

Dockets: 2017-383(CPP)  
2017-385(EI)  
2018-3794(EI)  
2018-3798(CPP)

BETWEEN:

EUROPEAN STAFFING INC.,  
and  
THE MINISTER OF NATIONAL REVENUE,  
and  
JERZY PAJECKI and PAUL KENNY,

Appellant,  
Respondent,  
Intervenors.

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Appeals heard on common evidence with the appeals of European Staffing Inc. (2017-383(CPP), 2017-385(EI), 2018-3794(EI) and 2018-3798(CPP)) on January 9 and 10, 2019 at Toronto, Ontario.

Before: The Honourable Justice Robert J. Hogan

Appearances:

Counsel for the Appellant: Jonathan Di Feo  
Counsel for the Respondent: Warren Silver  
For the Intervenors: The Intervenors themselves

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**JUDGMENT**

The appeals from the determinations (the “Determinations”) made by the Minister of National Revenue to the Reasons for Judgment herein that the Intervenors and the Workers listed in Schedule A and Schedule B were, for the purposes of the *Employment Insurance Act* and the *Canada Pension Plan*, employed by the Appellant in insurable and pensionable employment are dismissed and the Determinations are confirmed, the whole in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of March 2019.

“Robert J. Hogan”

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Hogan J.

Citation: 2019 TCC 59  
Date: March 11, 2019  
Dockets: 2017-383(CPP)  
2017-385(EI)  
2018-3794(EI)  
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BETWEEN:

EUROPEAN STAFFING INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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and

JERZY PAJECKI,

Intervenor,

and

PAUL KENNY

Intervenor.

## **REASONS FOR JUDGMENT**

Hogan J.

### **I. Overview**

[1] These are appeals from decisions of the Minister of National Revenue (the “Minister”) that the Appellant, European Staffing Inc., placed individuals in pensionable and insurable employment within the contemplation of the placement agency provisions under the *Canada Pension Plan*<sup>1</sup> (“CPP”) and the *Employment*

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<sup>1</sup> RSC 1985, c C-8.

*Insurance Act*<sup>2</sup> (the “*EI Act*”). The individuals in question are Mr. Paul Kenny during the period from February 23, 2017 to July 25, 2017, and the individuals listed in Schedules A and B to these reasons for the 2013 and 2014 taxation years (collectively, the “Workers”).

These appeals were heard on common evidence.

## II. The Facts

[2] The Appellant is in the business of providing workers to clients. The focus of the evidence was on the details of the Appellant’s operations and the working conditions of the Workers while performing services for the Appellant’s clients.

[3] The Appellant called three witnesses. The first was Mr. Miroslav Banach, founder and owner of European Staffing. The other two witnesses were former Workers Mr. Farhad Keshmiri and Mr. Kato Bennett. The Respondent also called three witnesses: a former Worker, Ms. Mariana Simoiu, and two Canada Revenue Agency CPP/EI appeals officers who worked on the file, namely Ms. Marie-Claude Marcoux and Ms. Sara Vis. Two other Workers, Mr. Jerzy Pajewski and Mr. Paul Kenny, testified as intervenors.

### Miroslav Banach

[4] Mr. Banach testified first. Mr. Banach described his business as being a “recruiting headhunting agency”.<sup>3</sup> According to the witness, clients approached him with a description of their labour needs. He then found workers that met those needs.<sup>4</sup> Mr. Banach testified that he conducted interviews either personally or over the phone. If the Worker was acceptable and agreed to Mr. Banach’s proposed term, Mr. Banach would arrange for the Worker to meet with the client.<sup>5</sup> The witness acknowledged that in some cases, the Worker met with the client directly.<sup>6</sup> The client would record the hours worked by the Worker on a time sheet. Mr. Banach invoiced the client on the basis of the time sheet<sup>7</sup> and paid the worker at a

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<sup>2</sup> SC 1996, c 23.

<sup>3</sup> Transcript, vol 1, p 17.

<sup>4</sup> Ibid at p 65.

<sup>5</sup> Ibid at p 73.

<sup>6</sup> Ibid at p 73.

<sup>7</sup> Transcript, vol 1, p 37.

lesser rate for time actually worked.<sup>8</sup> On the invoices the Worker's names are listed under the heading "Emp Name"<sup>9</sup>.

[5] According to the witness all of the Appellant's contracts were verbal.<sup>10</sup> He testified that he always made it clear to the Workers that they were being hired as independent contractors. In that capacity, they were responsible for paying their own taxes directly.<sup>11</sup> He acknowledged that he paid their Workers' compensation insurance premiums. He claims that he did so as a gift and favour to the Workers.<sup>12</sup>

[6] With respect to the working conditions, Mr. Banach agreed that there was usually a supervisor on the floor at the client's workplace.<sup>13</sup> However, he was evasive when asked whether the Workers were required to follow the supervisor's instructions.<sup>14</sup> He appeared to concede that the clients set the hours of work.<sup>15</sup> He stated that he was very hands-on and visited every client's workplace once a week to deliver the cheques but also to check on working conditions and see if there were any issues with the Appellant's Workers.<sup>16</sup> His testimony on this point remained uncorroborated.

[7] Much time was spent on the subject of tools. Mr. Banach testified that as a general rule the Workers had to supply their own tools. However, he conceded that as a personal favour to him, on many occasions the Appellant's clients supplied the workers with the necessary tools to perform their work.<sup>17</sup> When I questioned Mr. Banach as to how a welder making \$18 or \$19 per hour could afford to supply the requisite fuel or rods for a welding job, he acknowledged that Workers were never expected to provide those types of tools or equipment.<sup>18</sup>

[8] On the whole, I found Mr. Banach's testimony to be self-serving and rehearsed. His answers to direct questions were vague, if not evasive, and on several key points his testimony conflicted with that of other witnesses, as will be seen below. In such cases, I prefer the evidence of the other witnesses.

