

Dockets: 2016-488(EI)
2016-489(CPP)

BETWEEN:

SHAHROKH MONJAZEB,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KEN BROWN,

Intervenor.

Appeal heard on August 30, 2016, at Vancouver, British Columbia

By: The Honourable Justice Campbell J. Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Shannon Fenrich
For the Intervenor:	The Intervenor himself

JUDGMENT

The Appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and subsection 28(1) of the *Canada Pension Plan* are allowed and the Minister of National Revenue's decision is vacated on the basis that Shahrokh Monjazebe was in insurable and pensionable employment.

Signed at Ottawa, Canada, this 13th day of September 2016.

“Campbell J. Miller”

C. Miller J.

Citation: 2016 TCC 196
Date: 20160913
Dockets: 2016-488(EI)
2016-489(CPP)

BETWEEN:

SHAHROKH MONJAZEB,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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KEN BROWN,

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REASONS FOR JUDGMENT

C. Miller J.

[1] Shahrokh Monjazez, the Appellant, claims to have been an employee of PCS Pacific Cabling Solutions Ltd. (“PCS”) for the period in issue, January 1, 2014 to April 28, 2015 (the “Period”) notwithstanding he invoiced PCS twice a month for “system design, product support and training consulting fees” and charged GST. Mr. Brown, the principal of PCS, claims Mr. Monjazez was an independent contractor for the Period notwithstanding PCS provided paid vacation leave, paid a base salary plus commission and direct deposited the remuneration to Mr. Monjazez’s bank account. It is an interesting twist on the stereotypical employee versus independent contractor issue: normally the one asserting employment tends to create employment-like trappings and, similarly, the one asserting independent contractor attempts to create independent contractor-like trappings – not the other way around.

[2] The Canada Revenue Agency (“CRA”) initially sided with Mr. Monjazez, ruling on August 12, 2015 that he was in insurable and pensionable employment under the auspices of the Employment Insurance (“EI”) and Canada Pension Plan (“CPP”) legislation. However, upon PCS’s appeal of this ruling, the CRA overturned the ruling and on November 16, 2015 decided that Mr. Monjazez was

an independent contractor for purposes of the EI and CPP legislation. Mr. Monjazez appeals that decision.

[3] I note at the outset that the British Columbia Ministry of Jobs, Tourism and Skills Training and the Minister responsible for Labour issued a Determination in December 2015 finding that Mr. Monjazez was an employee bringing into play provisions of the *Employment Standards Act* of British Columbia.

[4] Both Mr. Monjazez and Mr. Brown testified, and while there were a few significant differences and points of view, there was sufficient similarity and consistency to glean the facts of the working relationship.

[5] Mr. Monjazez is an audio engineer with a keen interest in education in that field. Since the early 1990's in British Columbia, he has been developing education programs in customs electronics. Initially, he provided programs through a company, Hybrid Colleges Inc., which became insolvent in 2000. He then pursued his business as a proprietorship under the name Hybrid College International ("Hybrid"). He also operated what he called a subsidiary, Hybrid Customs (in fact this is also part of his proprietorship) which sold and installed systems and design products. In layman's terms, the industry Mr. Monjazez worked in was home entertainment systems. Another branch of his proprietorship was AV Supplies Importers ("AVSI"), through which he imported and distributed audio and video products.

[6] PCS was in the business of selling home entertainment systems and the incidental equipment to distributors of such packages. PCS was not a retailer and did not deal directly with the ultimate consumer. Mr. Brown, who described himself as owner, purchasing agent, sales representative, general manager and supervisor of PCS, first met Mr. Monjazez as a customer who was buying product through Hybrid Customs for resale. In conversation, he became aware of Mr. Monjazez's education business, training those in the industry in "understanding and learning to apply critical acoustical design concepts, learning applied science of loud speakers and amplifiers design concepts, advanced architectural acoustics design principles and techniques and advanced multi-channel HD surround sound systems" (taken from one of Mr. Monjazez's brochures). Mr. Brown and Mr. Monjazez agreed that PCS could provide some value added to new customers by attending Mr. Monjazez's courses offered through Hybrid. In 2010, Mr. Monjazez, again through Hybrid, offered a few programs to PCS customers. Mr. Monjazez testified that optimally he required six students, though did conduct programs (normally a four-day program) to less. Mr. Monjazez would invoice PCS through

Hybrid for these program. Mr. Monjazez referred to this arrangement as contract number 1. Initially, the programs were conducted in hotels but in 2012, PCS developed a theatre room on its premises for this purpose. Mr. Monjazez provided three or four programs a year until 2013.

