Docket: 2011-689(CPP)

BETWEEN:

PRIORITY ONE JANITORIAL SERVICES INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of *Priority One Janitorial Services Inc.* (2011-2491(EI)) on November 15, 2011, at Edmonton, Alberta.

Before: The Honourable Justice Paul Bédard

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Ansar Bacchus |
| Counsel for the Respondent: | Robert Neilson |

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## JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* from the decision of the Minister of National Revenue dated December 30, 2010, is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 9th day of January 2012.

"Paul Bédard"

Bédard J.

Docket: 2011-2491(EI)

BETWEEN:

PRIORITY ONE JANITORIAL SERVICES INC.,

Appellant,

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Appeal heard on common evidence with the appeal of
Priority One Janitorial Services Inc. (2011-689(CPP))
on November 15, 2011, at Edmonton, Alberta.

Before: The Honourable Justice Paul Bédard

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Ansar Bacchus |
| Counsel for the Respondent: | Robert Neilson |

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## JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* from the decision of the Minister of National Revenue dated December 30, 2010, is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 9th day of January 2012.

"Paul Bédard"

Bédard J.

Citation: 2012 TCC 1
Date: 20120109
Dockets: 2011-689(CPP),
2011-2491(EI)

BETWEEN:

PRIORITY ONE JANITORIAL SERVICES INC.,
Appellant,

and

THE MINISTER OF NATIONAL REVENUE,
Respondent.

## REASONS FOR JUDGMENT

Bédard J.

[1] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, Canada Pension Plan contributions in the amount of $3,928.37 for 2006, in respect of Ansar Bacchus (hereinafter “Ansar”), Connie Bacchus (hereinafter “Connie”), Denise McLeod (hereinafter “Denise”), Kary McLeod (hereinafter “Kary”), Manuel Mora (hereinafter “Mora”) and Jacquelin Pierre-Antoine (hereinafter “Pierre-Antoine”).

[2] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, Canada Pension Plan contributions in the amount of $871.48 for 2007, in respect of Kalsoom Gillani (hereinafter “Gillani”), Raiz Khan (hereinafter “Khan”), Mora, Pierre-Antoine and Abdul Hakim Yfate (hereinafter “Yfate”).

[3] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, Canada Pension Plan contributions in the amount of $1,237.50 for 2007, in respect of Ansar.

[4] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, Canada Pension Plan contributions in the amount of $300.96 for 2008, in respect of Pierre-Antoine.

[5] By Notice of Assessment dated June 5, 2009 the Appellant was assessed for, among other things, Canada Pension Plan contributions in the amount of $33.24 for 2009, in respect of Pierre-Antoine.

[6] By letter received March 19, 2010, the Appellant appealed to the Minister for a reconsideration of the assessments for 2006, 2007, 2008 and 2009.

[7] In response to the appeal, the Minister confirmed the assessments for 2006, 2007, 2008 and 2009 as Ansar, Connie, Denise, Kary, Mora, Pierre-Antoine, Khan, Gillani and Yfate (collectively hereinafter "the Workers") were employed under a contract of service with the Appellant.

[8] The facts on which the Minister relied in thus confirming the assessments in the CPP case (2011-689(CPP)) are set out in paragraph 9 of the Reply to the Notice of Appeal as follows:

(a) the Appellant was in the business of cleaning commercial properties; **(admitted)**

(b) the Appellant obtained the clients (hereinafter "the Client"); **(denied)**

(c) the share structure of the Appellant, in January 2006, was as follows:
Ansar 25%
Connie 25%
Kary 25%
Denise 25% **(admitted)**

(d) the share structure of the Appellant changed in mid 2006 to:
Ansar 50%
Connie 50% **(admitted)**

(e) the Workers were hired as labourers and their duties included cleaning, mopping, sweeping, dusting, wiping, vacuuming and garbage collection; **(denied)**

(f) the Workers did not enter in a written contract with the Appellant; **(admitted)**

(g) the Workers performed their services at the Client's premises; **(admitted)**