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<sup>8</sup> Ibid at p 18.

<sup>9</sup> Appellant's Book of Documents, vol 1, Tabs 31 and 32, and vol 2, Tab 37.

<sup>10</sup> Ibid at p 44-45.

<sup>11</sup> Ibid at p 22.

<sup>12</sup> Ibid at p 84-85.

<sup>13</sup> Ibid at p 76.

<sup>14</sup> Ibid at p 80.

<sup>15</sup> Ibid at p 81.

<sup>16</sup> Ibid at p 86.

<sup>17</sup> Ibid at p 41.

<sup>18</sup> Ibid at pp 41-42.

Farhad Keshmiri

[9] Mr. Keshmiri works as a millwright and industrial electrician and was clear in stating that he considered himself to be self-employed.<sup>19</sup> He currently has a registered company and issues invoices through his company,<sup>20</sup> but this company did not exist when he was working with European Staffing.

[10] Mr. Keshmiri testified that he did subcontract work through European Staffing at a bakery in late 2013 to early 2014. However, he first worked for that same bakery in the summer of 2013 through another agency.<sup>21</sup> He acknowledged that the first agency remitted EI premiums on his behalf.<sup>22</sup>

[11] Mr. Keshmiri described the work environment at the bakery. He was hired along with others among the Appellant's workers to test the newly installed automated bakery equipment to ensure that it would operate efficiently once commercial production began. He was paid at an hourly rate<sup>23</sup> and the bakery set the hours of work.<sup>24</sup> While Mr. Keshmiri was there, the maintenance manager at the bakery assigned jobs to the Workers.<sup>25</sup> Mr. Keshmiri testified that he provided his own basic tools and occasionally some other specific tools, and that the bakery did not provide any tools.<sup>26</sup> He explained that the bakery had two groups:

... One group we all were contractors and another group was their employee [*sic*]. They hired the group of technicians, same expertise as us, but they are employees. They hired us to boost that temporarily for the commissioning time just for the beginning . . .<sup>27</sup> [Emphasis added.]

[12] I surmise from the above that the full-time employees of the bakery were provided with the necessary tools to complete their tasks.

Kato Bennett

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<sup>19</sup> Ibid at p 96.

<sup>20</sup> Ibid at pp 96-97.

<sup>21</sup> Ibid at p 101.

<sup>22</sup> Ibid at pp 115-116.

<sup>23</sup> Ibid at pp 103-104.

<sup>24</sup> Ibid at p 112.

<sup>25</sup> Ibid at p 105.

<sup>26</sup> Ibid at pp 108-109.

<sup>27</sup> Ibid at p 120.

[13] Mr. Bennett is a welder who worked at a forklift manufacturing factory, Cascade Canada Corp., through European Staffing.<sup>28</sup> His working hours were set by Cascade, though Mr. Bennett would occasionally leave for a few days to do other jobs.<sup>29</sup> He testified that there were managers and supervisors who assigned him his projects and oversaw his work.<sup>30</sup> If he made a mistake, he had to fix it but would still be paid for the hours he took to do so.<sup>31</sup> He brought his own hammer and some other basic tools, but the welding machine, torch, and rods were all provided to him by the factory.<sup>32</sup> His factory-supplied<sup>33</sup> time sheet identified Mr. Bennett as a “temp employee”.<sup>34</sup>

### Jerzy Pajewski

[14] Mr. Pajewski is an intervenor in these appeals. Like Mr. Bennett, he is also a welder. Through European Staffing, Mr. Pajewski worked for Ankor Engineering systems ltd. as a welder from September 15, 2014 until the beginning of April 2015.<sup>35</sup> Mr. Pajewski was interviewed by European Staffing over the phone and then interviewed once more by Ankor.<sup>36</sup> While at Ankor, Mr. Pajewski had a supervisor and worked defined hours each day, which included two paid breaks.<sup>37</sup> Mr. Pajewski was supervised and followed the instructions he was given.<sup>38</sup> He punched in and out<sup>39</sup> and was only paid for days he worked.<sup>40</sup> Ankor provided Mr. Pajewski with all his tools, although Mr. Pajewski initially brought his own welding helmet. When that one broke, Ankor supplied him with another one.<sup>41</sup> Ankor arranged WHMIS (Workplace Hazardous Materials Information System) training for Mr. Pajewski.<sup>42</sup>

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<sup>28</sup> Ibid at p 121.

<sup>29</sup> Ibid at p 122.

<sup>30</sup> Ibid at pp 122-123.

<sup>31</sup> Ibid at pp 123-124.

<sup>32</sup> Ibid. at p 124.

<sup>33</sup> Ibid at pp 126-127.

<sup>34</sup> Appellant’s Book of Documents, vol 2, Tab 37.

<sup>35</sup> Transcript, vol 1, pp 128-129.

<sup>36</sup> Ibid at pp 134-135.

<sup>37</sup> Ibid at p 131.

<sup>38</sup> Ibid at p 148.

<sup>39</sup> Ibid at p 137.

<sup>40</sup> Ibid at p 140.

<sup>41</sup> Ibid at pp 139-140.

<sup>42</sup> Ibid at pp 149-150; Appellant’s Book of Documents, vol 1, Tab 35.

[15] Mr. Pajecki's testimony suggests that he was treated similarly to Ankor's permanent employees, except that he worked a shorter shift.<sup>43</sup> Mr. Pajecki's testimony bolstered is by the fact that after a few months, he was hired directly by Ankor Engineering and became a permanent employee until he was eventually laid off.<sup>44</sup> As a full-time employee, his tasks remained the same. The advantage was that he now received the same benefits as the other employees.<sup>45</sup>

[16] Mr. Pajecki agrees that Mr. Banach told him that he would be a subcontractor and would not have any tax deducted.<sup>46</sup> He acknowledged that he signed a document to that effect.<sup>47</sup> It is very clear however from his testimony that Mr. Pajecki did not understand what it meant to be a subcontractor and considered himself to be an employee.<sup>48</sup> He testified as follows: "That time I need a job. I need money. I need income. I want to take a job. I was thinking everything clear, yes, and I took the job. I found out what it means subcontractor few months later."<sup>49</sup> He realized the difference when he sought help to file his tax return and his tax advisor informed him that he did not qualify as a subcontractor given his description of his work.<sup>50</sup> He reported the amounts received from the Appellant as employment income on his tax return.

