



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-108261-XA (Mar. 10, 2010) -- Delivery drivers for bakery were not independent contractors because they were not permitted to carry competitors' products without the employer's prior approval. Thus, they were not free of the employer's control, and they were largely dependent upon the employer to grow their customer base.

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner in the Division of Unemployment Assistance (DUA), which concluded that the claimant's services, as well as those of others similarly situated, constituted employment within the meaning of G.L. c. 151A, § 2. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

In a status determination issued on June 9, 2008, the DUA determined that the services performed by the claimant and others similarly situated were those of an employee, not an independent contractor. The employing unit appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, the review examiner affirmed the agency's initial determination in a decision rendered on October 20, 2008.

The review examiner concluded that the claimant was not free from the employing unit's direction and control. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case back to the review examiner to take additional evidence. The claimant and the employer attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the consolidated findings.

The issue on appeal is whether the services provided by both the claimant and others who performed distributor services for the employer constituted employment within the meaning of G.L. c. 151A, § 2.

Findings of Fact

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

1. On 6/10/08, the appellant filed a timely appeal on a determination that was issued by the Employer Liability Department on 6/9/08. The appellant is [Employer]. The determination informed the employer that the claimant and others similarly employed are in "employment" within the Section 2 of the Law.
2. [Employer] bakes breads and rolls. The claimant, and others similarly employed, performed as distributors.
3. The employer finds Distributors by 'word of mouth'. A Manager of [Employer] interviews potential Distributors. During the interview the business philosophy is discussed as well as independent contractor, the potential distributor way of doing business, how the distributor likes to grow his business and if he would be a good fit. The owner of [Employer] decides if the potential Distributor will be a good fit. The distributor is asked if he/she is a good communicator and how are they going to grow business in the assigned territories and how do they plan to [build] good will and ensure customer satisfaction. The owner of [Employer] determined if the potential Distributor will be a good fit.
4. [Employer] assigns a territory and a list of established customers to each new Distributor. The primary responsibility of each Distributor is to build good will in their assigned territories which will increase the value for distribution. Distributors are expected to bring in new business.
5. Each of the Distributors, except the claimant, was issued and was required to sign a Distribution Agreement. Each of these Agreements contains the same basic information. The Agreement [] states in part that the Company desires to appoint Distributors as non-exclusive distributors in the sale, promotion and delivery of the products within the assigned area. The Agreement includes thirteen sections; Designation as Distributor; Non-Exclusive Appointment, Distributor's Operations, Term and Termination, Price of Product; Payment Terms, Distributor's Further Obligations, Insurance and Indemnification, Assignment, Independent Contractor, Waivers; Modifications, Notices; Consents, Governing Law, Severability and Entire Agreement: Amendments.
6. Currently, there are approximately thirty-four active Distributors. Distributors initially worked as delivery or back up drivers for the [Employer] and later

were offered an opportunity to work as independent Distributors. There were established customers in the territories assigned to each distributor. [Employer] assigned the territory to each Distributor. Often, the territories the distributor's initially worked as employees were the same territories assigned to them as Distributors.

7. Distributors purchased items for [Employer] and other bakeries. Distributors determine how much product they need to order based on the orders from their customers.
8. All cash sales are handled by the Distributors. The Distributors [place] orders with [Employer] and other bakeries. The Distributor is responsible to pick up the product ordered from [Employer] at the Company's loading dock. Some distributors made arrangements to pick up product at other locations. Each Distributor loads the product onto trays set up in their personal vehicles, which can be leased from [Employer]. They could also load product into bags or boxes. When the vehicle is loaded the Distributor begins making deliveries. Delivery times are set by the distributor, most often based on customer needs. Distributors generally work at night and in early mornings.
9. Distributors can do business with other bakeries. Some distributors do sell cash paying customers products from other bakeries. If a customer asks for a product that [Employer] does not produce, the Distributor will purchase the item from another bakery.
10. [Employer] lists the price of products purchased by the distributors. All cash sales are handled by the Distributors. Distributors place orders for the cash paying customers with the bakery. The product is charged to each Distributor. Distributors must pay for all cash sale products purchased from [Employer], once weekly on the day specified by the Company. Distributors can set the prices that they charge cash customers for product; for example if a Distributor is charged \$1.00 per roll by the bakery; the distributor can charge the customer \$1.35 per roll. Distributors keep the money collected from cash sales customers. Record of this transaction is posted on a settlement sheet. The Distributors [keep] the money that they collect from their customers.
11. Distributors use their personal vehicles and they are responsible for [paying] for gas, car insurance and upkeep of the vehicles.
12. The claimant and other Distributors are paid on 1099 Forms and were not entitled to any benefits.

