Docket: 2007-2817(EI)

BETWEEN:

CRITICAL CONTROL SANITATION INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
Critical Control Sanitation Inc. (2007-2816(CPP))
on June 25, 2008 at Toronto, Ontario

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant: Irving Solnik

Counsel for the Respondent: Laurent Bartleman

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Toronto, Ontario, this 29th day of July 2008.

"N. Weisman"

Weisman D.J.

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Citation: 2008 TCC 412
Date: 20080729
Dockets: 2007-2817(EI)
2007-2816(CPP)

BETWEEN:

CRITICAL CONTROL SANITATION INC.,

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REASONS FOR JUDGMENT

Weisman D.J.

[1] These two appeals are from determinations by the Respondent that two workers, Alfredo Baladan ("Baladan") and Filipe Formoso ("Formoso"), were in insurable and pensionable employment within the meaning of the *Employment Insurance Act*[1] (the "*Act*") and the *Canada Pension Plan*[2] (the "*Plan*") while engaged by the Appellant. The period under review for Baladan is January 1, 2004 to February 27, 2007; and for Formoso January 1, 2004 to December 31, 2005. On consent, the appeals were heard together on common evidence.

[2] The Appellant, Critical Control Sanitation Inc. ("CCSI"), is in the business of cleaning food processing plants, under the watchful eye, and according to the specifications of, the Canadian Food Inspection Agency (the "Agency"). The workers were both in managerial positions with the Appellant, Baladan being its

[1] S.C. 1966, c.23

[2] R.S.C. 1985, c. C-8 as amended

General Manager, and Formoso one of its supervisors. Formoso reported to Baladan who in turn reported to the Appellant's President, Raymond Junghans ("Junghans").

[3] While the foregoing is clear on the evidence as presented, there is much about the entire relationship between the parties that is not. Counsel for the Appellant was invited and guided to tailor his evidence to address each of the four criteria established in *Wiebe Door Services v. M.N.R.*[3] ("*Wiebe Door*"); namely control, ownership of tools, chance of profit, and risk of loss; in order to discharge the burden of proving that the Minister's determinations were objectively unreasonable. He failed to do so. Fortunately, upon cross-examination, counsel for the Minister lead the Appellant's witness Junghans through all the assumptions in the Minister's amended reply to the Appellant's amended notice of appeal, which helped to shed some light on the working relationship between the parties, so this matter could be decided on its merits.

[4] Formoso supervised the cleaners of a number of food plants. This entailed his attending various locations late at night, after plant closing, to ensure that the workers who were scheduled to clean, in fact showed up to do so. A second "pre-operational" attendance was required early in the morning before the plants opened for the day, to inspect the work done during the night by the cleaners, as a means of quality control. Formoso was otherwise free during the day to do as he wished. Junghans thought that he operated a taxi, but had no evidence in support of that suspicion.

[5] Formoso was paid according to the number of plants he supervised. He agreed to promote the Appellant, and was given a financial incentive to do so. His base weekly earnings of $850.00 would rise by $50.00 to $150.00 per week for each new plant that he introduced to the Appellant, depending upon their size. It was Junghans who went to the new plants to negotiate the necessary terms and conditions. There was no evidence of any expenses incurred by Formoso in connection with his duties, nor were there any tools required in connection therewith.

[6] Baladan, as General Manager, hired and supervised Formoso and the other supervisors and crew chiefs. He also worked on an incentive system. He did the hiring and firing for the company, and found replacements for workers who did not appear for their shift for whatever reason. For this service he was paid a bonus of $1.00 for each hour worked by the replacement workers. The normal hourly pay for cleaners was $8.00. Baladan would pay the workers and invoice the Appellant $9.00

[3] 87 DTC 5025 (FCA)

per hour plus G.S.T. on both his base remuneration and the replacements' wages including his mark-up. It was also thought, but not established, that when he drove cleaners to their job sites, he charged them for this service. Unfortunately, there was no evidence adduced as to the amount of these revenues or their significance in relation to the two workers' base remuneration. Moreover, the workers in question, who would know the answers to these relevant questions, were not called to testify on the Appellant's behalf, without explanation. I draw the inference that their evidence would not have been helpful to the Appellant[4].

[7] Baladan had no risk of loss in his dealings with the Appellant. The lease expense on his car was shared by CCSI, although he paid his own gasoline and insurance. He was reimbursed the cost of his office, and his business trips on the Appellant's behalf. He required no other tools in his work. It was not known whether CCSI shared the cost of the two workers' cell phones. When Junghans was asked if Baladan paid to advertise for cleaners, it was suggested that he might have done so in foreign language newspapers, but mainly his cleaners were obtained by word of mouth. If he was required to pay a cleaner more than the normal $8.00 per hour, he was fully reimbursed by the Appellant.