### Paul Kenny

[17] Mr. Kenny is an industrial painter and the second intervenor in these appeals. Mr. Kenny submitted an EI ruling request after being laid off from his work.<sup>51</sup>

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<sup>43</sup> Transcript, vol 1, p 138.

<sup>44</sup> Ibid at pp 132-133.

<sup>45</sup> Ibid at p 141.

<sup>46</sup> Ibid at p 132.

<sup>47</sup> Ibid at p 142; Respondent's Book of Documents, vol 1, Tab 4.

<sup>48</sup> Transcript, vol 1, pp 142, 144.

<sup>49</sup> Ibid at pp 135-136.

<sup>50</sup> Ibid at p 132.

<sup>51</sup> Transcript, vol 2, p 181.



[18] Mr. Kenny had found work through European Staffing by responding to an ad placed by the Appellant on Indeed.com. The Appellant set him up with an interview at Cascade, during which Cascade made no mention that his status would be that of a subcontractor.<sup>52</sup> Cascade provided him with all the tools he needed and an employee provided day-long training on how to perform his tasks.<sup>53</sup> His hours of work were set by Cascade.<sup>54</sup> Sometimes they requested that he do overtime, to which Mr. Kenny might or might not agree to perform depending on his availability.<sup>55</sup> When Cascade changed its overtime policy, Mr. Kenny had no ability to have it altered or negotiate something different.<sup>56</sup> He had three supervisors at Cascade who would instruct him as to how to perform his job and would assign him painting duties.<sup>57</sup> The supervisors would specify not only his duties, but the order in which and the time periods during which they were to be performed.<sup>58</sup> Mr. Kenny testified that he was expected to follow those instructions and that he did so.<sup>59</sup> Mr. Kenny received some feedback from his supervisors at Cascade.<sup>60</sup> He was required to do the work personally and to notify Cascade if he was going to be absent.<sup>61</sup> Cascade required him to take several in-house training courses<sup>62</sup> and he also received training for other painting and painting-related jobs.<sup>63</sup> He was paid to complete the training during regular company hours.<sup>64</sup> He signed his Worker Health and Safety Awareness certificate on the “employee signature” line.<sup>65</sup> Mr. Kenny testified that his work at Cascade was “very similar” to the work he had done as a directly employed employee at his previous company.<sup>66</sup>

[19] Mr. Kenny was paid by the Appellant.<sup>67</sup> When he received his first pay, he noticed there were no deductions but did not pursue the matter.<sup>68</sup> He reported his income on the “other income” line of his tax return, not as “employment

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<sup>52</sup> Ibid at pp 157-158.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid at p 182.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid at pp 183-184.

<sup>57</sup> Ibid at pp 184-185

<sup>58</sup> Ibid at p 185.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid at pp 174- 175.

<sup>61</sup> Ibid at p 172.

<sup>62</sup> Ibid at p 160.

<sup>63</sup> Ibid at pp 159, 167.

<sup>64</sup> Ibid at pp 186-187.

<sup>65</sup> Ibid at p 187.

<sup>66</sup> Ibid at p 189.

<sup>67</sup> Ibid at p 173.

<sup>68</sup> Ibid at pp 160-161.

income”.<sup>69</sup> He understood he would have to pay additional tax on his income but did not realize that CPP contributions and EI premiums were not being paid.<sup>70</sup> He testified that had he known that was the case he would not have taken the job as he was still eligible for EI benefits when he started work at Cascade.<sup>71</sup> He took the position at Cascade in the hope of being hired directly by Cascade in a permanent position.<sup>72</sup>

[20] Mr. Kenny testified that no one at European Staffing told him he was a contractor.<sup>73</sup> He only learned that European Staffing intended to treat him as a contractor when he applied for employment insurance later and could not get a record of employment from them as required.<sup>74</sup> Mr. Kenny testified that he never prepared an invoice to claim the amounts owed to him by the Appellant. Rather, the amounts owed to him by the Appellant were determined by reference to the hours worked by him that were recorded on the time sheets prepared by the Appellant’s clients.<sup>75</sup>

### Mariana Simoiu

[21] Mariana Simoiu is a mechanical engineer who applied to European Staffing through one of the job bank websites. She ultimately got two positions through European Staffing, the first at EMPCO and the second at Ankor.<sup>76</sup>

[22] In both positions, she worked at the client’s office with the long-term employees of the business. She took instructions from the engineers and supervisors there,<sup>77</sup> in one case working literally side by side with a company engineer who would give her instructions or help as required.<sup>78</sup> The clients provided all tools and materials that she needed and set her hours.<sup>79</sup> She testified that she had no say with respect to the hours worked and no discretion to accept or refuse work.<sup>80</sup> At both workplaces, somebody would sign off on her work.<sup>81</sup> Her

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<sup>69</sup> Ibid at p 161.

<sup>70</sup> Ibid at p 163.

<sup>71</sup> Ibid at p 164.

<sup>72</sup> Ibid at p 163.

<sup>73</sup> Ibid at p 171.

<sup>74</sup> Ibid at p 162.

<sup>75</sup> Ibid at p 180.

<sup>76</sup> Ibid at p 201.

<sup>77</sup> Ibid at p 205.

<sup>78</sup> Ibid at pp 212-213.

<sup>79</sup> Ibid at pp 202, 214.

