Golf lesson services performed at an employing unit's driving range/golf course constituted employment, because the services were done at the employing unit's place of business and the services were similar to those already provided by another employee. The employing unit failed to carry its burden under G.L. c. 151A, § 2(b).

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Issue ID: Sec2-19-001

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employing unit appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), which found that the services performed by [Worker A][1] constituted employment under G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On December 4, 2018, the agency initially determined that the services performed by [Worker A] constituted employment. The employing unit appealed, and attended the hearing. In a decision rendered on March 6, 2019, the review examiner affirmed the agency determination, concluding that the employing unit had failed to carry its burden to show the services were not employment under G.L. c. 151A, § 2. The Board accepted the employing unit's application for review.

The issue before the Board is whether the review examiner's decision, which concluded that the services at issue were employment pursuant to G.L. c. 151A, § 2, is supported by substantial and credible evidence and free from error of law.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The employer is a golf course.

2. The employer has a golf professional (GP 1) on its payroll.

3. All calls to the golf course for golf lessons are scheduled with GP 1.

[1] He is referred to as "GP2" in the review examiner's decision.

4. The employer bills $60.00 per hour for lessons with GP 1.

5. On or about 2014, the owner was approached by a former Pro Golf Association golfer (GP 2) about providing golf lessons to his students.

6. GP 2, a graduate of College [A], tutored students.

7. GP 2's students wanted golf lessons.

8. The owner agreed to allow GP 2 use of the driving range and golf balls for 25% of his earnings from the lessons which 25% also included grass repair.

9. The employer's customary [sic] charges, depending on the number of golf balls, $3.00/$6.00/$9.00 per bucket for use on the driving range.

10. GP 2 gave golf lessons to students and others.

11. GP 2's students and others used their own clubs.

12. The employer did not provide any clients to GP 2 because he had GP 1 on the payroll to provide the same service.

13. GP 2 solely made his schedule of lessons.

14. The employer did not advertise GP 2's services.

15. GP 2 did not receive training from the employer.

16. GP 2 was not required to wear anything with the employer's name or logo.

17. GP 2 was not a named insured on the employer's liability policy.

18. The employer did not provide any benefits such as health insurance or have workers compensation insurance for GP 2.

19. The owner set the rate for golf lessons with GP 2 at $60.00 per hour, the same amount charged for lessons with GP 1.

20. After each lesson or series of lessons, GP 2 would provide the employer with an accounting of the students and number of hours of lessons he provided.

21. The employer, on its letterhead, prepared a bill and submitted it to GP 2's students/others for payment.

22. GP 2 did not get paid until the bill submitted by the employer to a student/other had been paid.

23. GP 2 was issued a Form 1099. The employer did not deduct taxes from GP 2's checks.

24. GP 2 was not a member of the golf course.

25. In May of 2018, the arrangement between GP 2 and the employer ended.

26. On December 4, 2018, the employer was mailed a status determination finding that the services provided by GP 2 in the title of golf teacher constituted "employment" within the meaning of Section 2 of the Massachusetts Unemployment Insurance Law.

27. On December 7, 2018, (postmark) the employer appealed the determination.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employing unit's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record.

By its terms, G.L. c. 151A, § 2, presumes that an employment relationship exists, unless the employing unit carries its burden to show "that the services at issue are performed (a) free from the control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." Athol Daily News v. Board of Review of Department of Employment and Training, 439 Mass. 171, 175 (2003). The test is conjunctive, and it is the employing unit's burden to meet all three prongs of this "ABC" test. Should the employing unit fail to meet any one of the prongs, the relationship will be deemed to be employment. Coverall North America, Inc. v. Comm'r of Division of Unemployment Assistance, 447 Mass. 852, 857 (2006).

The review examiner concluded that the employing unit had failed to meet its burden to show that the services were not employment, because the employing unit had not shown that [Worker A] was free from the employing unit's direction and control under G.L. c. 151A, § 2(a). Under that portion of the statutory test, we analyze whether the worker is free from supervision "not only as to the result to be accomplished but also as to the means and methods that are to be utilized in the performance of the work." Athol Daily News, 439 Mass. at 177, *quoting* Maniscalco v. Dir. of Division of Employment Security, 327 Mass. 211, 212 (1951). "The essence of the distinction under common law has always been the right to control the details of the performance," but "the test is not so narrow as to require that a worker be entirely free from direction and control from outside forces." Athol Daily News, 439 Mass. at 177–178. The review examiner's conclusion primarily focused on the payment arrangement between the employing unit and [Worker A]. We think that this ignores the statutory focus, which is on "the performance of" the services at issue. Here, the services are, essentially, golf lessons to various clients. As to the golf lessons, [Worker A] was substantially free from the employing unit's

direction and control. *See* Findings of Fact ## 11 through 16. We think that the employing unit did carry its burden under prong (a) of the statutory ABC test.

However, we affirm the review examiner's conclusion in this case, because the employing unit did not carry its burden under prong (b). To satisfy its burden under prong (b), the employing unit must show that the "service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed." G.L. c. 151A, § 2(b). There was no dispute that the worker here performed his work at the employing unit's driving range. *See* Finding of Fact # 8. Thus, the work was not performed outside the employing unit's place of business.

Moreover, the golf lessons provided by [Worker A] are within the usual course of the employer's golf business. The employing unit's owner testified that it employs a golf professional who provides lessons to various clients. The worker here provided similar lessons. Although the worker brought in his own business and had considerable freedom in how he conducted his golf lessons, there is no question that giving golf lessons is a part of the employing unit's business model. As such, the employing unit has failed to carry its burden to show that the services were either performed outside the employing unit's places of business or outside the usual course of its business.

We, therefore, conclude as a matter of law that the employer has not carried its burden under prong (b) of G.L. c. 151A, § 2.

The review examiner's decision is affirmed. The services performed by [Worker A] constituted employment for purposes of G.L. c. 151A, § 2.[2]

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION – April 24, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws, Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

[2] Since the employing unit failed to carry its burden under G.L. c. 151A, § 2(b), we need not progress into a full discussion of prong (c). However, based on the record and the review examiner's findings, there seems little doubt that the employing unit met its burden under that part of the ABC test. *See* Findings of Fact ## 5, 15, and 24.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses
Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SF/rh