(h) the Workers were hired on a continuous basis; **(denied)**

(i) the Appellant paid the Workers on a monthly basis; **(denied)**

(j) the Appellant determined the Workers' wage rates; **(denied)**

(k) the Workers did not bid for work; **(admitted)**

(l) the Workers did not invoice the Appellant; **(admitted)**

(m) the Appellant set the Workers' hours of work; **(denied)**
(n) the Workers worked during the "off hours" of the Client's business; **(admitted)**
(o) the Workers worked whatever hours were required to complete the work; **(admitted)**
(p) the Appellant retained the right to control the Workers; **(denied)**
(q) the Appellant trained the Workers; (admitted)
(r) the Workers did not have specific licenses, certifications or designations relating to the job; **(admitted)**
(s) the Appellant instructed the Workers on the work to be done and the duties to be performed; **(admitted)**
(t) the Appellant reviewed the Workers' work; **(denied)**
(u) some of the Workers worked in groups; **(admitted)**
(v) the Appellant, through it's agreement with the Client, established the Workers' priorities and deadlines; **(admitted)**
(w) the Workers represented the Appellant while performing their services; **(admitted)**
(x) the Workers could not hire their own helpers or replace themselves; **(denied)**
(y) the Client provided all of the tools and equipment required; **(admitted)**
(z) the Workers did not provide any tools or equipment; **(denied)**
(aa) the Client provided all of the supplies required; **(admitted)**
(bb) the Workers did not incur any expenses in the performance of their duties; **(admitted)**
(cc) the Workers did not provide their own liability insurance; **(admitted)**
(dd) the Workers did not incur any capital costs of a business; **(admitted)**
(ee) the Workers did not have a chance of profit or a risk of loss; **(admitted)**
(ff) the Workers did not present themselves as their own business presence; **(denied)**
(gg) the service performed by the Workers was for the benefit of the Appellant; **(denied)**
(hh) the Workers did not work for others while performing services for the Appellant; **(denied)**
(ii) some Workers considered themselves to be employees while performing services for the Appellant; **(denied)**
(jj) the Workers were not in business for themselves while performing services for the Appellant; **(denied)**
(kk) the Appellant withheld and remitted payroll deductions for part of the 2006 year; **(denied)**
(ll) the Appellant's income tax return included the following expenses: **(denied)**

| | 2006 | 2007 |
|---|---|---|
| Salaries and wages | $16,754 | $17,584 |
| Management salaries | $44,000 | $16,000 |

(mm) wages paid by the Appellant to the Workers, for the period January 1, 2006 to January 31, 2009, were as follows: **(denied)**

| | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|
| Ansar | $4,250 | 16,000 | | |
| Connie | $4,250 | | | |
| Denise | $17,750 | | | |
| Kary | $17,750 | | | |
| Mora | $4,500 | $2,837 | | |
| Pierre-Antoine | $12,246 | $6,839 | $6,540 | $627 |
| Khan | | $458 | | |
| Gillani | | $4,380 | | |
| Yfate | | $787 | | |

[9] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, employment insurance premiums in the amount of $619.34 for 2007, in respect of Michael Dagnew (hereinafter “Dagnew”), Gillani, Khan, Gibran Khan (hereinafter “Gibran”), Mora, Pierre-Antoine and Yfate.

[10] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, employment insurance premiums in the amount of $279.91 for 2008 in respect of Pierre-Antoine and Ashley Vaughan (hereinafter “Vaughan”).

[11] By Notice of Assessment dated June 5, 2009, the Appellant was assessed for, among other things, employment insurance premiums in the amount of $34.51 for 2009 in respect of Pierre-Antoine and Vaughan.

[12] By letter received March 19, 2010, the Appellant appealed to the Minister for a reconsideration of the assessments for 2007, 2008 and 2009.

[13] In response to the appeal, the Minister confirmed the assessments for 2007, 2008 and 2009 as Dagnew, Gillani, Khan, Gibran, Mora, Pierre-Antoine, Vaughan and Yfate (collectively hereinafter “the Workers”) were employed under a contract of service with the Appellant.

