

Docket: 2003-1079(CPP)

BETWEEN:

PARK AVENUE SPECIALTIES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUSAN PASAY,

Intervenor.

Appeal heard in common evidence with the appeal of *Park Avenue Specialties Ltd.*
(2003-1078(EI)) on October 3, 2003, at Edmonton, Alberta

By: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:

Peter L. Court

Counsel for the Respondent:

Galina M. Bining

For the Intervenor:

The Intervenor herself

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is dismissed and the decision of the Minister, on the appeal made to him under section 27 of the *Plan* is confirmed.

Signed at Ottawa, Canada, this 27th day of October 2003.

"C.H. McArthur"

McArthur, J.

Docket: 2003-1078(EI)

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PARK AVENUE SPECIALTIES LTD.,

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Appearances:

Counsel for the Appellant:

Peter L. Court

Counsel for the Respondent:

Galina M. Bining

For the Intervenor:

The Intervenor herself

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister, on the appeal made to him under section 91 of the *Act* is confirmed.

Signed at Ottawa, Canada, this 27th day of October 2003.

"C.H. McArthur"

McArthur, J.

Citation: 2003TCC750
Date: 20031027
Docket: 2003-1078(EI)
2003-1079(CPP)

BETWEEN:

PARK AVENUE SPECIALTIES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SUSAN PASAY,

Intervenor.

REASONS FOR JUDGMENT

McArthur, J.

[1] These appeals are from decisions of the Minister of National Revenue ("Minister") under the *Employment Insurance Act* ("Act") and the *Canada Pension Plan* ("Plan"). The issue is whether Susan Pasay was employed in insurable employment by the Appellant under a contract of service or was she engaged under a contract for services (paragraph 5(1)(a) of the *Act*).

[2] Before commencing, the Appellant's counsel adjournment request was denied. The principal of the Appellant (Don) who had been notified of the date of the hearing, was in Montreal attending a trade show or conference. Apparently, he had forgotten about the appeal. The Minister's counsel advised that she had been just notified an hour before of the Appellant's request and opposed the granting of an adjournment. The Appellant had been notified of the day and time of these proceedings by notice dated August 6, 2003. Appeals are held at considerable expense to the taxpayer and the Court cannot adjourn at whim or forgetfulness of the taxpayer. The Appellant had almost two months notice and its appeals were the only ones scheduled for October 3, 2003.

[3] The Appellant was represented by legal counsel and Tracey Manning, Administrative Assistant to the Appellant, testified on its behalf. The worker, Susan Pasay, gave evidence on behalf of the Minister. The position of the Appellant, briefly stated, is that Susan Pasay had 17 years experience in the sales business as carried on by the Appellant. She was engaged by the Appellant because she took with her several hundred clients she had established over the years. She set her own hours and had her own customers. She was very aware of pricing and set her own prices for the goods sold and, was personally liable for accounting mistakes or losses.

[4] The Respondent's position that Susan Pasay was employed in insurable and pensionable employment was based on the following findings of assumptions of fact:

- (a) the Appellant was in the business of selling promotional items;
- (b) the Worker was hired as a sales person;
- (c) the Worker performed her services at the Appellant's premises and in the field;
- (d) the Worker did not bid for work;
- (e) the Worker was paid by commissions;
- (f) the Worker's wage was based on 50% of the profit from sales;
- (g) the Appellant set the product prices;
- (h) the Worker had some flexibility on the prices based on the client and the volume of the order;
- (i) the Worker also received bonuses;
- (j) the Appellant also made RRSP payments for the Worker;
- (k) the Appellant collected the sales and controlled the payments to the Worker;
- (l) the Worker was eligible for advances on her commissions;
- (m) the Appellant maintained the right to control the Worker;

- (n) the Appellant had the right to monitor and direct the Worker's work;
- (o) the Worker represented the Appellant while in the field;
- (p) the Worker attended sales meetings;
- (q) the Worker could not perform similar services for the Appellant's competitors;
- (r) the Worker was required to perform the services personally and could not replace herself;
- (s) the Appellant provided the Worker with a furnished office and support staff;
- (t) the Appellant provided the Worker with a leased vehicle;
- (u) the Worker incurred fuel and maintenance expenses for the vehicle;
- (v) the Appellant paid for the Worker to attend a trade show in Toronto;
- (w) the Appellant provided the Worker with jackets and shirts with the Appellant's logo;
- (x) the Appellant provided the product and any sales supplies;
- (y) the Worker temporarily hired someone to assist her with administrative work, and
- (z) the Worker was employed under a contract of service with the Appellant.

[5] There was no serious challenge to (a) through to (f) inclusive, (h), (i), (j), (k), (p), (q), (s), (t), (u), (v), (x), and (y). I note that (d) is not clear, there was no evidence with respect to (l) and (r) and (z) is the issue.

[6] The disputed assumptions apart from (z) are:

- (g) the Appellant set the product prices;
- (l) the Worker was eligible for advances on her commissions;
- (m) the Appellant maintained the right to control the Worker;
- (n) the Appellant had the right to monitor and direct the Worker's work;

(o) the Worker represented the Appellant while in the field;

[7] The facts as agreed to and as I find them, include the following:

[8] The Appellant is and was in the business of selling promotional items such as pens, mugs, T-shirts and the like in Edmonton and area. Susan Pasay had been selling similar items in the same area for some 17 years.

