlement to overtime pay, something he had not considered;

g) he currently works for another trucking company doing similar work, with the same remuneration and level of autonomy, and is considered and treated as an employee; and

h) he did not think or know he was an independent contractor for Lipsett.

[39] I am satisfied Lipsett considered Elias to be an independent contractor. However, I am not satisfied on the evidence that Lipsett structured the relationship so that Elias would be regarded as an independent operator. Examples are:

a) making source deductions from its payments to Elias;

b) issuing a T-4;

c) enrolling Elias in Lipsett's health plan; and

d) issuing a ROE;

all acts consistent with an employer/employee relationship.

[40] Lipsett argued that it only attended to making source deductions and issuing a T-4 and ROE because it was requested to do so by CRA. Zoe's testimony was that CRA made this request because Contract Drivers "often don't pay." I do not find this testimony credible. It is inconsistent with my understanding of the law. The independent contractor structure is such that it is designed where no source deductions are made. T-4s and ROEs are not for independent contractors. I note that Lipsett did not tender any witness–an expert and/or from CRA–concerning such a request and practice and therefore I draw an adverse inference in that regard. I find as a fact that CRA did not ask or advise Lipsett to make source deductions and issue a T-4 and ROE in connection with Elias or any other individual that Lipsett considered to be independent contractors.

[41] The real question in this matter is what the parties genuinely intended.

[42] It very much appears as though Lipsett wanted Elias to be an independent contractor. However, Lipsett tendered no evidence that it:

a) discussed such an arrangement and came to an agreement in that regard with Elias; and

b) requested that Elias provide a GST number and invoices.

[43] Glenn could not recall his conversation with Elias when he commenced his services for Lipsett. Zoe did not testify to any such discussion or request. Lipsett did not tender any evidence from any other person in authority–such as Sandstra–concerning the issue. I draw an adverse inference in that regard. I find as a fact that Lipsett did not:

a) discuss and come to an arrangement with Elias that he would be an independent contractor; and

b) request that Elias provide a GST number and invoices.

[44] As for Elias, I am satisfied on the evidence he:

a) did not agree to be an independent contractor; and

b) always considered himself to be an employee;

of Lipsett.

[45] I find the parties were not *ad idem* as far as motivation was concerned. I am not persuaded the intention of both parties was such that Lipsett was retaining the services of Elias as a person who was performing those services truly as an individual in business on his own account. On the evidence, I am satisfied Elias believed he was performing his services as an employee.

2. Control over the Work

[46] From the authorities,[9] we can glean the following about control:

a) the difference between the relations of a principal and agent and of employer and employee is a principal has the right to direct what the agent has to do, but an employer has not only that right, but also the right to say how it is to be done; and

b) inadequacies with the control test can surface when, for example, in the case of:

i) an independent contractor, we see a contract contain detailed specifications and terms for the task in question is to be carried out–this could cause greater control with an independent contractor, as would be the normal expectation in a contract with an employee, even though a literal application of the test might find the actual control should be less; or

ii) highly skilled and professional employees who possess skills far beyond the ability of their employers to direct.

[47] Lipsett argues:

> 39. . . . Lipsett exerts no control over the manner in which the work is to be performed. The only requirement is to honour the terms of work provided not by Lipsett, but by the ultimate customer. Furthermore if Mr. Elias did not want to honour the customer's terms he was free to refuse to deliver the product.
>
> . . .
>
> 43. In the present matter, while Lipsett Cartage did, through its dispatcher, relay to Mr. Elias conditions on how a given freight was to be delivered, at what time or date and in what condition, these conditions were not imposed by Lipsett Cartage, but rather by the customer.
>
> . . .

---

[9] *Supra*, footnote 8

> 45. . . . [T]he level of control Lipsett Cartage had over Mr. Elias was minimal. Lipsett Cartage did not restrict or make any attempt to control Mr. Elias's activities; did not supervise how or when Mr. Elias delivered loads; and did not determine when he worked or took holidays. Similarly, . . . Mr. Elias determined his own: working hours; scheduling; breaks; location of work; and, what routes to take during his pickups or deliveries, subject of course to the conditions imposed by the customer. Mr. Elias could, during the tenure of his contract with Lipsett Cartage, choose or reject any given load . . . .
>
> 46. Furthermore, . . . the keeping of log books and being instructed as to where loads were to be picked up or delivered is simply the nature of the business of shipping. It is in fact, a requirement imposed by federal regulators and did not establish Mr. Elias as an employee. Likewise, the requirement of maintaining proper log books is a governmental obligation which has to be observed by contractors and employees alike.