<sup>80</sup> Ibid at p 231.

situation was similar to Mr. Kenny's in that she wished to be hired directly by the client in a permanent position.<sup>82</sup>

### Marie-Claude Marcoux

[23] Ms. Marcoux was the CPP/EI appeals officer first assigned to the European Staffing file. As part of her investigation, she sent out contact letters to all of the workers for whom the CRA had address information,<sup>83</sup> a total of 77. Although she received many calls from worried workers, she did not have a high response rate to the formal questionnaires she sent out, receiving six in total.<sup>84</sup> Ms. Marcoux testified that all of the callers she spoke to, about 16 in total, believed they were employees and that they had been placed with clients of European Staffing.<sup>85</sup> One worker was determined to be an independent contractor and his case was removed from the investigation. This worker worked in IT at the Appellant's offices and was not placed with clients of the Appellant.

[24] Ms. Marcoux's conclusions from the questionnaires she did receive were that the workers considered themselves to be employees, that they were placed by a placement agency with clients of the payor, that they were supervised by the client, that their hours were forwarded by the client to the payor and that they were paid by the payor.<sup>86</sup> This was supported by the information she gathered from one of European Staffing's clients, Ankor.<sup>87</sup>

[25] Ms. Marcoux testified that Mr. Banach did not cooperate with her investigation. He refused to provide her with a list of his clients<sup>88</sup> and required multiple extensions in order to provide requested information.<sup>89</sup>

### Sara Vis

[26] Ms. Vis is the CPP/EI appeals officer who took over the European Staffing file from Ms. Marcoux.<sup>90</sup> As part of her investigation, she reviewed the filing

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<sup>81</sup> Ibid at pp 226-227.

<sup>82</sup> Ibid at p 223.

<sup>83</sup> Ibid at p 237.

<sup>84</sup> Ibid at p 241. One of these was from a worker determined to be self-employed who does not form part of this appeal.

<sup>85</sup> Ibid at pp 238-239.

<sup>86</sup> Ibid at p 242.

<sup>87</sup> Ibid at p 243.

<sup>88</sup> Ibid at p 245.

<sup>89</sup> Ibid at pp 246-247.

history of approximately half of the workers and found that the majority had reported either employment income or “other employment income” on their returns.<sup>91</sup>

[27] Ms. Vis came to the conclusion that the Appellant was a placement agency and placed workers in pensionable and insurable employment with its clients.<sup>92</sup> She based this on the totality of the data gathered specifically from the telephone calls between Ms. Marcoux and the workers, from the questionnaires, from further written documentation, from her filing history review and from the interviews with Ankor.<sup>93</sup> She is confident that the information received by her could be extrapolated to all of the Workers because in general the Workers were all engaged in similar lines of blue-collar employment such as industrial painters, mechanics, cleaners, millwrights, and electricians and such.<sup>94</sup>

[28] She performed a complete total relationship analysis for the Paul Kenny file, which was a separate file from the rest.<sup>95</sup> Both parties provided information that supported her conclusion that he was placed by the Appellant in insurable and pensionable employment with Cascade as an industrial painter.<sup>96</sup> This was based on things such as Mr. Kenny’s email correspondence regarding his overtime hours, which confirmed that he was bound by Cascade’s policy.<sup>97</sup> The two training certificates Mr. Kenny received while working with Cascade were another indication.<sup>98</sup> Ms. Vis considers the factual circumstances of Mr. Kenny’s appeal to be very similar to those in main appeals.<sup>99</sup>

### III. Issues

[29] The issues in these appeals are as follows:

- (1) Is the Appellant a placement agency

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<sup>90</sup> Ibid at p 253.

<sup>91</sup> Ibid at pp 255-256.

<sup>92</sup> Ibid at p 256.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid at p 257.

<sup>95</sup> Ibid at p 257.

<sup>96</sup> Ibid at pp 257-258.

<sup>97</sup> Ibid at p 258.

<sup>98</sup> Ibid at pp 258-259.

<sup>99</sup> Ibid at p 259.

- (2) Did the Appellant place the Workers with clients for the performance of services under terms and conditions which were analogous to a contract of service, within the meaning of the regulations under the *CPP*
- (3) Did the Appellant place the Workers with clients in employment under the control and direction of these clients, within the meaning of the regulations under the *EI Act*.

#### IV. **The Law**

[30] Despite the similarities in purpose and effect, the relevant provisions in the two applicable statutes are worded differently.

#### ***CPP***

[31] Subsection 34(1) of the *Canada Pension Plan Regulations*<sup>100</sup> is a deeming provision that broadens the definition of “pensionable employment” to include the performance of services under conditions analogous to those of a contract of service where the worker is placed by a placement agency. In such cases, whichever party that pays remuneration to the worker that is deemed to be the employer for the purpose of CPP contributions:

34 (1) Where any individual is placed by a placement or employment agency in employment with or for performance of services for a client of the agency and the terms or conditions on which the employment or services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service, the employment or performance of services is included in pensionable employment and the agency or the client, whichever pays the remuneration to the individual, shall, for the purposes of maintaining records and filing returns and paying, deducting and remitting contributions payable by and in respect of the individual under the Act and these Regulations, be deemed to be the employer of the individual. [Emphasis added.]

[32] Subsection 34(2) defines “placement agency” as an organization that places individuals in the above-described work situation for “a fee, reward or other remuneration”:

(2) For the purposes of subsection (1), ***placement or employment agency*** includes any person or organization that is engaged in the business of placing individuals

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<sup>100</sup> CRC, c 385.

in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

***EI***

[33] Paragraph 6(g) of the *Employment Insurance Regulations*<sup>101</sup> includes in insurable employment the “employment” of a person placed under the direction and control of a “client” by a placement agency where that person is paid by the agency:

6 Employment in any of the following employments [ ... ] is included in insurable employment:

[ ... ]

(g) employment of a person who is placed in that employment by a placement or employment agency to perform services for and under the direction and control of a client of the agency, where that person is remunerated by the agency for the performance of those services.

