

Docket: 2019-2374(EI)

BETWEEN:

TINA POSITANO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1017867 ONTARIO LTD.,

Intervenor.

---

Appeal heard on common evidence with the appeal of  
*1017867 Ontario Ltd.* (2019-2568(EI)), on August 22, 2024, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Yan Cui and Hye-Won (Caroline) Ahn
Agent for the Intervenor:	Joseph Positano

---

**JUDGMENT**

The Appellant’s appeal of the Respondent’s decision of April 9, 2019, that the Appellant was not engaged in insurable employment with the Intervenor under the *Employment Insurance Act* from January 16, 2012 to May 20, 2017 is dismissed without costs.

Signed at Toronto, Ontario, this 6th day of September 2024.

“David E. Spiro”

---

Spiro J.

Docket: 2019-2568(EI)

BETWEEN:

1017867 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

---

Appeal heard on common evidence with the appeal of  
*Tina Positano* (2019-2374(EI)), on August 22, 2024, at Toronto, Ontario

Before: The Honourable Justice David E. Spiro

Appearances:

Agent for the Appellant: Joseph Positano

Counsel for the Respondent: Yan Cui and  
Hye-Won (Caroline) Ahn

---

**JUDGMENT**

The Appellant’s appeal of the Respondent’s decision of April 9, 2019, that Ms. Tina Positano was not engaged in insurable employment with the Appellant under the *Employment Insurance Act* from January 16, 2012 to May 20, 2017 is dismissed without costs.

Signed at Toronto, Ontario, this 6th day of September 2024.

“David E. Spiro”

---

Spiro J.

Citation: 2024TCC117

Date: 20240906

Docket: 2019-2374(EI)

BETWEEN:

TINA POSITANO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

1017867 ONTARIO LTD.,

Intervenor,

Docket: 2019-2568(EI)

AND BETWEEN:

1017867 ONTARIO LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Spiro J.

[1] Ms. Tina Positano was employed by her brother's company, 1017867 Ontario Ltd. (the "company"), to do office work from 2012 to 2017. The company's business was asphalt paving in the summer and snow removal in the winter.

[2] The Respondent found that Ms. Positano was an employee of the company during that period. But the Respondent also found that it was not reasonable to conclude that the company and Ms. Positano would have entered into a substantially similar contract of employment if they had been dealing with each

other at arm's length, resulting in a decision that, under the *Employment Insurance Act* (the "EI Act"), Ms. Positano was not engaged in insurable employment with the company from January 16, 2012 to May 20, 2017 (the "Decision").

[3] Ms. Positano has appealed the Decision and the company has intervened in her appeal. The company has also appealed the Decision on its own. These reasons deal with both appeals which were consolidated and heard on common evidence.

[4] In relevant part, subsections 5(2) and 5(3) of the EI Act provide:

**Excluded employment**

(2) Insurable employment does not include

...

(i) employment if the employer and employee are not dealing with each other at arm's length.

**Arm's length dealing**

(3) For the purposes of paragraph (2)(i),

(a) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[5] Because Ms. Positano was the sister of the company's sole shareholder, the company was not dealing at arm's length with Ms. Positano within the meaning of section 251 of the *Income Tax Act*, so the statutory presumption of non-arm's length dealing in paragraph 5(2)(i) of the EI Act applies, subject to the exception in paragraph 5(3)(b) of the EI Act that if:

... having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would

have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[6] The only witnesses to testify were Ms. Positano and her brother, Mr. Joseph Positano, whose parents established the company's asphalt paving business in Barrie, Ontario in the 1950s. The business later expanded to include snow removal.

[7] Mr. Positano testified that asphalt paving season runs from May to December and that snow removal season runs from December to April. He also testified that only four of the company's employees were full-time: Mr. Positano, his older brother, and two other arm's length employees. If Mr. Positano's evidence is to be believed, the rest of the company's employees – including Ms. Positano – would have been hourly employees. Yet Ms. Positano, for her part, maintained that she was either a salaried employee or a combination of salaried employee and hourly employee. This was the first of many red flags.