[8] Both Formoso and Baladan were required by the Agency to have registered business names, and this they did. Both Baladan and Formoso signed Agreements with the Appellant agreeing to be independent contractors, but it is trite law that such agreements are not determinative of the issue.

[9] Evidence was persistently led as to the working terms and conditions of the cleaners themselves, which bore no relevance to those of Baladan and Formoso, the two workers before the Court. It is clear, however, that the Appellant had *de jure* control over both of them. According to Junghans, they both reported to him, and in Balaam's case it was "quite often". Formoso also reported to Baladan as aforesaid. As well, the Independent Contractor Agreements signed by both workers contain several clauses that in my view constitute direction and control. The workers are responsible: "… to learn, understand, and follow these policies, rules and guidelines"; for "Completing all necessary paperwork for CCSI"; for "Maintaining communication with the plant, or job sites on behalf of CCSI, and promote CCSI during any such communication"; and for "Providing to CCSI any other reasonable assistance that CCSI may require". These responsibilities establish not only *de jure* control, but a relationship of subordination as well.

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[4] *Levesque v. Comeau et al.*, [1970] S.C.R. 1010

[10] There was evidence that the two workers could find replacements for themselves at CCSI's expense, if they were ill or otherwise unavailable. In fact, Formoso did so on one occasion. As to the relevance of personal services, McKenna, J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance*[5] says: "Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be". In my view, Baladan and Formoso had just such a limited or occasional power of delegation, which was consistent with a contract of service.

[11] With reference to the two workers before the Court, the foregoing facts establish the requisite control, subordination, absence of risk of loss, and the provision by CCSI of Baladan's necessary tools.

[12] The only remaining issue in this case is whether Baladan and Formoso had a chance of profit in their working relationship with CCSI. This requires discerning if their various revenues over and above their base weekly remunerations were profits from sound management, or sales incentives. Throughout his testimony Mr. Junghans repeatedly referred to their "incentives" and their "bonuses". In my view, that is just what they were - sales incentives and sales bonuses, neither of which is consistent with the two workers being independent contractors.

[13] Since all the relevant *Wiebe Door* criteria indicate that Baladan and Formoso were employees under contracts of service with CCSI during the periods under review, it is not necessary to give great weight to the stated intention of the parties[6].

[14] The Appellant bears the burden of demolishing the assumptions made in the Minister's amended reply to its amended notice of appeal. These allegations must be assumed true as long as the Appellant has not proven them false[7]. Assumption 8 g) (iii) is incorrect. It is Mr. Junghans who provides estimates and negotiates contracts with the food plants. Assumption 8 j) is also wrong. It is not Baladan and Formoso who had to pass inspection for cleanliness, but the plants their workers cleaned. Assumption 8 o) was disproved by the evidence that the two workers could occasionally hire replacements for themselves. Assumption 8 r) was not substantiated

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[5] [1968] 1 All E.R. 433 at 440 (Q.B.D)

[6] *The Royal Winnipeg Ballet v. M.N.R.*, [2006] FCA 87 (F.C.A.)

[7] *Elia v. M.N.R.*, [1998] F.C.J. No. 316 (F.C.A.)

by the evidence. CCSI merely shared the lease expense, and did not provide Baladan with a corporate vehicle as alleged. The remaining facts proven at trial were sufficient in law to support the Minister's determinations[8].

[15] I have investigated all the facts with the parties and the witness called on the Appellant's behalf to testify under oath for the first time, and have found no new facts and nothing to indicate that the facts inferred or relied upon by the Minister were unreal, or were incorrectly assessed or misunderstood. I can find no business that either Baladan or Formoso was in on his own account. The Minister's conclusions are objectively reasonable[9].

[16] In the result, the Minister's determinations are confirmed and the two appeals are dismissed.

Signed at Toronto, Ontario, this 29th day of July 2008.

"N. Weisman"

Weisman D.J.

[8] *Canada (Attorney General) v. Jencan Ltd.(C.A.)*, [1998] 1 F.C. 187 (F.C.A.)

[9] *Légaré v. M.N.R.*, [1999] F.C.J. No. 878 (F.C.A.); *Pérusse v. M.N.R.*, [2000] F.C.J. No. 310

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APPEARANCES:

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Counsel for the Respondent:	Laurent Bartleman

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