[14] The facts on which the Minister relied in thus confirming the assessments for 2007, 2008 and 2009 are set out in paragraph 7 of the Reply to the Notice of Appeal as follows:

(a) the Appellant was in the business of cleaning commercial properties; **(admitted)**

(b) the Appellant obtained the clients (hereinafter "the Client"); **(denied)**

(c) the share structure of the Appellant, in January 2006, was as follows:
Ansar Bacchus 25%
Connie Bacchus 25%
Kary McLeod 25%
Denise McLeod 25% **(admitted)**

(d) the share structure of the Appellant changed in mid 2006 to:
Ansar Bacchus 50%
Connie Bacchus 50% **(admitted)**

(e) the Workers were hired as labourers and their duties included cleaning, mopping, sweeping, dusting, wiping, vacuuming and garbage collection; **(denied)**

(f) the workers did not enter in a written contract with the Appellant; **(admitted)**

(g) the Workers performed their services at the Client's premises; **(admitted)**

(h) the Workers were hired on a continuous basis; **(denied)**

(i) the Appellant paid the Workers on a monthly basis; **(denied)**

(j) the Appellant determined the Workers' wage rates; **(denied)**

(k) the Workers did not bid for work; **(admitted)**

(l) the Workers did not invoice the Appellant; **(admitted)**

(m) the Appellant set the Workers' hours of work; **(denied)**

(n) the Workers worked during the "off hours" of the Client's business; **(admitted)**

(o) the Workers worked whatever hours were required to complete the work; **(admitted)**

(p) the Appellant retained the right to control the Workers; **(denied)**

(q) the Appellant trained the Workers; **(admitted)**

(r) the Workers did not have specific licenses, certifications or designations relating to the job; **(admitted)**

(s) the Appellant instructed the Workers on the work to be done and the duties to be performed; **(admitted)**

(t) the Appellant reviewed the Workers' work; **(denied)**

(u) some of the Workers worked in groups; **(admitted)**

(v) the Appellant, through it's agreement with the Client, established the Workers' priorities and deadlines; **(admitted)**

(w) the Workers represented the Appellant while performing their services; **(admitted)**

(x) the Workers could not hire their own helpers or replace themselves; **(denied)**

(y) the Client provided all of the tools and equipment required; **(admitted)**

(z) the Workers did not provide any tools or equipment; **(denied)**

(aa) the Client provided all of the supplies required; **(admitted)**

(bb) the Workers did not incur any expenses in the performance of their duties; **(denied)**
(cc) the Workers did not provide their own liability insurance; **(admitted)**
(dd) the Workers did not incur any capital costs of a business; **(admitted)**
(ee) the Workers did not have a chance of profit or a risk of loss; **(admitted)**
(ff) the Workers did not present themselves as their own business presence; **(denied)**
(gg) the service performed by the Workers was for the benefit of the Appellant; **(denied)**
(hh) the Workers did not work for others while performing services for the Appellant; **(denied)**
(ii) some Workers considered themselves to be employees while performing services for the Appellant; **(denied)**
(jj) the Workers were not in business for themselves while performing services for the Appellant; **(denied)**
(kk) the Appellant withheld and remitted payroll deductions for part of the 2006 year; **(denied)**
(ll) the Appellant's income tax return included the following expenses: **(denied)**

| | 2006 | 2007 |
|---|---|---|
| Salaries and wages | $16,754 | $17,584 |
| Management salaries | $44,000 | $16,000 |

Item (mm) continues on the next page.

(mm) wages paid by the Appellant to the Workers, for the period January 1, 2006 to January 31, 2009, were as follows: **(denied)**

| | 2007 | 2008 | 2009 |
|---|---|---|---|
| Dagnew | $225 | | |
| Gibran | $277 | | |
| Mora | $2,837 | | |
| Pierre-Antoine | $6,839 | $6,540 | $627 |
| Khan | $458 | | |
| Gillani | $4,380 | | |
| Vaughan | | $200 | $203 |

| Yfate | $787 | | |
|---|---|---|---|

[15] The Appellant carried on, *inter alia,* a business of cleaning commercial properties. The Appellant hired the Workers to clean the commercial properties of its clients.