[8] Ms. Positano lived in Arizona for about ten years and continued to visit Arizona from time to time between 2012 and 2017. She moved back to Barrie, Ontario from Arizona in 2003 when she started performing office duties for the company. Ms. Positano testified that those duties included scheduling asphalt paving jobs for residential and small commercial clients. It also included some bookkeeping which involved entering information into QuickBooks. She testified that for most of the bookkeeping duties, the company retained an outside bookkeeper at \$20 per hour who would invoice the company for her services.<sup>1</sup>

[9] In 2019, Ms. Positano completed a lengthy questionnaire sent to her by the CPP/EI Appeals Division of the Canada Revenue Agency. In the questionnaire, she stated that she was required to work Monday to Friday from 8:00 a.m. to 7:00 p.m. each day.<sup>2</sup> She also stated that her hours were not recorded.<sup>3</sup>

[10] Throughout the questionnaire Ms. Positano conveyed the impression that she was employed on a salaried basis only. She stated that her rate of pay was \$800 per week.<sup>4</sup> She stated that she was paid biweekly and that her rate of pay was determined by salary.<sup>5</sup> Finally, she stated that she received vacation pay at a rate of 4% each pay cheque.<sup>6</sup> There was no mention of any hourly work.

[11] But under cross-examination, a different picture emerged. Ms. Positano testified that she was not only paid salary, but was paid on an hourly basis as well. She testified that her hourly pay began at \$15.00/hour in 2012 and rose to \$20.00/hour by 2017. She testified that she recorded her hours in her Day-Timer

and that the company never double-checked her hours as she was on the “honours system”.

[12] In addition to her lack of credibility, Ms. Positano’s recollection was selective and unreliable. She was loquacious during her evidence in chief, but under cross-examination was at a loss to explain how any of the insurable earnings reported on her Records of Employment (“ROEs”)<sup>7</sup> were computed. In answer to questions in cross-examination on how the amounts reported on her ROEs were computed, Ms. Positano’s response was invariably one of the following:

- “I don’t understand”;
- “I don’t know why”;
- “I can’t remember”; or
- “I’d have to look at QuickBooks to see what it was for”.

[13] This is a brief summary of each of those ROEs:

January 16, 2012 to October 26, 2012

Earnings from 27 pay periods were reported ranging from a low of zero dollars to a high of \$918 for each pay period for total insurable earnings of \$3,744.

December 24, 2012 to May 10, 2013

Earnings from 10 pay periods were reported ranging from a low of zero dollars to a high of \$1,560 for each pay period for total insurable earnings of \$10,920.

May 27, 2013 to May 10, 2014

Earnings from 27 pay periods were reported ranging from a low of zero dollars to a high of \$3,018 for each pay period for total insurable earnings of \$23,645.20.

July 13, 2014 to November 7, 2014

Earnings from 13 pay periods were reported ranging from a low of zero dollars to a high of \$1,944 for each pay period for total insurable earnings of \$11,273.60.

February 9, 2015 to March 14, 2015

Earnings from 2 pay periods were reported ranging from a low of \$1,800 to a high of \$1,944 for each pay period for total insurable earnings of \$3,744.

May 11, 2015 to June 20, 2015

Earnings from 3 pay periods were reported at \$1,872 each for total insurable earnings of \$5,616.

November 8, 2015 to December 19, 2015

No earnings were reported from any pay period but total insurable earnings were reported as \$5,616.

February 1, 2016 to May 21, 2016

Earnings from 7 pay periods were reported ranging from a low of zero dollars to a high of \$1,872 for each pay period for total insurable earnings of \$9,360.

July 3, 2016 to December 30, 2016

Earnings from 13 pay periods were reported ranging from a low of zero dollars to a high of \$1,872 for each pay period for total insurable earnings of \$13,104.

July 3, 2016 to May 20, 2017<sup>8</sup>

Earnings from 23 pay periods were reported ranging from a low of zero dollars to a high of \$4,272 for each pay period for total insurable earnings of \$20,184.

[14] Ms. Positano offered no evidence whatsoever on how any of the amounts in the ROEs were computed. For example, of the 125 pay periods (two-week periods) covered by the ROEs, 39 pay periods reflected insurable earnings of \$1,872. Ms. Positano was unable to explain how that particular amount was computed. If the information provided by Ms. Positano on her questionnaire was correct, one would have expected to see entries on the ROEs for all pay periods reflecting insurable earnings of \$1,600 plus 4% vacation pay of \$64 amounting to \$1,664. There was not a single entry of that amount on any of the ROEs.