[34] Pursuant to the *Insurable Earnings and Collection of Premiums Regulations*,<sup>102</sup> in such a case the placement agency is deemed to be the employer of the worker for the *EI* premiums purposes:

7 Where a person is placed in insurable employment by a placement or employment agency under an arrangement whereby the earnings of the person are paid by the agency, the agency shall, for the purposes of maintaining records, calculating the person’s insurable earnings and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the person.

[35] Although the *EI Act* and regulations contain no definition of the term “placement agency”, this Court has on several occasions applied the definition found in the *CPP Regulations* to achieve consistency.<sup>103</sup> This Court on other occasions has given the term its ordinary meaning in context, namely “an

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<sup>101</sup> SOR/96-332.

<sup>102</sup> SOR/97-33.

<sup>103</sup> *Wholistic Child and Family Services Inc v MNR*, 2016 TCC 34; *Carver PA Corp v MNR*, 2013 TCC 125.

organization engaged in matching requests for work with requests for workers.”<sup>104</sup>  
Both definitions are quite similar.

## V. Analysis

[36] As noted earlier, the issues in these appeals are 1) whether the Appellant is a placement agency; 2) whether the Appellant placed the Workers with clients for the performance of services under the terms and conditions which were analogous to a contract of service, within the meaning of the regulations under the CPP; and 3) whether the Appellant placed the Workers with clients in employment under the control and direction of those clients, within the meaning of the regulations under the *EI Act*.

[37] I propose to leave the first issue for last. I will first consider whether the Workers were placed in pensionable employment under the deeming provision in the *CPP Regulations*. I will then consider whether they were placed in insurable employment within the contemplation of the *EI Act*. Finally, I will determine whether the Appellant operates as a placement agency for the purposes of both the *CPP* and the *EI Act*.

### ***CPP: Were the terms and conditions analogous to a contract of service?***

[38] The test as to whether an individual is working under a contract of service, i.e., as an employee, or under a contract for services, i.e., as an independent contractor, is easy to state but may be tricky to apply in practice. The question is always whether or not the individual is performing services as a person in business on his own account. The Supreme Court of Canada in *671122 Ontario Ltd v Sagaz Industries Canada Inc*<sup>105</sup> confirmed and summarized the test originally laid out in *Wiebe Door Services Ltd v MNR*<sup>106</sup>:

. . . In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the

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<sup>104</sup> *Silverside Computer Systems Inc v Minister of National Revenue*, 1997 CarswellNat 3198 at para 14; [1997] TCJ No 38, at para 13.

<sup>105</sup> 2001 SCC 59 [2001] 2SCR 983.

<sup>106</sup> [1986] 3 F.C. 553, [1986] FCJ No 1052; 1986 CarswellNat 366.

worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.<sup>107</sup>

[39] Recently the Federal Court of Appeal clarified the role of the parties' subjective intention for the purpose of the above analysis. In *1392644 Ontario Inc v Minister of National Revenue*<sup>108</sup> *Connor Homes*, Mainville J.A. established a two-step analysis whereby first, the subjective intentions of each party must be ascertained and second, the facts are analyzed to determine whether this subjective intent is in accordance with objective reality.<sup>109</sup> This objective reality is measured by application of the *Wiebe Door* factors, namely i) control; ii) ownership of tools; iii) chance of profit and risk of loss; and iv) integration into the business.

#### **A. Subjective Intention**

[40] I shall consider now whether the parties to the contracts, namely the Appellant and the Workers, intended to enter into a contract for services. In *Connor Homes* the Federal Court of Appeal notes that this may be evidenced by "the written contractual relationship" or "the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor."<sup>110</sup>

[41] This analysis is hampered by Mr. Banach's practice of eschewing written contracts in favour of verbal ones. I must therefore base my determination of the content of alleged oral contracts on testimony.

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<sup>107</sup> *Sagaz*, at paras 47-48.

<sup>108</sup> 2013 FCA 85.

<sup>109</sup> At paras 39-40.

<sup>110</sup> *Connor Homes*, at para 39.



[42] It is Mr. Banach's testimony that it was understood and intended by all that the Workers were signing on to be independent contractors and that they were responsible for their own taxes.<sup>111</sup>

[43] There is some evidence in support of Mr. Banach's testimony. There is the documentation that the Appellant provided after the fact to the Workers stating their total earnings and indicating that they were subcontractors.<sup>112</sup> There is also a letter from one worker (who did not testify) stating that he worked on a subcontract basis.<sup>113</sup> There is as well the testimony of Mr. Keshmiri and Mr. Bennett, who both stated that they understood that they were contractors. With respect to Mr. Keshmiri, however, not all of his evidence is consistent with that statement. Mr. Keshmiri worked for the Appellant in late 2013 to early 2014 but did not register his business until 2015, and Mr. Keshmiri acknowledged that he did not charge or remit GST on the payments he received from the Appellant.<sup>114</sup>

[44] Multiple witnesses, however, contradicted Mr. Banach's account that the Workers knew that the Appellant intended to treat them as independent contractors. Mr. Kenny testified that he was never told that European Staffing considered him to be a contractor until he sought his record of employment from them following his being laid-off.<sup>115</sup> Ms. Simoiu testified that she did not realize she was a contractor until the government pointed out that the document she had filed from European Staffing identified her as a subcontractor.<sup>116</sup> Ms. Simoiu had in fact asked for a written contract from the Appellant but never received one.<sup>117</sup> Mr. Pajecki testified that Mr. Banach had told him that he would be an independent contractor but he was not aware that this meant he was not an employee. The Appellant's client invoices identify the Workers in the "Emp Name" column.<sup>118</sup> Mr. Pajecki was ultimately hired directly by a client, and Mr. Kenny and Ms. Simoiu had hoped to be.