[9] The Appellant operated substantial premises that included several support staff employees not involved in direct sales. It maintained a commercial building that included a showroom for the customers, offices, office equipment and supplies for the sales people and support staff. During the relevant period there were five to seven sales people, two of whom received a fixed salary and the remainder earned commissions only. Susan Pasay's commission was 50 per cent of the profit from her sales. Because she had annual sales over \$250,000 and \$400,000, the Appellant paid her expenses to a Toronto trade show and paid for the lease and insurance on a vehicle it provided for her. She paid the fuel and maintenance. Susan Pasay was free to come and go as she wished. Most of her sales were made at the customer's premises and in the smaller municipalities outside of Edmonton. She needed no directions with respect to the art of selling and to whom she sold to. She brought a valuable asset with her when engaged by the Appellant, a substantial list of customers she had cultivated over the years. Obviously, she was self-motivated. The more she sold the more commission she made. While the Appellant had little control over her day-to-day sales activities, it did provide substantial support and assistance in addition to the vehicle and a trip. At no cost to her, a showroom of products was made available for her clients. A receptionist was available to answer her customers' calls and questions. She was provided with her own private office, sales aids such as brochures and up-to-date office equipment, at no cost. This was in addition to her fully equipped office at home. Her sales orders were reviewed by Don, the owner of the Appellant, daily and she met with him to discuss her business situation, a few times yearly. She had the advantage of attending sales meetings and seminars. She could obtain the support of her colleagues during her absence. Sample products were provided without charge to her. She was given a jacket, vest and T-shirt with the Appellant's logo. She hired at her expense clerical help during a six-month period when she was extremely busy. When filing income tax returns, she deducted expenses such as home office and car maintenance in the manner of an independent contractor. She paid for her own mistakes in her order

forms. She was a goods and services tax ("GST") registrant and charged the Appellant GST in her order forms.

[10] Susan Pasay had some latitude with respect to the price she charged as long as she maintained approximately 40 per cent profit ratio overall. She might sell some products at a 50 per cent markup and others at a 30 per cent markup. She had substantial work autonomy in that she sold where, when and how she wanted. The Appellant had control over her commissions, what products she sold and the office building. The oral evidence provided on behalf of both parties was substantially truthful. Both witnesses were cautious when answering and weighed their response in favour of their own positions.

THE TESTS AND THE FACTS

[11] The present case is difficult because the principal of the Appellant did not give evidence and the relationship between the Appellant and Susan Pasay was governed by a loosely defined oral agreement.

[12] The thrust of the Appellant's case is that Susan Pasay was not controlled by the Appellant, she brought her own customers, she risked profit or loss because she priced the product and paid for her mistakes and she owned much of her own equipment in that she operated out of her home. The only deduction from her net commissions was with respect to a voluntary Registered Retirement Savings Plan. The Appellant matched her contributions up to \$100 monthly. When she left the Appellant, she kept many of her clients.

[13] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J. reviewed some cases dealing with the distinction between a contract of service and a contract for services. At page 1005¹ he stated:

¶ 47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. 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

¹ Paragraphs 47 and 48 of the version provided by the Respondent's Book of Authorities Tab 2.

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

¶ 48 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.

[14] I will now deal with the above tests and the present facts. Susan Pasay was a highly experienced salesperson. She needed no direction. While the Appellant did review her orders and encouraged her to attend sales meetings, for the most part she was free to complete her work, when, how and where, she decided. This favours the Appellant's position. The Respondent's position is supported by the facts that: she could not work for a competitor of the Appellant; she had to promote its products exclusively; she used its letterhead logo, salesroom and products. This test is inconclusive.

[15] Ownership and use of tools required by Susan Pasay to carry out her work is inconclusive. The Appellant provided a building, showroom, office, equipment, support staff, products, sales aids and a car. This supports an employee relationship. She had an office in her home and she hired an assistant to help with her sales. This supports an independent contractor relationship yet the helper was not involved in direct sales.

[16] She was a commercial salesperson and was paid on a set commission. This did not involve a substantial risk.

[17] My conclusion that she was an employee of the Appellant is arrived at with considerable hesitation and deliberation. Obviously, it is close to the line.

[18] After applying the facts and tests, the question boils down to, was Susan Pasay working on her own account or for the Appellant?

- The answer is more consistent with her working for the Appellant;
- the Appellant hired her and could fire her;
- she promoted and sold the Appellant's product;
- she used the Appellant's extensive support system;

- she was paid according to the Appellant's profit splitting formula;
- she presented herself to her customers, as an employee of the Appellant;
- she could not have carried on as successfully without the Appellant's resources;
and
- originally the Appellant and Susan Pasay had considered themselves in an independent contractor relationship but that is not the determining factor. The manner in which they viewed themselves will prevail unless they can be shown to be mistaken by the true nature of their relationship.² After considering the total relationship, I find that their relationship was more one of employer and employee than independent contractor.

[19] Susan Pasay was engaged in insurable employment within the meaning of paragraph 5(1)(a) of the *Act* as she was engaged under a contract of service with the Appellant for the period January 1, 2001 to April 10, 2002.

[20] The appeals are dismissed.

Signed at Ottawa, Canada, this 27th day of October 2003.

"C.H. McArthur"

McArthur, J.

² *Wolf v. Canada (C.A.)*, [2002] F.C.J. No. 375 (Q.L.).

CITATION: 2003TCC750

COURT FILE NO.: 2003-1078(EI) and 2003-1079(CPP)

STYLE OF CAUSE: Park Avenue Specialties Ltd. v.
The Minister of National Revenue and
Susan Pasay

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: October 3, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice C.H. McArthur

DATE OF JUDGMENT: October 27, 2003

APPEARANCES:

Counsel for the Appellant:	Peter L. Court
Counsel for the Respondent:	Galina M. Bining
For the Intervenor:	The Intervenor herself

COUNSEL OF RECORD:

For the Appellant:

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