[15] The inconsistent variations in pay for each of the 125 reported pay periods lead to the inference that Ms. Positano was remunerated on a purely discretionary basis. At certain times, her pay resembled a salary. At other times, it resembled an

hourly wage. She was unable to say which pay periods reflected salaried remuneration and which reflected hourly remuneration.

[16] The discretionary nature of Ms. Positano’s terms of employment is confirmed by her evidence that she was laid off from time to time and then re-hired as soon as her brother told her that the company had work. The timing of those layoffs and re-hirings was not provided by Ms. Positano, but is found in the assumptions section of the Reply:

Start and End Dates of Employment	Layoff Periods	Season of Layoff Period
Jan 16, 2012 to Oct 26, 2012	Oct 27, 2012 to Dec 23, 2012	Autumn
Dec 24, 2012 to May 10, 2013	May 11, 2013 to May 26, 2013	Spring
May 27, 2013 to May 10, 2014	May 11, 2014 to July 12, 2014	Spring/Summer
July 13, 2014 to Nov 7, 2014	Nov 8, 2014 to Feb 8, 2015	Autumn/Winter
Feb 9, 2015 to Mar 14, 2015	Mar 15, 2015 to May 10, 2015	Spring
May 11, 2015 to June 20, 2015	June 21, 2015 to Nov 7, 2015	Summer/Autumn
Nov 8, 2015 to Dec 19, 2015	Dec 20, 2015 to Jan 31, 2016	Winter
Feb 1, 2016 to May 21, 2016	May 22, 2016 to July 2, 2016	Spring/Summer
July 3, 2016 to Dec 30, 2016	Dec 31, 2016 to Feb 5, 2017	Winter
Feb 6, 2017 to May 20, 2017		

[17] In addition to the inconsistent timing of her layoffs and re-hirings, Ms. Positano’s evidence about her own vacation schedule also confirms that her employment arrangement with the company was discretionary:

- 2012 – 8 weeks of vacation
- 2013 – 2 weeks of vacation
- 2014 – 14 weeks of vacation
- 2015 – 33 weeks of vacation
- 2016 – 10 weeks of vacation
- 2017 – 5 weeks of vacation

[18] As all of the evidence supports the conclusion that Ms. Positano’s employment arrangement was discretionary, it is eminently reasonable to conclude that, having regard to all the circumstances of the employment, the company and Ms. Positano would not have entered into a substantially similar contract of



employment if they had been dealing with each other at arm's length. It was perfectly reasonable for the Respondent to have arrived at the same conclusion.

[19] I have no doubt that Ms. Positano was genuinely trying to help her brother and his company whenever she was able to do so. But that does not mean that her employment was insurable under the EI Act.

[20] As I have concluded that Ms. Positano was not engaged in insurable employment with the company from January 16, 2012 to May 20, 2017, both appeals will be dismissed without costs.

Signed at Toronto, Ontario, this 6th day of September 2024.

“David E. Spiro”

---

Spiro J.

CITATION: 2024 TCC 117

COURT FILE NO.: 2019-2374(EI)  
2019-2568(EI)

STYLES OF CAUSE: TINA POSITANO AND M.N.R. AND  
1017867 ONTARIO LTD.  
  
1017867 ONTARIO LTD. AND M.N.R.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 22, 2024

REASONS FOR JUDGMENT BY: The Honourable Justice David E. Spiro

DATE OF JUDGMENT: September 6, 2024

APPEARANCES:

For the Appellant: The Appellant herself

Agent for the Intervenor and Agent for 1017867 Ontario Ltd. in its own appeal: Joseph Positano

Counsel for the Respondent: Yan Cui and Hye-Won (Caroline) Ahn

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm: N/A

For the Respondent: Shalene Curtis-Micallef  
Deputy Attorney General of Canada  
Ottawa, Canada

---

<sup>1</sup> Exhibit R-1, page 12, questions 85-87.

<sup>2</sup> Exhibit R-1, page 6, questions 34 and 36.

<sup>3</sup> Exhibit R-1, page 7, question 38.

<sup>4</sup> Exhibit R-1, page 8, question 48.

<sup>5</sup> Exhibit R-1, page 8, questions 49-50.

<sup>6</sup> Exhibit R-1, page 9, question 61.

<sup>7</sup> The bundle of ten ROEs were marked as Exhibit R-3.

<sup>8</sup> Ms. Positano was unable to explain why two ROEs reflected the identical start date of July 3, 2016.