[45] According to Ms. Marcoux, the CRA appeals officer who commenced the investigation, all of the Workers who contacted her (bar the IT worker not included

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<sup>111</sup> Transcript, vol 1, at p 43.

<sup>112</sup> See for example Respondent's Book of Documents, Tab 4, p 23.

<sup>113</sup> Ibid, Tab 5.

<sup>114</sup> Transcript, vol 1, at p 113.

<sup>115</sup> Transcript, vol 2, at p 162.

<sup>116</sup> Ibid at p 221.

<sup>117</sup> Ibid at pp 221-222.

<sup>118</sup> Appellant's Book of Documents, vol 1, Tabs 31 and 33, and Appellant's Book of Documents, vol 2, Tab 37.

in these appeals) believed themselves to be employees.<sup>119</sup> Ms. Vis, who took over the investigation, found that the majority of the Workers that she reviewed identified their income as “employment income” or “other employment income” rather than business income on their tax returns.<sup>120</sup> From the above, it is far from clear that most of the Workers agreed to provide their services as independent contractors. In any event, even if the Workers were hired by the Appellant as independent contractors, I find that the objective reality surrounding the actual performance of their services does not conform to that status for the reasons stated below.

## **B. *Wiebe Door* Factors**

### **(i) Control**

[46] Control concerns the ability of the recipient of a worker’s services to control the manner in which the worker carries out his or her duties. In the context of a placement agency situation, the question is to what degree the Appellant’s clients, rather than the Appellant, controlled the workers. Generally, the more control the client has over the worker, the more likely it is that an employment relationship exists. In these appeals, I have no difficulty concluding that the Workers worked under the control and supervision of the Appellant’s clients.

[47] Firstly, each worker testified that the clients set the hours and location of the work. Workers had to show up at a defined hour and all work was performed on the clients’ premises. According to Mr. Kenny’s experience, overtime was at the discretion of the client. Both Mr. Keshmiri and Mr. Bennett testified that at times during their placements they would not show up for work for personal reasons in Mr. Keshmiri’s case or to take different jobs in Mr. Bennett’s case. This is a typical feature of short-term, casual employment and I do not consider it evidence that the Workers could control their hours. Workers could decide whether or not to work but if they accepted the job, the work could only be performed within the times and at the location set by the clients.

[48] The evidence as to whether a Worker would notify the client or the Appellant if he or she was not going to be at work on a given day was mixed. Mr.

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<sup>119</sup> Transcript, vol 2, at pp 238-239.

<sup>120</sup> Ibid at p 255.

Bennett testified that he would notify European Staffing while Mr. Kenny testified that he would notify the client. Accordingly I treat this factor as neutral.

[49] Secondly, each worker testified that the clients assigned tasks to the Workers and supervised the completion of the work. Before I review the individual testimony on this point, I want to note that this is a basic requirement given the industries in which many of the Workers were placed. The Appellant provided workers for the industrial, technical and manufacturing sectors, i.e., for factories with production lines or integrated work spaces. It is unlikely that the Workers in those situations would have been permitted to approach their tasks without supervision.

[50] In Mr. Kenny's case, he received a full day of paid training from the client before he began working.<sup>121</sup> His supervisors would specify not only duties, but the order in which and time periods during which they were to be performed, and Mr. Kenny felt he had to follow those instructions.<sup>122</sup> Likewise, Mr. Pajecki and Mr. Bennett testified that their work was supervised and overseen. Mr. Pajecki put it this way: "You know, if they like it and they don't like it, everything up to them. I'm not there to tell them how to do and what to do. ...they have their standard and I had to follow their standard no matter what I think about that."<sup>123</sup> In Mr. Bennett's words, the plant manager and supervisors were there to "make sure I still do the job in a good manner."<sup>124</sup>

[51] Mr. Keshmiri's evidence was somewhat different in that he testified that the workers were usually in a position to judge how the work should be done.<sup>125</sup> This is common in cases of skilled or professional workers and the case law establishes that what matters is the existence of the right to direct and control the manner of work, not whether that right is actually exercised.<sup>126</sup> Nothing Mr. Keshmiri described suggested to me that the supervisors did not have that right. Indeed, he acknowledged getting some direction from the engineer and maintenance manager.<sup>127</sup>

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<sup>121</sup> Transcript, vol 2, at p 158.

<sup>122</sup> Ibid at p 185.

<sup>123</sup> Transcript, vol 1, at pp 144-145.

<sup>124</sup> Ibid at p 122.

<sup>125</sup> Ibid at p 106.

<sup>126</sup> *Becher v Minister of National Revenue*, 2003 TCC 373 at para 38.

<sup>127</sup> Transcript, vol 1, at p 107.

[52] Unlike the other witnesses, Ms. Simoiu was an office worker in her two placements. She testified that, in both, she took instruction and direction from permanent employees. They would show her how to use the technical software and how to find projects on the computer, and they would answer questions and check and revise her output. At her second placement, she sat literally side by side with the employee who instructed her on how to carry out assigned tasks and then inspected her work.<sup>128</sup>

[53] Only Mr. Keshmiri testified that he was able to subcontract his placement if he so desired, but he never did so. Mr. Kenny testified that he was required to do the work personally.<sup>129</sup>

[54] For these reasons, I find that the clients exercised a significant degree of control over the Workers.

### **(ii) Ownership of Tools**

[55] The evidence shows that, with few exceptions, the Appellant's clients provided all necessary tools to the Workers. Particularly for industrial workers, a case where tools are critical to the work performed, this factor weighs heavily towards a finding of an employment relationship.