[7] In June 2013, the relationship altered somewhat. This is where there is a different point of view between Mr. Monjazez and Mr. Brown. Mr. Brown maintains that Mr. Monjazez was looking to increase his income as he was struggling financially. Mr. Brown agreed to provide work for Mr. Monjazez in the form of technical system design support to his sales staff. PCS did not have a design expert with Mr. Monjazez's qualifications. There was no written contract but they agreed that Mr. Monjazez would work five days a week. Mr. Brown saw this added expertise as a way to improve sales. Initially, Mr. Monjazez had no sales responsibility.

[8] Mr. Monjazez testified that Mr. Brown asked him to join the team and did not want him to work as an independent contractor, other than with respect to the training element, which would now be exclusive to PCS. Mr. Monjazez indicated he considered himself a full-time employee in technical support.

[9] Three months later, a salesperson left PCS and a position became available in sales, and Mr. Monjazez asked to be involved in a few accounts. Mr. Brown agreed and offered Mr. Monjazez that opportunity, assigning certain accounts to him. Mr. Brown saw this as a "morphing" from just providing a training service to train and design support to adding a sales element. Mr. Brown viewed this as temporary.

[10] The arrangement did not change *vis-à-vis* the education programs. PCS still invoiced customers \$800 or \$900 and Mr. Monjazez invoiced PCS about \$500 per student. PCS paid Mr. Monjazez for these programs through Hybrid by way of cheque.

[11] Mr. Brown and Mr. Monjazez agreed on a remuneration package with respect to technical support and sales of a base amount plus commission. There was a commission for sales made directly by Mr. Monjazez on accounts he handled that were assigned to him and a smaller commission on sales of others where he provided some technical and design support.

[12] Mr. Monjazez indicated that in June 2013, Mr. Brown had suggested that Mr. Monjazez remain an independent contractor, which required an invoice every

two weeks charging a fee plus GST. I take from the testimony from the two witnesses that, in fact, it was Mr. Monjazez who insisted on this arrangement so that source deductions would not be taken thus reducing his income. This arrangement continued into the fall when Mr. Monjazez took on the sales responsibilities. He acknowledged that he could not afford to have the source deductions taken off. Mr. Brown indicated that he did not know what to do but continue the arrangement, though suggested to Mr. Monjazez on several occasions that an employment arrangement be formalized. Mr. Monjazez refused. Finally, in March of 2014, Mr. Brown presented Mr. Monjazez with a written offer of employment. This is worth repeating:

PCS
Pacific Cabling Solutions Ltd.

March 26, 2014
Shahrokh Monjazez

Dear Shahrokh, I am very pleased to offer you employment with Pacific Cabling Solutions Ltd. and have outlined the issues we recently discussed in presenting this package.

Position: System Design & Support/Sales

Reporting To: President - Ken Brown

Start Date: April 1, 2014

Hours of Work: 8:00am - 4:30pm **8:30-4:30**

Probationary Period: Three (3) Months

Salary: \$50,000.00 per annum (paid Bi-Monthly) **(\$50,400)** **\$4,200/mo**
\$2,100/pty

Benefits: As we are not currently part of an external benefits program, PCS will reimburse to a maximum of \$500.00 annually for approved health & dental care services. This will be available following the probationary period.

Vacation: Two (2) weeks

Commission Scheme: **Sales Incentive Scheme**
Commission Calculation Rate (Gross Margin from dollar one) 6%.

Example; Monthly G.P.	Monthly Commission	Annual
\$5,000.00	\$300.00	\$3,600.00
\$10,000.00	\$600.00	\$7,200.00
\$20,000.00	\$1,200.00	\$14,400.00
\$30,000.00	\$1,800.00	\$21,600.00
Etc. (No Cap)		

Based on our F2014 Budget this program should provide you with a targeted earning expectation of \$64,400.00 per annum. We will continue on with the "TECH SALES" portion of the original program we had in place when you were on contract, but will reduce the percentage to 2% margin contribution. Based on our current monthly average this should provide another \$3500-\$4000 annually. **(2% → 3%)**

Sincerely yours,

Ken Brown
President
Pacific Cabling Solutions Ltd.