[48] In essence, Lipsett argues Elias had as much control as an independent contractor could have under the circumstances.

[49] In response, Elias argued:

a) Lipsett did exert control over the manner in which the work is to be performed;

b) Lipsett instructed Elias on what freight was to be delivered, how it was to be delivered and at what time or date and in what condition; and

c) while on the road, Lipsett's level of control could only be minimal, but in all other respects, Lipsett had full control and direction of him.

[50] It is worthy of note that Glen testified he told Elias:

a) "if you don't follow the company line, you would not work"; and

b) he would not get a two percent (2%) bonus every quarter (¼) if there were claims, tickets or the like attributable to him.

[51] On the issue of control, the evidence points to Elias carrying out the duties one would expect of an employee. Lipsett has not persuaded me the evidence points to control consistent with what is expected for an independent contractor.

3. Ownership of Tools and Equipment

[52] The authorities[10] say an examination of the ownership of tools and equipment is a long-standing conceptual element to be considered by the trier of fact in determining whether or not there is employee status.

[53] Lipsett argues:

> 48. . . . [T]he ownership of the truck or trucks driven by Mr. Elias is not, of itself, indicative of the relationship between the driver and trucking company. . . . .
>
> 49. . . . [I]t is an industry wide practice in trucking to allow privately contracted drivers to utilize the freight company's trucks in order to deliver freight to a customer. In this case, Lipsett Cartage provided some of the equipment such as the truck, license plate, insurance, operating expenses of the vehicle and conducted all vehicle maintenance. Mr. Elias provided his own cell phone, personal protection equipment, trucking license and satellite navigation tool.
>
> . . .
>
> 52. We submit that the "tools of the trade" supplied by Lipsett Cartage are not unique, are commonly supplied to independent professional drivers industry wide, and provide little probative value in determining if there is an employer/employee relationship.
> . . . .

[54] Elias argues that Lipsett owns and supplies all aspects of the business–including the trucks, tools and equipment. Lipsett pays all expenses, including repairs and fuel. He argues he owns and supplies nothing but the protective clothing he wears, a cellular telephone and a GPS. Consequently, he argues this issue must be resolved in his favour.

[55] The tools and equipment that most relate to the essence of the work Elias performed for Lipsett–namely, driving–are a properly equipped, maintained, and insured truck and trailer. Lipsett was responsible for ensuring the same were provided to Elias. Without these tools/equipment, Elias would not have been able to perform work as a driver for Lipsett. As such, I prefer and accept Elias' argument.

---

[10] *Ibid.*

4. Chance of Profit and Risk of Loss

[56] Lipsett argues:

> 54. . . . Mr. Elias was not salaried, but rather was paid solely on a percentage basis, and thus exercised considerable control over his own chances of profit when performing his work tasks. . . . .
>
> 55. Unlike prototypical employment situations, where the success of the employee's tasks in benefiting the employer does not affect the remuneration of the employee, we submit that the current situation is easily distinguished from the employee/employer relationship.
>
> 56. In the present case, the evidence led shows that Mr. Elias was remunerated as per the industry standard for contract drivers, that is: 22% of the value of the contract for delivery, plus a 2% performance bonus and, when part of the delivery contract tarping fees. This arrangement between Mr. Elias and Lipsett Cartage resulted in Mr. Elias receiving remuneration in an amount directly related to the positive performance of his contractual duties, subject of course to statutory and regulatory restrictions, including, inter alia, the speed at which he completed delivery of freight; number of deliveries he accepted; and the number of days he made himself available for driving. Mr. Elias's performance also directly influenced his expenses incurred (e.g.: meals, motels, etc), for each delivery, which would, of course, have a direct impact on the profit per delivery.
>
> 57. As per Mr. Elias' testimony, the size of his cheque was directly related to his own performance. Mr. Elias also testified that his availability, due to his needing to care for his spouse, directly impacted his level of income. We submit that these factors, as well as the impact of regular provision of driver services at a level below industry standard, which would have resulted in less work being made available to him and thereby lower his profits, are clear indications that Mr. Elias controlled his own ability to increase or decrease his profit.
>
> . . .
>
> 59. In the present matter, Mr. Elias earnings were based solely on a percentage of the gross revenue of a contract for delivery of freight on Lipsett Cartage's behalf. Lipsett Cartage's responsibility was to secure said contracts for delivery of freight from individual customers and, in those cases where drivers were contracted to provide professional driving services, Lipsett Cartage would also provide the truck. . . . .
>
> . . .
>
> 61. We respectfully submit that any contractual relationship where a driver relies entirely on a percentage of the amount paid by the customer to deliver freight places the driver at financial risk. Mr. Elias' earnings were determined solely by the decisions made by Mr. Elias. He could choose to deliver as many loads as he could within the parameters of the law and earn more money. Conversely, he could also choose to take fewer jobs, or shorter travelling jobs, which would provide a lower rate of payment in return. Additionally, if no deliveries were made on a given day, or if Mr. Elias decided not to work on a given day or week, there would be no commission or "profit split" payable. . . . Mr. Elias assumed a substantial financial risk in his relationship with Lipsett Cartage.
>
> 62. In the present matter, Mr. Elias testified that his remuneration was directly tied to his performance and that he didn't make money if he was sick, or when he took day's