[56] There are two exceptions to this: both Mr. Bennett and Mr. Keshmiri testified that they provided a few basic tools during their placements, and Mr. Keshmiri testified that on occasion he also provided more specialized tools. With respect to Mr. Bennett, I give the fact that the client supplied him with specialized and expensive welding equipment, welder, torch, rods, fuel, and greater weight than the fact that Mr. Bennett supplied his own hammer or mask.<sup>130</sup> With respect to Mr. Keshmiri, while I accept that he may have supplied his own tools, I am not convinced that these tools would not have been available to him from the client if he had so desired, given his description of the work environment and his admission that he worked alongside employees engaged in the same tasks.

[57] Mr. Banach testified that the provision of tools to his Workers by the clients was done as a "personal favour" to him, rather than as a consequence of the nature

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<sup>128</sup> Transcript, vol 2, at p 213.

<sup>129</sup> Ibid at p 172.

<sup>130</sup> Transcript, vol 1, at p 124.

of the work contracted for.<sup>131</sup> This is simply not credible and is not supported by any other testimony. The use of expensive and specialized equipment is an important factor in costing projects. Businesses are not likely to be laissez-faire or charitable with respect to that cost when pricing their labour needs, nor are they likely to allow use of such equipment by persons not under their control. Mr. Banach actually appears to concede that such equipment was always provided by the clients. With respect to more basic tools, the evidence either largely did not corroborate his testimony or is, in my opinion, just as likely to be an example of worker preference or comfort, e.g., workers supplying their own welding masks.

### **(iii) Profit or Loss**

[58] The Workers had a minimal chance of profit or risk of loss. They were paid hourly and their only opportunity for additional profit was to work more hours. Whether or not this was possible was up to the clients, who set the hours. The Workers had no real ability to negotiate those hours, as illustrated by Mr. Kenny's experience when Cascade changed its overtime policy. Likewise, the Workers had no real risk of loss as they were paid hourly regardless of the quality of their work and were not required to fix mistakes on their own time. As they did not supply their own tools, they were not at risk for unexpected cost overruns if the equipment they were using broke or malfunctioned.

### **(iv) Integration**

[59] With regard to integration, it must be considered whether the worker is part of the business or recognizably separate from it.<sup>132</sup> Its popularity as a factor waxes, and wanes but integration is relevant to these appeals because all the testifying Workers worked alongside permanent employees of the clients performing the same or similar functions. In fact, Mr. Pajacki was subsequently hired to work directly for the client as an employee doing the same work as he had before. That was also Mr. Kenny's and Ms. Simoiu's goal, though it did not work out in their cases.

[60] None of the Workers distinguished the nature of the work they did or supervision they were under from that of the permanent employees. Mr. Keshmiri testified that he and other workers with the same expertise as the permanent

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<sup>131</sup> Ibid at p 41.

<sup>132</sup> *Sagaz* at para 40.

employees were hired in order to temporarily boost the employee group in the lead-up to the opening of the new facility.<sup>133</sup> He did not recall whether he had received an offer of permanent employment with the client, but said that normally such an offer is made.<sup>134</sup> Mr. Pajecki's working conditions were identical to those of the permanent employees except that he had shorter hours. Mr. Bennett's client-designed time sheet identified him as a "temp employee".<sup>135</sup> Mr. Kenny attended client-mandated training on the client's time and at the client's expense.<sup>136</sup> Ms. Simoiu worked side by side with the clients' employees and managers on the same projects.

[61] Together these facts suggest that the Workers' work was done as an integral part of the clients' businesses and, further, that this was often recognized by the clients. The integration factor supports an employment relationship.

### **C. Conclusion**

[62] The sum total of the *Wiebe Door* factors indicates that the objective reality of the situation is that the Workers were placed with clients in conditions analogous to those of a contract of service.

[63] In so ruling, I am mindful of the fact that not all the Workers listed in the attached Schedules worked in the same positions as the Workers who testified. Despite this, I am confident about including them in my ruling for several reasons. Firstly, the burden is on the Appellant to demolish the Minister's assumption that the Workers were pensionably employed. The Appellant has not done this. Secondly, Mr. Banach identified the Workers in the Schedules as occupying any of the following positions: machine builder, welder, material handler, millwright, cleaner, painter, machinist, electrician, mechanical engineer, and hydraulic technician. In addition, he identified three persons as working at the office. I agree with Ms. Vis of the CRA that the Workers were engaged in the types of work typically described as blue-collar employment.

### ***EI: Direction and Control***

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<sup>133</sup> Transcript, vol 1 at p 110.

<sup>134</sup> Ibid.

<sup>135</sup> Appellant's Book of Documents, vol 2, Tab 37.

<sup>136</sup> Transcript, vol 2, at p 160.

[64] The next issue is whether the Workers were engaged in insurable employment within the meaning of the *EI Act*. The question to be answered is whether the Workers in these appeals were placed to perform services under the direction and control of the client. For the reasons stated above under the heading “Control”, I find that the Workers were placed in employment by the Appellant under the direction and control of its clients.

### ***Placement Agency***

[65] I will now consider the Appellant’s argument that it is not a placement agency. For convenience’ sake, I reproduce the definition of “placement agency” provided in subsection 34(2) of the *Canada Pension Plan Regulations*:

(2) For the purposes of subsection (1), ***placement or employment agency*** includes any person or organization that is engaged in the business of placing individuals in employment or for performance of services or of securing employment for individuals for a fee, reward or other remuneration.

[66] I have found that the Appellant placed Workers in employment and/or for the performance of services in exchange for a fee. However, the Appellant argues that it was not a placement agency because it provided a service for its clients that went beyond simply supplying them with Workers. In *S K Manpower Ltd v Minister of National Revenue*, Sheridan J. quoted Deputy Judge Porter on this point:

The question as I see it is not so much about who is the ultimate recipient of the work or services provided ... but rather who is under obligation to provide the service. If the entity alleged to be the Placement Agency is under an obligation to provide a service over and above the provision of personnel, it is not placing people, but rather performing that service and is not covered by the Regulations.<sup>137</sup>

[67] What additional service did European Staffing provide to its clients? The Appellant’s Notice of Appeal states that the Appellant’s “role is exclusively to connect skilled workers with businesses in need of such specialized services.” [Emphasis added.]<sup>138</sup> Mr. Banach testified that he often visited the work sites and

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<sup>137</sup> 2010 TCC 584, at para 40, citing Deputy Judge Porter in *Big Sky (Lundle) drilling Inc v Canada (Minister of National Revenue)*, [2002] TCJ No 16 (Qc) at para 19 and *Supreme Tractor Services Ltd v Canada (Minister of National Revenue)*, [2001] TCJ No 580 (Qc).