Pacific Cabling Solutions Ltd.
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Delta, British Columbia, Canada V4G 1H1
www.pacificcabling.com

Telephone 604.946.0669
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[13] Mr. Brown stated that this offer was not accepted, as had it been, he would have made the appropriate source deductions. Mr. Monjazez stated the offer was

accepted as his remuneration increased accordingly. Mr. Monjazez, however, continued to invoice PCS, using Hybrid invoices and charging GST. He was paid by direct deposit as, according to Mr. Brown, it was easier for his wife who attended to payroll to deal with Mr. Monjazez in the same fashion. There was an email dated August 2013 from Mr. Monjazez to Mrs. Brown stating "here is my new bank information for payroll deposit...". Mr. Monjazez did not accept the 8:00 to 4:30 time offered but negotiated a 9:00 a.m. start time. He did go to the office daily and performed well, in many months being the leading salesperson for PCS. While it was clear no one at PCS, including Mr. Brown, had Mr. Monjazez's expertise in design, he did seek and get help in the sales aspect from Mr. Brown. He also received some guidance on the PCS software (GP) inventory system. He relied on PCS computers at work to utilize this system, critical to the sales function.

[14] Mr. Monjazez did not engage in some of the duties other employed sales staff provided such as occasionally working in the warehouse. He also did not take an hour-long lunch break, but limited his break to just half an hour.

[15] Mr. Brown felt Mr. Monjazez was always looking to increase his remuneration as Mr. Monjazez never felt it was adequate. Mr. Brown attempted to help where he could but also had to be cognizant of PCS's bottom line. He did, however, assist Mr. Monjazez by having the company reimburse him for mileage and cell phone costs. Also, when Mr. Monjazez decided he was going to go to an annual electronics convention in Las Vegas, Mr. Brown paid a small portion of costs, given Mr. Monjazez said he had met a customer of PCS's.

[16] Mr. Brown also was, in his words, trying to be a nice guy in allowing Mr. Monjazez paid vacation leave. In an email from Mrs. Brown dated May 8, 2014, she confirmed the total number of holidays from June 3, 2013 to May 2, 2014, was 17 ½ days. She wrote:

Two weeks vacation equals 10 days from your anniversary date of June 3, 2013 through to June 3, 2014. You have taken 17 ½, so if you subtract the 10 days that employees are entitled to in one year, you have taken 7 ½ days over that without a year being yet complete. Ken has agreed to have you pay back 4 of these days less one day each over the next 4 pay periods; two days at your previous rate of pay and two days at your current rate of pay...

[17] PCS had employed sales staff as well as contracted sales agents. Mr. Brown acknowledged he viewed Mr. Monjazez more as an agent though not exactly the same as the other agents. Mr. Monjazez could not sell competing product through

the auspices of Hybrid, though he did continue to conduct some business through AVSI. He indicated that would be outside his PCS working hours. He did not do any outside design work through Hybrid during his time with PCS.

[18] During the Period, Mr. Monjazez continued to pay an assistant, Ms. Bertolo, to assist him administratively, though she testified her work was a few hours on weekends and was limited to the education business. She could not replace Mr. Monjazez at his work at PCS. While he could engage others to provide some of the education programs, he did not believe he could do so with respect to his design and sales role at PCS. Mr. Monjazez clearly saw the education program he provided for PCS as a separate agreement from what he believed was his contract of employment, or as he called it “contract 2”, with PCS. He agreed the education element was provided as an independent contractor.

[19] Mr. Monjazez had a PCS business card showing a PCS email address and describing him as a system design and support specialist. He also had business cards for Hybrid. Mr. Brown stated sales agents (i.e. not employed sales staff) would also be provided cards. Agents could sell other products. Mr. Monjazez felt he could not use his Hybrid tradename to do so, though, as indicated earlier, it appears that he did earn a small amount of income through AVSI while working at PCS.

[20] Mr. Monjazez presented several emails to evidence the true nature of the working relationship: for example, in January 2014, Mr. Brown wrote to a customer suggesting he contact “our Shahrokh Monjazez...for pricing information”. Mr. Monjazez refuted that he was able to work his own hours and come and go as he pleased. He explained he was required to be at work from 9:00 a.m. until 5:00 p.m. He provided an email of January 7, 2014, from Mr. Brown to a customer stating “Shahrokh will be in at 9:00 .a.m. today”. Mr. Monjazez also pointed to emails from Mr. Brown providing budget spreadsheets “as you can see where you are at throughout the year”. Mr. Brown also requested sales forecasts from Mr. Monjazez. It was clear Mr. Brown stayed on top of the sales activity.

