Docket: 2009-1042(EI)

BETWEEN:

1423087 ONTARIO INC.
O/A PLATINUM AIR CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on December 17, 2009, at London, Ontario.

Before: The Honourable Justice Réal Favreau

Appearances:

Agent for the Appellant:	Jim Travis
Counsel for the Respondent:	Sara Chaudhary

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue is vacated on the basis that John W. Ducharme was carrying on the sale and service of air purifiers as an independent contractor through the Appellant and was not employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* during the period from August 26, 2007 to February 28, 2008, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 31st day of August 2010.

"Réal Favreau"

Favreau J.

Citation: 2010 TCC 451
Date: 20100831
Docket: 2009-1042(EI)

BETWEEN:

1423087 ONTARIO INC.
O/A PLATINUM AIR CARE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from the decision by the Minister of National Revenue (the "Minister") that Mr. John W. Ducharme (the "Worker") held insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "*Act*") while working for the Appellant during the period from August 26, 2007 to February 28, 2008 .

[2] During the period in question, the Worker worked as a salesperson from August 26, 2007 to September 30, 2007 (approximately one month) and as a service technician from October 1, 2007 to February 28, 2008 (five months). At the hearing, counsel for the Respondent recognized that the Worker was self-employed while he was working as a salesperson.

[3] In making his decision, the Minister relied on the following assumptions of fact set out in paragraph 10 of the Reply to the Notice of Appeal:

(a) the Appellant is in the business of selling and servicing air purifiers; (admitted)
(b) the Appellant's President, Nick Dereza, controlled the day-to-day operations and made the major business decisions for the Appellant; (denied as written)

(c) Ray Schneider was in charge of sales and customer relations for the Appellant; (admitted)

(d) Jim Travis was in charge of service and sales part [*sic*] for the Appellant; (admitted)

(e) the Worker was hired initially as "Salesperson" and subsequently as "Service Technician" under a written agreement; (admitted)

(f) the Worker worked as "Salesperson" from August 2, 2007 to September 30, 2007; (admitted but the starting date was August 26, 2007)

(g) the Worker worked as "Service Technician" from October 1, 2007 to February 21, 2008; (admitted but the termination date was February 28, 2008)

(h) the Worker signed different documents such as "Independent Dealer form" which outlined Worker's personal data, vehicle make, model and insurance information and emergency contact information, "Injury Disclaimer" and "Non-Competition and Confidentiality Agreement"; (admitted)

(i) the documents enumerated in (h) above, contained information about commissions, frequency of payments, responsibility of [*sic*] expenses, specific services to provide, confidential information, non-competitive clause and termination of work; (admitted)

(j) the Appellant's business hours [sic] were Monday to Friday, 8 am to 8 pm; (admitted)

(k) the Appellant booked the Worker's appointment times with their clients; (admitted)

(l) the Worker's hours of work were not recorded; (admitted)

(m) the Worker was required to report initially to pick up client lists and later to turn in completed reports and work orders and funds collected; (admitted)

(n) the Appellant was able to track the task completed by the Worker and update the customer records based on reports submitted by the Worker; (admitted)

(o) the Worker's rate of pay was determined by the Appellant; (denied)

(p) the Worker was paid by cheque to his personal name, on a weekly basis; (admitted)

(q) the Appellant did not provide benefits such as vacation pay or paid vacation; (admitted)

(r) the Appellant decided the timing and amounts of bonuses which it paid as incentives; (admitted)

(s) the Worker did not invoice the Appellant for services performed; (admitted)

(t) the Worker was required to perform his services personally; (admitted)

(u) the Worker did not have a registered business name, [was] not registered with Canada Revenue Agency and did not have a business bank account; (admitted)

(v) the Worker was instructed on tools, equipment and materials he needed to perform his duties; (admitted)

(w) the Appellant provided maps, testers, screwdriver with a magnetic tip and vacuum, at no charge to the Worker; (admitted)

(x) the Appellant also provided business cards which noted its name and its contact information; (admitted)

(y) the Worker provided his vehicle, a GPS, some hand tools and his cell phone and was responsible for the operating costs; (admitted)

(z) the Appellant covered the accommodation costs when out of town; (admitted)

(aa) the Appellant required professional dress but no uniform; (admitted)

(bb) the Worker must wear a name badge that displayed his picture as well as both his name and the Appellant's name; (admitted)

(cc) the Appellant was responsible to resolve customer complaints; (admitted)

(dd) the Appellant covered the costs of redoing work; (admitted)

(ee) the Appellant guaranteed the work performed by the Worker; (admitted)

Salesperson

(ff) the Worker's duties were to sell air purifiers using customer lists or leads provided by the Appellant; (admitted)

(gg) the Worker's work day was filled by the sales leads; (admitted)

(hh) the Worker performed his duties at the Appellant's customer's [*sic*] homes; (admitted)

(ii) the Worker received a three-day session training [*sic*] which reviewed the Appellant's products and learned sales strategies; (admitted)

(jj) the Appellant provided also a "Sales book"; (admitted)