<sup>138</sup> Fresh Amended Notice of Appeal, Court file 2017-383(CPP) and Court file 2017-385(EI), in both cases at para 9(f) under Reasons.

would be involved in checking the working conditions.<sup>139</sup> Even if one accepts that he was on site, as he said, it is unclear what service this provides. In *S K Manpower*, the agency guaranteed a certain output to its clients and was liable to them for the results of the Workers' labour.<sup>140</sup> The Appellant here did no similar thing. There is also minimal corroboration of Mr. Banach's evidence as to his visits. No documentary evidence was submitted in support of it, and Mr. Kenny and Ms. Simoiu never saw him on site. Only Mr. Pajecki affirmatively corroborated ever seeing him on site, although he stated that "sometimes I didn't – most I didn't see him, yes."<sup>141</sup>

[68] I therefore cannot accept the proposition that European Staffing provided a service to its clients beyond supplying Workers. The Appellant is a placement agency for the purposes of the *CPP* and the *EI Act*.

[69] For all of the above reasons, the Appellant's appeals are dismissed and the Minister's determinations are confirmed.

Signed at Ottawa, Canada, this 11<sup>th</sup> day of March, 2019.

"Robert J. Hogan"

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Hogan J.

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<sup>139</sup> Transcript, vol 1, at pp 19, 86.

<sup>140</sup> *S K Manpower* at para 34.

<sup>141</sup> Transcript, vol 1, at pp 140-141.



**Schedule "A"**

**Employee List**

#	Worker Surname	EE CPP	#	Worker Surname	EE CPP
1	AL-ABBAS	171.81	24	MCGRATH	430.35
2	BACARRA	887.98	25	MIKHNIUK	183.20
3	BANAITT	1,048.16	26	MOLDOVAN	60.39
4	BENNETT	533.81	27	MOZESONHAR	426.24
5	CANARI	35.64	28	MOZSGAY	106.97
6	CESKO	1,524.35	29	NAYAK	10.05
7	DEBLOIS	16.04	30	NEBOR	101.18
8	DOLINSKI	355.16	31	PATEL	26.38
9	DOTO	8.07	32	RAMIREZ	18.22
10	FARQUHARSO	629.59	33	RAMOS	1,999.45
11	GRABOWSKI	210.38	34	ROMANSKI	126.82
12	GRUZINSKI	350.41	35	RUIZ ZEGARRA	188.94
13	HAASE	2,025.34	36	SALMON	326.70
14	KAMINSKA	318.73	37	SIMOIU	505.54
15	KELLY	143.30	38	STOJANOWSKA	344.42
16	KESHMIRI	53.96	39	SYEDSHAH	876.99
17	KOVALCHUK	344.42	40	THOMAS	137.91
18	LAMORIE	292.20	41	TYLAK	62.77
19	LOYDMAN	441.00	42	WALTERHOUS	18.22
20	MAJESKA	289.72	43	WHELAN	300.86
21	MALINOWSKA	379.81	44	WHITE	496.09
22	MANEJA	68.51	45	ZAJAC	318.73
23	MAYAH	163.99			

**Schedule "B"**

**Employee List**

#	Worker Surname	EE CPP	#	Worker Surname	EE CPP
1	BACHAN	42.42	27	LOYDMAN	391.10
2	BENNETT	1,969.75	28	MANEJA	20.39
3	BOBY	499.31	29	MIKHNIUK	386.15
4	BRITTON	326.60	30	MONROE	66.33
5	CABANLIG	881.89	31	NEBOR	391.20
6	CLARKE	32.67	32	PAJECKI	553.26
7	COLE	582.32	33	PATEL	1,492.47
8	DEVADAAS	504.85	34	PATEL	6.24
9	DHARAMDEO	433.52	35	RAGNAUTH	324.72
10	DOTO	979.46	36	RAMKHALAWA	105.93
11	EDISON	269.18	37	RAMOS	343.98
12	FARQUHARSO	1,473.96	38	ROMANSKI	343.58
13	GERGIL	352.04	39	RUIZ ZEGARRA	730.42
14	GODRA	327.94	40	SARTOR	103.46
15	GOULET	334.47	41	SHAHEEM	1.90
16	GRABOWSKI	379.07	42	SHARMA	1,206.27
17	HAASE	532.57	43	SIMOJU	147.72
18	HARRISON	65.65	44	SNOP	462.97
19	HERSHKOVITZ	286.26	45	SNOP	582.04
20	HUGH-BRO (or BROWN)	235.92	46	SYEDSHAH	286.26
21	KESHMIRI	291.80	47	TARCZYLUK	655.28
22	KOLODZIEJEK	664.59	48	THOMSON	433.67
23	KONARKOWSKI	20.25	49	ULMAN	920.11
24	KURIANOWIC	52.37	50	WALKER	6.34
25	LAM	349.97	51	ZHANG	2.97
26	LAMBERT	205.23			

CITATION: 2019 TCC 59

COURT FILES NOS.: 2017-383(CPP)  
2017-385(EI)  
2018-3794(EI)  
2018-3798(CPP)

STYLE OF CAUSE: EUROPEAN STAFFING INC. AND THE  
MINISTER OF NATIONAL REVENUE  
AND JERZY PAJECKI AND PAUL  
KENNY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 9 and 10, 2019

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: March 11, 2019.

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