Analysis

[21] As with every case of employee versus independent contractor, the key determination is whether the worker was in business on his own account. Jurisprudence has evolved to provide guidance on how to grapple with that question. The first step is to identify what the parties themselves intended. Then an analysis of the circumstances follows to see if they align with that intention. The

traditional factors of control, ownership of equipment, risk of loss, chance of profit and responsibility for investment and management are considered in this analysis.

[22] The difficulty in this case, as I alluded at the outset, is that Mr. Monjazez, who wants to be found to be an employee refused to accept an employment remuneration package that would have meant source deductions being taken from his pay. On the other hand, Mr. Brown, who insists Mr. Monjazez always remained an independent contractor, provided vacation pay and other trappings of employment. This incongruity, I suggest, goes more to intention than being determinative factors one way or the other. The issue is further confused by Mr. Monjazez's acknowledgment that he remain an independent contractor as far as the provision of education programs goes. He continued to hire an assistant to help in that "business" every second weekend. It is understandable why Mr. Brown might view all Mr. Monjazez's services in one light.

[23] So, does what was intended, even if it can be figured out, assist in this analysis? I agree with Mr. Brown that the relationship morphed, to use his word, from a clear independent contractor relationship into some sort of hybrid. I accept that Mr. Brown wanted to cement the relationship as an employment relationship. I accept as evidence that he made this offer on several occasions, formalizing the written offer of April 1, 2014. I view this as a recognition by Mr. Brown that Mr. Monjazez was, in most respects, other than with respect to source deductions, already an employee, and that Mr. Brown needed to solidify that position.

[24] While Mr. Monjazez says he accepted the April 2014 offer, he clearly did not do so *vis-à-vis* the actual formalizing of an employment relationship, as he continued to insist on submitting invoices and charging GST rather than accept the standard employee source deductions. I can only conclude that any mutual intention is unclear and an attempt to rely on intention as shaping the real working relationship is unhelpful. Frankly, this is a conclusion that I have reached in many an employee versus independent contractor cases. The relationship is more readily determined by addressing the traditional factors confirmed by the Supreme Court of Canada in the *Sagaz Industries Canada Inc. v 671122 Ontario Limited*,¹ and which I identified earlier.

Control

¹ 2001 SCC 59.

[25] As the Supreme Court of Canada emphasized, control is always a factor, and, indeed, I would go so far as to say in most cases it is the most important factor. In reviewing control there are several elements courts have indicated are helpful:

- actual hands-on supervision;
- training;
- negotiating terms;
- ability to work elsewhere;
- ability to hire substitute workers;
- freedom to come and go and set schedule.

[26] To be clear, this analysis does not address the education portion of Mr. Monjazez's work. I am satisfied that remained a discrete part of the work provided by Mr. Monjazez, a part which he acknowledges was provided as an independent contractor. It is the balance of the work I intend to review, of which there are two categories. First, his technical assistance to other salespeople for which he received a 2% commission if such assistance resulted in a sale. This formed a minor part of the work. Second, his sales work for which the commission portion of his remuneration was 6% of gross margin in sales.

[27] With respect to hands-on supervision, Mr. Brown admitted neither he nor anyone else at PCS had the technical expertise of Mr. Monjazez to oversee that element of his work. With respect to the far larger element of his work, sales, I am satisfied that there was some considerable oversight by Mr. Brown. He was diligent in following sales activity and demanding forecasts. I also find that Mr. Monjazez sought Mr. Brown's advice on sales issues. Further, it was Mr. Brown who assigned Mr. Monjazez customers, and indeed, some of PCS's best customers due to Mr. Monjazez's additional technical expertise. I conclude this aspect of control favours employment.

[28] While Mr. Brown could provide no training in the technical domain, he could and did assist on the sales front. He also trained Mr. Monjazez with respect to the use of the software system required to make and track sales. This suggests a slight tip towards employment.

[29] With respect to negotiating terms of the contract, it was evident that Mr. Monjazez was constantly seeking to enhance his remuneration, but it was Mr. Brown, limited by PCS's financial circumstances, who set the percentages, salary and, at his discretion, paid certain expenses. I do not perceive these negotiations as

a business-to-business negotiation, but more readily consistent with an employer/employee negotiation.

