File No. YM2707-3645

IN THE MATTER OF:

A wage recovery appeal under Division XVI - Part III, Section 251.11 of the *Canada Labour Code*, R.S.C. 1985, c. L-2,

- and -

A hearing of the said appeal,

BETWEEN:

Harpinder Singh Bajwa, Ajipal Singh Bhullar and 101169252 Saskatchewan Ltd., carrying on business under the name and style of Majha Carriers,

APPELLANTS,

- and -

Sher Shub Jeet Singh,

RESPONDENT.

REFEREE'S DECISION
May 26, 2017

T. F. (TED) KOSKIE,
B.Sc., J.D.

REPRESENTATIVES:

Appellant, Harpinder Singh Bajwa, Self Represented

Appellant, Ajipal Singh Bhullar, Self Represented

Harpinder Singh Bajwa and Ajipal Singh Bhullar for the Appellant, 101169252 Saskatchewan Ltd., carrying on business under the name and style of Majha Carriers

Respondent, Sher Shub Jeet Singh, Self Represented

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I. INTRODUCTION

[1] Sher Shub Jeet Singh ("Singh") lodged a complaint[1] ("Complaint") pursuant to section 251.01 of the *Canada Labour Code*[2] ("*Code*") alleging that 101169252 Saskatchewan Ltd., carrying on business under the name and style of Majha Carriers ("Majha") failed to pay him wages, overtime, vacation pay and pay in lieu of notice owing under the *Code*.

[2] The Inspector was of the view the Complaint was well founded and issued a Payment Order[3] ("Order") ordering Majha and its directors, Harpinder Singh Bajwa ("Bajwa") and Ajipal Singh Bhullar ("Bhullar"), to pay two thousand five hundred and seventy-six dollars and eighty-five cents ($2,576.85) to the Receiver General for Canada, on account of Singh, comprising:

a) two thousand and three dollars and five cents ($2,003.05) for payment of wages from March 25, 2014, to April 23, 2014, pursuant to section 247 of the *Code*;

b) twenty-one dollars and eighty-seven cents ($21.87) for overtime pursuant to section 174 of the *Code*;

c) one hundred and thirty-nine dollars and ninety cents ($139.90) for general holiday pay (Good Friday, April 18, 2014) pursuant to section 198 of the *Code*; and

d) four hundred and twelve dollars and three cents ($412.03) for vacation pay pursuant to section 188 of the *Code*.

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[1] Exhibit G-1, Singh Complaint dated October 10, 2014

[2] RSC 1985, c L-2

[3] Exhibit G-2, Payment Order dated December 16, 2015

[3] Majha, Bajwa and Bhullar requested review[4] ("Appeal") of the Order.

[4] The Minister of Labour (Canada) appointed me to hear and determine the Complaint.

II. FACTS

[5] Majha is a trucking company based in Regina, Saskatchewan. It is engaged in the interprovincial transportation of various goods.

[6] Bajwa testified that Majha:

a) engages some drivers as employees and some as independent contractors;

b) supplied employees and at least some independent contractors with a tractor and trailer;[5]

c) paid each the same–a "city" rate of $16.00 to $20.00 per hour and a "highway" rate of $0.38 to $0.42 per mile; and

d) "made deductions" for those drivers it considered to be employees, but did not for those it considered to be independent contractors.

[7] Bajwa testified:

a) Singh and his corporation, 101249955 Saskatchewan Ltd. (the "# Co."), signed an agreement[6] (the "Agreement") with Majha that references–and sets forth the

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[4] Exhibit G-3, Request for Review dated December 28, 2015

[5] Majha owned the tractor driven by Singh, the licence plate was under Majha's name, its insurance was purchased by Majha and Majha was solely responsible for its maintenance and fuel.

[6] Exhibit D-4, Agreement between Majha and Singh and # Co. dated March 3, 2014

terms of–Singh and the # Co. as a "contractor"; and

b) Majha paid the # Co. for its services.[7]

It does not appear as though Majha drew any distinction as to whether it engaged both Singh and the # Co. as independent contractors or just the # Co. However, Bajwa did not give evidence as to any other reason why Majha considered Singh and/or the # Co. to be an independent contractor.