[16] The Appellant's position is that the Workers were not employed under a contract of service. In other words, the Appellant contends that the Workers were independent contractors.

[17] Ansar and Pierre-Antoine were the only two witnesses.

[18] Each case in which the question of whether a person is an employee or an independent contractor arises must be dealt with on its own facts. Each of the four components (control, ownership of tools, chance of profit and risk of loss) of the composite test enunciated in *Wiebe Door Services Ltd. v. M.N.R.*, 87 DTC 5025, and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, must be assigned its 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 (*Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87; *Wolf v. Canada*, [2002] 4 F.C. 396; *City Water International Inc. v. Canada*, 2006 FCA 350; *National Capital Outaouais Ski Team v. M.N.R.*, 2008 FCA 132).

[19] In assessing the evidence provided by the Appellant, the Court must comment on the failure to call as witnesses certain persons who could have confirmed Ansar's statements. In *Huneault v. Canada*, [1998] T.C.J. No. 103 (QL), 98 DTC 1488 (Fr.), my colleague, Lamarre J., referred, at paragraph 25, QL (page 1491 OTC), to remarks made by Sopinka and Lederman in *The Law of Evidence in Civil Cases,* which were cited by Judge Sarchuk of this Court in *Enns v. M.N.R.*, 87 DTC 208, at page 210:

> In *The Law of Evidence in Civil Cases*, by Sopinka and Lederman, the authors comment on the effect of failure to call a witness and I quote:
>
>> In *Blatch v. Archer*, (1774), 1 Cowp. 63, at p. 65, Lord Mansfield stated:
>>
>> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted."

> The application of this maxim has led to a well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies the court in drawing the inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure was attributed.
>
> *In the case of a plaintiff who has the evidentiary burden of establishing an issue, the effect of such an inference may be that the evidence led will be insufficient to discharge the burden.*(*Lévesque et al. v. Comeau et al.* [1970] S.C.R. 1010, (1971), 16 D.L.R. (3d) 425) (emphasis added)

[20] In the instant case, before analyzing the relevant facts, it is useful to make certain general comments on the credibility of Ansar, who, I would point out, was the only person to testify in support of the Appellant's appeal. I emphasize that the Appellant actually filed only the letters (Exhibit A-1) of three workers stating that they were independent contractors when they worked for the Appellant, to which letters I did not give much weight since those workers were not called as witnesses by the Appellant. In my view, it would be hazardous to give Ansar's testimony any credence without any conclusive corroborative evidence in the form of documentation or of testimony by credible witnesses.

[21] Ansar's answers were generally vague, imprecise and ambiguous. All too often, in cross-examination, he was unable to provide any explanation of the Appellant's operations; he constantly repeated that he was a "moron" and that only the accountant and Kary - who, I note again, did not come and testify - were able to give valid explanations regarding, among other things, the reason for the Appellant's stopping the withholding and remitting of payroll deductions in 2006. I infer that these testimonies would have been unfavourable to the appellant. Not only were the Appellant's answers generally vague and imprecise, but they were contradicted on certain points. For example, he testified that the legal relationship the Workers entered into with the Appellant was discussed when they were hired by the Appellant. Pierre-Antoine, on the other hand, testified that the legal relationship he entered into with the Appellant was never discussed. For these reasons, I attached little probative value to Ansar's testimony where it was not corroborated by sound documentary evidence or by the testimony of credible witnesses.

[22] We also learnt the following from Pierre-Antoine's testimony, which seemed credible :

(i) He was paid a fixed amount to clean for one of the Appellant's clients.

(ii) He did not negotiate his rate of pay.
(iii) He did not provide any tools or equipment.
(iv) He did not incur any expenses in the performance of his duties.
(v) He had the right to set his hours of work as long as he worked during the off hours of the client's business.
(vi) He hired his wife on one occasion to replace him.