(kk) the Worker's hours of work were Monday to Friday, 11 am to 7 pm, as determined by the Appellant; (admitted)

(ll) the Worker was supervised by Ray Schneider; (admitted)

(mm) the Worker required permission to approve discounts, exchange machines and perform all but minor repairs; (admitted)

(nn) the Worker was paid 100% commissions which was $500 per machine sold less 50% of any sales discount offered to the customer; (admitted)

Service Technician

(oo) the Worker's duties were to service, inspect and repair equipment and units sold by the Appellant as well as service packages and replacement units to the Appellant's clients; (admitted)

(pp) the Worker performed his duties mostly on the road at the Appellant's clients [*sic*] place; (admitted)

(qq) the Worker did not receive any training; (admitted)

(rr) the Appellant supplied the Worker with manufacturer manuals and directives for those units sold and serviced by the Appellant, to be used as guidelines for repairs; (admitted)

(ss) the Appellant's Service Manager, Jim Travis, was also available as reference; (admitted)

(tt) the Worker's hours of work were Monday to Friday, 7 am to 5 pm as determined by the Appellant; (admitted)

(uu) the Worker was supervised by Jim Travis; (admitted)

(vv) the Worker was paid a stipend of $450 per week, plus gas allowance, bonuses and commissions (10% of sales). (admitted)

[4] The Worker testified at the hearing. He explained what the three-day training session he received when he applied for a job with the Appellant as a commission salesman consisted of. He said that he was not paid for the training session. He further stated that he thought he was an employee of the Appellant and that is why, in February 2008, he asked for a T4 slip for the 2007 taxation year, i.e. for the period of that year during which he was a service technician. In his income tax return for 2007, he declared the income earned as a salesperson as business income and the income earned as a service technician as employment income. He further testified that he

never obtained a business number or a goods and services tax (“GST”) number. The GST that the Appellant paid to him on his remuneration was remitted to the Receiver General of Canada.

[5] The Worker’s request for a T4 slip came only a few days after Mr. Jim Travis, the Appellant's service manager, had written two letters confirming that the Worker had been a valued employee of the Appellant since August 27, 2007. The first letter was dated January 21, 2008 and was addressed to Mr. Michael G. Barry, barrister at law. The second, dated February 5, 2008, was a "to whom it may concern" letter, that is, it was not addressed to any person in particular.

[6] Mr. James Coe Travis also testified. He explained that the letters referred to in the preceding paragraph were written out of compassion, at the request of the Worker, in order to help him to retain a lawyer (the first letter) and renegotiate the mortgage on his house (the second letter). He further explained that those letters were part of other measures intended to help the Worker get his life in order. The witness confirmed having paid the Worker over $1,300 cash to perform renovations at his residence and having sold him an eight-year-old vehicle on credit terms, with no interest on a good portion of the purchase price. The witness also referred to the fact that the president of the Appellant had made an interest-free loan of $2,200 to the Worker to help make him solvent. The loan was repaid in full by means of payments of $100 per week.

[7] The witness also explained that salespersons and service technicians all signed the same agreements with the Appellant. No other agreements are executed when a person becomes a service technician. When the Worker was discharged as a salesperson and became a service technician, his services were not terminated by the Appellant and no new agreement had to be signed. However, the remuneration for the Worker’s services was renegotiated. As a salesperson, the worker was paid a commission of $500 per unit sold less 50% of any sales discount, while as a service technician the Worker was paid $450 per week, plus a gas allowance of $20 per day and a bonus of 10% of sales of service plans, filters, units and spare parts.

[8] Mr. Nicholas Dereza, the president of the Appellant, also testified. According to him, the Worker was well aware of the terms and conditions of his working relationship with the Appellant. No source deductions were taken from his paycheque and GST was added despite the $30,000 threshold. He recognized, however, that the agreements signed by the Worker were structured for salespersons and he confirmed having made an interest-free loan of $2,200 to the Worker.

Analysis

[9] In *Lang v. Canada (M.N.R.)*, [2007] T.C.J. No. 365 (QL), 2007 TCC 547, Chief Justice Bowman, as he then was, summarized in the following manner the rules applicable where the matter of the legal status of a worker arises:

> 4 Each case in which the question of employee versus independent contractor arises must be determined on its own facts. The four components in the composite test enunciated in *Wiebe Door Services Ltd. v. M.N.R.*, 87 D.T.C. 5025 and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, must each be assigned their appropriate weight in the circumstances of the case. Moreover, the intention of the parties to the contract has, in recent decisions of the Federal Court of Appeal, become a factor whose weight seems to vary from case to case. (*The Royal Winnipeg Ballet v. M.N.R.*, [2006] F.C.J. No. 339, 2006 FCA 87; *Wolf v. Canada*, [2002] F.C.J. No. 375, 2002 FCA 96; *City Water International Inc. v. M.N.R.*, [2006] F.C.J. No. 1653, 2006 FCA 350).