13. The Distributors are paid commission on authorized charge sales. The commission rate is set by [Employer]. Authorized charge sales are sales made to customers who are billed by [Employer]. [Employer] sets the price for goods delivered to the charge sale customers. The authorized charge sales customers are usually multi location accounts and large food service companies. These customers place orders for product with the bakery and [Employer] will then bill these customers for the cost of product. These customers pay the bakery directly. The Distributors, working in the territories where the authorized charge sale customers are located, deliver the products. The Distributors also secure charge sale invoices from these customers. The Distributors return the charge sale invoice to [the] Company and [Employer] will then pay the Distributor his/her share/commission on the sales. The Company acts as a collection agent for the Distributors.
14. The percentage of cash customers and the percentage of authorized charge sales vary from Distributor to Distributor. Given the evidence presented at the hearing, the percentage of cash customers is less than the percentage of authorized charge sales.
15. [Employer] cannot set the price for a cash sale product without approval from the Distributor.
16. Since the Distributor is solely responsible for the cost of distribution, he/she can reject or discontinue service to a customer if he/she determines it in the best interest of the business.
17. It is the responsibility of the Distributor to find someone to cover for him/her when ill or on vacation. It is the Distributor's responsibility to pay the person who covers his/her route. Distributors can also hire employees to work with them at their own personal expense. Distributors are responsible to train their back up distributors. At times a Distributor may ask [Employer] Company if they have a spare driver to cover a route. The Distributor would be responsible to pay the spare driver who covers her/his route.
18. Distributors are not required to [issue] reports or time records to the [Employer]. Distributors are not required to wear uniforms or any clothing item with the bakery name on it. Distributors wear their own personal clothing when making deliveries to their customers.
19. One Distributor decreased the cost of product for one of his customers. This customer was the owner of a small pizzeria. The owner of this business informed the distributor that he found [a] competitor who was offering him a lower price for the product. In order to continue to do business with this

- customer the distributor lowered his price. Another Distributor who delivered to a customer in Hingham, [Massachusetts] changed the times per week he made deliveries to this customer location. At this site, the security officer on duty would allow the Distributor to enter the building at 4am. The Distributor would [enter] the building at 4am and leave the bread order in front of the kitchen. When this customer hired a new security company, security would not allow anyone into the building at 4am. However, the customer wanted the same Distributor to provide the same amount of service on the same days. The Distributor informed the customer that he could not continue to delivery daily and he put a block on their account limiting their ordering ability to two days a week, on Tuesdays and Fridays.
20. Distributors determined the times and the order in which to make deliveries in their territories.
 21. The claimant was initially hired to work as a delivery driver for [Employer]. He was offered a Distributor job working in the same territory he had while working as an employee for the employer. The claimant was not succeeding as a Distributor and was allowed to return to work for [Employer] as an employee/delivery driver. In time, the claimant again tried working as a Distributor. Although he worked as a Distributor on two separate occasions, he was never required to sign a Distribution Agreement.
 22. The claimant took two loans from [Employer] because he could not afford to pay for the product he purchased for his customer base. In an effort to help the claimant succeed as a Distributor, [Employer] maintained direction and control over the claimant's work activities. The claimant continued to rely heavily on the employer for support. He continued to spend long periods of time at the loading dock.
 23. The claimant did not have a vehicle to use to make deliveries. Since the claimant could not afford to purchase a truck, [Employer] offered to sell the claimant a company truck for \$28,661.00. The claimant agreed and bought the truck. The claimant paid [Employer] a weekly car payment.
 24. The claimant followed the same route the employer set up for him when he was an employee, delivering the same orders to the same [customers], as he was trained to do by the senior delivery driver that trained him. The claimant had about eight or nine cash customers on his route. All of the other customers were authorized sales charge customers.
 25. The claimant was unaware that he could charge cash paying [customers] more for the product to increase his payment until the gas prices went up and he asked his prior Manager who explained this option was available to him.