[23] Starting with the issue of intention, what evidence do I have of the Appellant's and the Workers' intention with regard to the legal relationship they entered into. Firstly, it should be pointed out that there is no written agreement to which I can refer. Secondly, the Appellant stated that its intent in engaging the Workers was that the Workers would be subcontractors. The Appellant's evidence in this regard was based on Ansar's testimony, which I decided was not very credible, and on documentary evidence (Exhibit A-1, 3 letters of Workers stating that they were independent contractors when they worked for the Appellant) to which I did not give much weight since those workers were not called as witnesses by the Appellant. On the other hand, I had a credible witness who testified that the legal relationship he entered into with the Appellant was not even discussed when he was hired by the Appellant. This witness also testified that he did not really understand the meaning of self-employment when he first verbally entered into the contract with the Appellant. I cannot infer from the evidence that the Appellant and the Workers shared a common understanding that the Workers were to be self-employed and not employees. Where the intention of the parties cannot be ascertained, it is quite proper, indeed necessary, to look at all the facts to see what legal relationship they reflect. In that regard, the four components of the composite test enunciated in *Wiebe Door Services Ltd.* are relevant and helpful in ascertaining the intent of the parties to the contract and the legal nature of the contract.

[24] My analysis of the *Wiebe Door Services Ltd.* factors is set out hereunder.

[25] The opportunity for profit. The evidence revealed that the Workers did not negotiate their rate of pay. The Workers were paid a fixed amount to clean the Appellant's clients' premises. For example, Pierre-Antoine was paid $700 a month to clean 3 times a week the premises of a client of the Appellant. Since the Appellant's clients provided the equipment and material needed to clean their premises, the only opportunity for the Worker to increase their income would have been for them to subcontract their duties to other workers at a lower rate. The evidence did not reveal that the Workers were allowed to do so or that they had in fact done so. This favours the conclusion that the Workers were employees.

[26] The degree of responsibility for investment and management borne by the Workers. The Workers had no such responsibility. This favours the conclusion that the Workers were employees.

[27] The degree of financial risk taken on by the Workers. The Workers bore no financial risks related to any investment in equipment or tools, or with regard to the cost of operating the business. The Workers did not obtain their own liability insurance. This favours the conclusion that the Workers were employees.

[28] Whether the Workers provided their own materials and equipment. In my view, this factor is neutral. Neither the Workers nor the Appellant were required to provide the equipment and the materials needed to clean for the Appellant’s clients. The Appellant’s clients provided all the materials and equipment needed to clean their premises.

[29] The level of control the Appellant had over the Workers’ activities. The evidence revealed that the Appellant did not directly supervise the work of the Workers. Considering the nature of the employment, little supervision would have been needed, whether the Workers were employees or self-employed. For this reason, I consider this factor to be neutral.

[30] Whether the Workers hired helpers. Pierre-Antoine testified that the Appellant gave him the right to substitute another worker for himself at his own cost. That is consistent with the Workers being self-employed. However, there is no evidence that any Workers exercised this right (with the exception that Pierre-Antoine was replaced once by his wife), which suggest that this factor should be given little weight.

[31] On balance, the *Wiebe Door Services Ltd.* factors favour the conclusion that the Workers were employees.

[32] For the foregoing reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 9th day of January 2012.

"Paul Bédard"

Bédard J.

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|---|---|
| CITATION: | 2012 TCC 1 |
| COURT FILE NOS.: | 2011-689(CPP)<br>2011-2491(EI) |
| STYLE OF CAUSE: | Priority One Janitorial Services Inc. v. M.N.R. |
| PLACE OF HEARING: | Edmonton, Alberta |
| DATE OF HEARING: | November 15, 2011 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Paul Bédard |
| DATE OF JUDGMENT: | January 9, 2012 |

APPEARANCES:

| | |
|---|---|
| Agent for the Appellant: | Ansar Bacchus |
| Counsel for the Respondent: | Robert Neilson |

COUNSEL OF RECORD:

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