[10] In *André Gagnon v. The Minister of National Revenue*, 2007 FCA 33, the Federal Court of Appeal reiterated the principle that the burden is on the party who opposes the Minister's decision to rebut the assumptions of fact made by the Minister (*Le Livreur Plus Inc. v. The Minister of National Revenue and Laganière*, 2004 FCA 68, at paragraph 12).

[11] In the present case, the Worker signed various written agreements with the Appellant when he started his working relationship with that company. Clearly, the intent of the parties at that time was to establish a business relationship based on independent contractor status for the Worker. When the Worker joined the service department, no new agreements were signed and the understanding of the Appellant's representatives was that the Worker entered the service department under the same agreements as those that were signed by the Worker on August 27, 2007. According to the testimony of the Appellant's representatives, the Worker knew very well what the contractual arrangements were and agreed to them. The financial terms were renegotiated and were accepted by the Worker. Despite the fact that the agreements were structured for salespersons and not for service technicians, they should not be disregarded.

[12] The factors that have been applied in determining the legal status of a worker include the following:

(a) control
(b) ownership of tools

(c) chance of profit
(d) risk of loss (sometimes (c) and (d) are combined)
(e) integration.

According to Chief Justice Bowman, referring to *Wiebe Door*, factors (a) to (d) are part of one single test. The integration factor is not part of that test, is difficult to apply and is not by itself relevant in determining whether or not a person is an employee.

[13] The term "control" has been defined by Justice Bowie of this Court in *André Gagnon v. The Minister of National Revenue*, 2006 TCC 66, as being "the right to direct the manner of doing the work", rather than the actual exercise of that right.

[14] In the present case, the evidence at the hearing, which was essentially based on the testimony of the Appellant's representatives and of the Worker and/or representations made by the said representatives to the Canada Revenue Agency, was as follows:

- The Appellant booked the Worker's appointment times with its clients. Normally, the clients dictated the work that the Worker was required to perform and on what day and at what time he was to do it. The basic schedule prepared by the Appellant was often negated or defeated by the Worker's other commitments (such as meetings with banks and mortgage companies, medical, legal and counselling appointments or other job commitments).
- The worker worked independently and on his own, without supervision, in clients' homes;
- The Worker did not receive any training from the Appellant on how to do the repairs and was supplied by the Appellant with manufacturer's manuals and directions for the units sold and serviced by the Appellant. These manuals and directions were to be used as guidelines for repairs.
- The Worker kept his own daily records on a daily journal pad and wrote reports, all of which allowed the Appellant to track job completion and to update customer information in its data bank.
- The Worker was not required to record his working hours.
- The Worker performed his duties on the road at the Appellant's clients' premises and did not have any specific or allotted space on the Appellant's premises.

- The Worker was not subject to any restriction preventing him from hiring or using the services of someone else to assist him in performing the required services.

[15] Concerning the ownership of tools, the evidence was to the effect that the Worker was required to supply his own tools, vehicle, cell phone and equipment. The Worker was responsible for insurance, repairs and maintenance for his own tools and equipment including his vehicle (however, a gas allowance of $20 per day was paid by the Appellant).

[16] Concerning the chance of profit and risk of loss, the following has been established:

- The Worker had to assume a significant financial risk. He was responsible for all his personal expenses (meals and clothes) and for fines, traffic offences, tickets, accidents and personal injuries. He had to bear the acquisition costs, as well as insurance, repair and maintenance costs, with respect to his tools, equipment and vehicle.
- The Worker did not receive any fringe benefits from the Appellant, unless one considers perhaps the gas allowance, and there were no income guarantees or job security.
- The Worker was not at risk with respect to the collection of accounts receivable (for example, NSF cheques).
- The Worker had a lesser chance of profit and risk of loss when he became a service technician because he was entitled to a basic salary of $450 per week and to a commission of only 10% on his sales. Even if the chance of profit and the risk of loss were substantially reduced, they were nonetheless present and the Worker had the opportunity to work more hours to generate greater earnings.

[17] The application of the *Wiebe Door* test to the facts of this case clearly points to a legal status of an independent contractor. There was no supervision or control over the providing of the repair services on the customer's premises. The Worker had a chance of profit and bore the risk of loss; he supplied his own tools and equipment; he had no job security and could take on other jobs or contracts (for example, the renovations at Mr. Travis's residence).

[18] The application of the intention test also points towards an independent contractor status.

[19] Therefore, the appeal is allowed and the decision of the Minister is vacated on the basis that the Worker was carrying on the sale and service of air purifiers as an independent contractor through the Appellant and was not employed in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Act* during the period from August 26, 2007 to February 28, 2008.

Signed at Ottawa, Canada, this 31st day of August 2010.

"Réal Favreau"

Favreau J.

CITATION:	2010 TCC 451
COURT FILE NO.:	2009-1042(EI)
STYLE OF CAUSE:	1423087 Ontario Inc. O/A Platinum Air Care and M.N.R.
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	December 17, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	August 31, 2010

APPEARANCES:

Agent for the Appellant:	Jim Travis
Counsel for the Respondent:	Sara Chaudhary

COUNSEL OF RECORD:

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Firm:	
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