26. If a customer on the claimant's route wanted bread the claimant would call the order into [Employer]. The claimant performed this same task while working as an employee.
27. The claimant was never told that he could work for another Bakery while working for [Employer]. In the three years the claimant worked as a Distributor he brought in one new customer.
28. When [Employer] received a complaint that the [claimant] had delivered bread late, [Employer] would call the claimant to discuss the complaint with him. In January 2007, the claimant's prior Manager added an additional fifteen stops/customers to the claimant's route. The Manager insisted that the claimant deliver to these additional routes and promised the claimant that if he got into trouble, for example with late deliveries, [Employer] would do something to help him.
29. When the claimant was sick and wanted to take some time off he would call his prior Manager and asked for the time off and request the Manager arrange for coverage for his route. The Manager did find coverage for the claimant's route.
30. The claimant did receive verbal warnings from his prior manager who told him more than once that if he was late making a delivery he would be fired.
31. The claimant was unaware that he could perform distribution work for competitors while working as a Distributor for [Employer]. The claimant worked six days a week ten plus hours a day as a Distributor for [Employer]. The claimant is not in business for himself in this industry.
32. The services performed by the claimant and other Distributors are [performed] in the usual course of the employer's trade or business.
33. Given the facts, the Distributors, except for the claimant, were required to pay [Employer] for product that they ordered for the customer in their territories. Distributors keep all the cash they collected from their cash customers. The Distributors used their personal vehicles to make deliveries and were responsible for the cost of gas and maintenance of their vehicles. The Distributors could work for competitors. [Distributors] had the authority to increase or decrease customer prices and to reject and restrict deliveries. Distributors perform services outside of [Employer] place of business.
34. The Distributors set their own work schedule, most often based on the needs of their customers. When ill or on vacation, the distributors were responsible

- to find coverage and were solely responsible to pay the individuals(s) who [performed] the work in their absence. They have the freedom to hire employees to work in the territories. Distributors did not to wear uniforms or apparel with the [Employer] logo on them.
35. The services performed by the Distributors, delivering [Employer] product to customers, is the purpose for which the employer was organized to do business. However, the Distributors are established in an independently established business of the same nature as that involved in the services performed. This is [supported] by the freedom they had to sell other bakery products, not produced by [Employer], to their customers.
36. The employer has established that a common law relationship of master and servant did not exist between [Employer] and all other Distributors.
37. However, the claimant's case is different. It is clear, based on the evidence that in an effort to help the claimant succeed as a distributor the employer continued to maintain direction and control of the [claimant's] work activities. This is supported by the fact that the employer allowed the claimant to return to work as a driver for the company when he failed to succeed as a Distributor. The employer provided financial support to the claimant by making loans to him. The claimant was not required to sign a Distribution Agreement, which contained information relative to this position. The claimant continued to perform his job in the same fashion he did as an employee, while on his route would call in order for customer as he did when he was an employee. His performance was being monitored by the employer. He was issued warnings and threatened with termination by the manager for making late deliveries. The Manager of the company promised that [Employer] would do something to help him if [he failed] to do the additional assigned stops. When he was sick and needed time off, he called the Manager who arranged coverage for his route in his absences.
38. The services performed by the claimant are deemed to be employment.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact, except for portions of findings #15, #35, and #36, as explained below.¹ In so doing, we deem the adopted findings to

¹ We reject findings #35 and # 36 to the extent that they reach legal conclusions. We reach our own legal conclusions as to whether the employer's distributors had their own independent businesses and whether a "master and servant" relationship existed between the distributors and the employer. Finding #15 misstates the evidence. The employer sets the price for cash sales, which distributors are free to raise or lower.

be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner evaluated the claimant's eligibility under G.L. c. 151A, § 2, which states, in relevant part, as follows:

Service performed by an individual...shall be deemed to be employment subject to this chapter...unless and until it is shown to the satisfaction of the commissioner that –

(a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and

(b) such 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; and

(c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

It is the employing unit's burden to meet all three prongs of the "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).

Prong (a) – Freedom from direction and control

With respect to prong (a), we consider whether services performed by an individual are 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." Griswold v. Dir. of Division of Employment Security, 315 Mass. 371, 372 (1944). However, the inquiry under prong (a) is "not so narrow as to require that a worker be entirely free from direction and control from outside sources." Athol Daily News v. Board of Review of the Division of Employment and Training, 439 Mass. 171, 178 (2003).