off, or if he was unable to drive due to a breakdown of the truck, saying: "If the truck wasn't moving I wasn't getting paid". Mr. Elias also corroborated the evidence led by Glenn Lipsett and Zoe Lipsett that contract drivers were personally responsible for paying any speeding tickets, overweight tickets or other infraction tickets.

63. The evidence further shows that Mr. Elias was free to determine his own time of work and what "jobs" to take. If he chose a particular job and the goods that he was transporting at the time, were either damaged, lost or delivered late, Mr. Elias would suffer a reduction in the amount of earnings as per the delivery agreement made with the customer. In addition, any and all fines incurred by Mr. Elias during the course of delivering a load, due to traffic or safety violations, were to be paid by Mr. Elias. In short, Mr. Elias risked a reduction in income if he failed his contractual obligations while delivering freight, due to his underperformance of the contract. This we submit establishes the "Risk of Loss" as per the above jurisprudence.

[57] In essence, Elias argued:

a) all aspects of the business are owned by Lipsett;

b) he made no capital investment;

c) his income came from percentage wages, not a business invoice;

d) he had no chance of profit;

e) he had no liability for the business–that was Lipsett's responsibility and it answered to its customers; and

f) he had no risk of loss.

[58] I find this point to be really no different from that of a commissioned agent. I am satisfied:

a) Elias was limited exclusively to the service of Lipsett;[11]

b) Elias was subject to the control of Lipsett, not only as to the items to be hauled,

---

[11] Glenn's evidence was that he was not so limited. Elias' testimony was to the contrary. I prefer and accept Elias' testimony in this regard.

but also as to when, where and how it is hauled;

c) aside from nominal items, Elias did not have an investment or interest in the tools relating to his service;

d) Elias has not undertaken any risk in the business sense and has no expectation of profit associated with the delivery of his service as distinct from a fixed percentage;

e) Elias' activity is not part of Lipsett's business organization–in other words, it is Lipsett's business.

[59] I am satisfied on the evidence that Elias took no risk from performance of the business. His income came from a percentage wage. There was no chance of profit and loss in the traditional business sense.

5. Conclusion

[60] In addressing the two steps, including the fourfold test for the latter, and, more to the point, in determining the debate in this matter, it is necessary to view the totality of the relationship between Lipsett and Elias from an "above the forest" perspective. In that context and on a focussed examination of the true nature of the components of the relationship between Lipsett and Elias, the analysis leads me to the conclusion that Elias was, in real terms, an employee of Lipsett.

[61] Lipsett focussed its evidence and argument on the issue of whether Elias was and independent contractor or employee. It did not present evidence and argument that took issue with the calculation and quantum of the Order should I find Elias to be an employee. In any event, I find that Lipsett did not have just cause to dismiss Elias.

[62] I find Lipsett owes Elias five thousand five hundred and twenty-five dollars and thirty cents ($5,525.30), comprising:

a) eight hundred and seventy-eight dollar and eighty-one cents ($878.81) for overtime pursuant to section 174 of the *Code*;

b) one thousand one hundred and eighty dollars and sixty-three cents ($1,180.63) for general holidays when you do not work pursuant to section 196 of the *Code*;

c) five hundred and seventy dollars and twenty-two cents ($570.22) for general holidays when you do work pursuant to section 198 of the *Code*; and

d) two thousand eight hundred and ninety-five dollars and sixty-four cents ($2,895.64) for pay in lieu of notice pursuant to section 230(1) of the *Code*.

[63] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so. I note that neither party asked for costs.

Dated at Saskatoon, Saskatchewan, on January 6, 2017.

T. F. (TED)KOSKIE, B.Sc., J.D.,
REFEREE