[30] Could Mr. Monjazez work elsewhere? While he continued to provide education programs, even though during the period only to PCS customers, they were provided by him as an independent contractor. He also did continue some work for the AVSI branch of his business, though confirmed this was not in competition with PCS. He believed he could not compete with PCS. His work there was full-time and limited what else he could do. This element of control, I conclude, is neutral.

[31] With respect to substitute workers, I find Mr. Monjazez could not have sent anyone in his place to perform the technical and sales service he was hired to do. While he did have an assistant, her work had nothing to do with the sales work at PCS. Clearly, this evokes employment.

[32] Concerning freedom to come and go as he pleased, I am satisfied both Mr. Monjazez and Mr. Brown had the expectation that Mr. Monjazez was to be at work from 9:00 a.m. until 5:00 p.m. Yes, Mr. Monjazez took only a half hour lunch, but it was within the time set by Mr. Brown. The very fact of a limited time for lunch is indicative of employment.

[33] Mr. Brown points to Mr. Monjazez's unilateral decision to go to the CES convention in Las Vegas. I agree that does accord with the freedom of an independent contractor, but it is only one instance and I am not swayed it overwhelms the everyday requirement of PCS which was much more a sign of employment.

[34] On balance, I find the control factor favours a finding of employment.

Ownership of Equipment

[35] The equipment Mr. Monjazez required to properly perform his sales function was a terminal at the PCS offices, with access to the particular GP software program used by PCS. This minor point suggests employment.

Chance of Profit

[36] Like other sales employees, Mr. Monjazeб's chance of profit was tied into his commission arrangement, an arrangement equally associated with sales employees as sales agents. The Respondent suggested, however, that with access to PCS customers, Mr. Monjazeб had an opportunity to develop customers for the education side of his business, and, conversely, through his education business he could develop potential customers for the sales side of his work. There was no evidence this actually happened. The evidence was that the education programs during the Period in question were limited to PCS customers. I recognize though that there may have been some crossover that could potentially increase his income, which does point to business rather than employment.

Risk of Loss

[37] I find Mr. Monjazeб faced little or no risk of loss. The only example of expenses incurred unilaterally that might suggest being in business for himself was attending the CES convention. Even then, PCS reimbursed some expenses. PCS also covered some other incidental expenses such as phone and automobile. On balance, I conclude this factor is more in line with employment than business.

Responsibility for Investment and Management

[38] Any responsibility for investment and management appears to be tied into the education element of his work. This is where he invested in hiring assistants to develop programs and provide administrative support. I heard no evidence of any investment by Mr. Monjazeб in PCS or involvement in the management of the business of sales. The business was that of PCS.

[39] The analysis supports a finding of employment notwithstanding not all factors point overwhelmingly in that direction: sufficient do, however, on balance.

[40] I have considerable sympathy for Mr. Brown. He was caught between a rock and a hard place. He had a worker who, I believe, he realized was truly an employee, but who refused to formalize that status due to the consequent impact on income earned by deduction of the source deductions. Mr. Brown simply let it go. He could have insisted on the employment contract and run the risk of losing a top salesman, or he could carry on with the invoicing arrangement and "pretending" Mr. Monjazeб was an independent contractor. It is understandably irksome to Mr. Brown that Mr. Monjazeб now turns around and demands the benefits of

employment, with the financial impact on PCS that flows from that. Yet, I conclude that in law, Mr. Monjazez was an employee. But I also conclude that he is responsible for creating this unnecessary and unfortunate litigation. If I were able to award costs against Mr. Monjazez in PCS's favour, I would do so. Regrettably, our Rules do not permit such.

[41] I allow the Appeal and vacate the Minister of Revenue's decision of November 16, 2015 on the basis that Mr. Monjazez was an employee for purposes of the EI and CPP legislation.

Signed at Ottawa, Canada, this 13th day of September 2016.

“Campbell J. Miller”

C. Miller J.

CITATION: 2016 TCC 196

COURT FILE NOS.: 2016-488(EI) and 2016-489(CPP)

STYLE OF CAUSE: SHAHROKH MONJAZEB AND THE
MINISTER OF NATIONAL REVENUE
AND KEN BROWN

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: August 30, 2016

REASONS FOR JUDGMENT BY: The Honourable Justice Campbell J. Miller

DATE OF JUDGMENT: September 13, 2016

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Shannon Fenrich
For the Intervenor:	The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:

Name: n/a

Firm:

For the Respondent:	William F. Pentney Deputy Attorney General of Canada Ottawa, Canada
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