Claimant

Here, the claimant was not free from the employer's direction and control. Specifically, the review examiner found that the employer added customers to the claimant's delivery route without consulting the claimant. He was disciplined if his job performance was lacking. The employer had to find replacement drivers when the claimant wanted time off. Moreover, by the

employer's own admission, the claimant was unsuccessful at delivering the product without supervision.² Given the employer's significant supervision of the claimant's work, we conclude that the employing unit has not shown that the claimant was free from its direction and control. Since the ABC test is conjunctive, the employing unit's failure to prove prong (a) is sufficient to classify the claimant's relationship as employment. We turn now to the other distributors.

Other Distributors

In the course of performing delivery services, the employer's distributors had a great deal of freedom. They set their own hours and delivery routes, hired their own replacements or assistants, could reject a delivery stop if it was not working out, and, most significantly, could increase or decrease the price on goods sold to their cash customers for their own gain or loss. However, even though the ratios varied from distributor to distributor, the majority of customers negotiated prices directly with the employer. Referred to as "authorized charge sales," the employer retained the exclusive right to set prices and collect payments. Distributors submitted sale invoices for these deliveries and were paid set margins. Thus, the distributors had no control over prices in the bulk of their deliveries.

Additionally, the employer exercised considerable control over the distributors' ability to perform services for competitors or for themselves. Distributors could not deliver competitors' bakery products that were also produced by the employer without the employer's permission. Trays, which the employer leased to distributors to stack the baked goods in their trucks, could only be used to carry the employer's product. Moreover, the distribution agreement prohibited the distributors from selling the employer's product directly to consumers.

Compare the distributors' relationship with the employer to the drivers in recent court decisions under G.L. c. 151A, § 2. In Athol, newspaper carriers had no restrictions on their ability to deliver publications for other companies. Athol, 439 Mass. at 172-173. Similarly, taxi drivers in Comm'r. of Division of Unemployment Assistance v. Town Taxi of Cape Cod were free to use their leased taxis to drive for other services. 68 Mass.App.Ct. 426, 432 (2007). This freedom to work for others was a key element to the courts' determination that the newspaper carriers and taxi drivers were independent contractors.

Given the strong component of control over the exercise of the distributors' delivery services in the present case, we find that they were not sufficiently free from direction and control of the appellant to satisfy prong (a).

Prong (b) – Services performed outside the course or place of the employer's business

Since the majority of the distributors' services were performed delivering bakery products in their sales territories and not at the employer's loading facility, we find that the employer has satisfied its burden to prove prong (b).

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006).

Prong (c) – Those providing the services are customarily engaged independently in the same line of business

The SJC requires the following approach to evaluating part (c). In order to assess whether a service could be viewed as an independent trade or business, we must consider whether “the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer...” Athol, 439 Mass. at 181.

The employer encouraged its distributors to grow their routes. Some expanded the number of small cash customers, others simply increased the volume sold to the large charge customers. Either method served to expand the employer’s business. This is significant. The relationship looks much like the janitorial franchisee arrangement in Coverall, where each new cleaning customer obtained by the claimant expanded the employer’s clientele base. 447 Mass. at 859. Due to the restriction on selling competitors’ products in this case, the distributor could largely, or perhaps exclusively, expand his or her individual enterprise by helping the employer sell more product. The reality is that were the employer to terminate the distribution agreement, the distributor would lose most, if not all, of his or her customers. As such, “the nature of the relationship compels the worker to depend upon a single employer for the continuation of the services.” Coverall, 447 Mass. at 858, *quoting Athol*. For this reason, the employer also failed to prove prong (c).

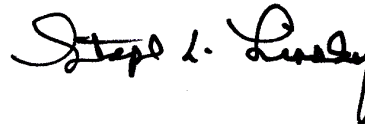
We conclude as a matter of law that both the claimant’s and distributors’ services were employment, within the meaning of G.L. c. 151A, § 2.

The review examiner’s decision is affirmed. The services performed by the claimant and other distributors constituted employment and, therefore, the employing unit is required to report the compensation for their services to the DUA and to make unemployment tax contributions.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 10, 2010



John A. King, Esq.
 Chairman



Stephen M. Linksy, Esq.
 Member

Member Sandor J. Zapolin did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 12, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – April 9, 2010