[8] Singh denies signing the Agreement and:

a) points to both the signature and initials on same and compares them to documents that bear his true signature and initials;[8] and

b) says the signature and initials are forged.

[9] Singh's Complaint says his first day of work was December 28, 2013, and his last day of work was April 23, 2014. This would be just shy of four (4) months. Bajwa's evidence was that Singh and/or his # Co. started later than December 28, 2013. However, his evidence did not suggest a start date later than March 25, 2014.

[10] Singh testified:

a) he agreed to be paid city rate of $18.00 per hour and a highway rate of $0.42 per mile;

b) Majha paid for his services via cheques made payable to his numbered

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[7] Exhibit D-2, Cheques from Majha to # Co. dated April 12 and 30, 2014

[8] Exhibit P-1, Specimen documents (the "Specimen Documents") bearing Singh's signature and initials

company;[9] and

c) Majha made no deductions from the payments for his services.[10]

[11] Singh testified that:

a) Majha was "paying him late";

b) he told Majha he was unhappy with late payments and he was thinking of doing something else; and

c) Majha responded by terminating Singh's engagement.[11]

[12] Bajwa testified Majha terminated Singh's engagement because it believed Singh wanted to:

a) drive his friends' trucks, instead of Majha's; and

b) "steal" Majha's sub-contract with another company.

Singh denied this.

[13] Bajwa also alluded that Singh was not performing to the best of his abilities. However, he gave no concrete particulars in that regard.

[14] Singh testified:

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[9] No evidence was presented that Singh or his # Co. ever submitted an invoice for his services to Majha.

[10] It appears Singh paid little attention to the significance of these arrangements. He testified he used the services of an accountant to prepare and file his income tax returns.

[11] Singh's last day of work was April 23, 2014.

a) he had always considered himself to be an employee;[12] and

b) he worked to the best of his ability.

[15] Other that what I have already referenced, Bajwa tendered no evidence with respect to:

a) the parties intention;

b) control over;

c) ownership of tools and equipment used in; and

d) the chance of profit and risk of loss in connection with;

the work performed by Singh and/or his # Co.

[16] Majha did not present any evidence that it:

a) advised Singh he was not performing to the best of his abilities;

b) advised Singh it was concerned he wanted drive his friends' trucks;

c) advised Singh it was concerned he wanted to steal its sub-contract;

d) prepared a performance evaluation of Singh;

e) advised Singh of any broader range of concerns about his performance;

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[12] Singh testified and filed texts and logs that he maintains show he was under the control of Majha. He further testified that he drove Majha's tractor for ten (10) to twelve (12) hours per day and, therefore, did not have time to work for others, even if he wanted to.

f) gave Singh a time period to correct or improve his performance; and/or

g) told Singh the consequence of not meeting its expectations.

[17] It appears Singh was not aware that Majha was not going to pay him overtime, holiday and vacation pay.

[18] Though challenging the Order, Majha did not present any evidence that same was incorrectly calculated.

III. DISPUTE

[19] The issue here is whether Singh was an employee or independent contractor.

IV. DECISION

[20] I find that Singh was an employee of Majha.

[21] I dismiss the Appeal.

[22] I confirm the Order.

[23] I direct payment to Singh of any money held in trust by the Receiver General that relates to the within Appeal.

[24] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so.

V. REASONS

A. *ACT*

[25] The relevant provisions of the *Code* are:

DIVISION I
Hours of Work

. . .

Overtime pay

174 When an employee is required or permitted to work in excess of the standard hours of work, the employee shall, subject to any regulations made pursuant to section 175, be paid for the overtime at a rate of wages not less than one and one-half times his regular rate of wages.

. . .

DIVISION IV
Annual Vacations

. . .

Termination of employment during year

188 When an employee ceases to be employed, the employer shall pay to the employee within 30 days after the day on which the employee ceases to be employed

(a) any vacation pay then owing by the employer to the employee under this Division in respect of any prior completed year of employment; and

(b) four per cent or, if the employee has completed six consecutive years of employment by one employer, six per cent of the wages of the employee during any part of the completed portion of their year of employment in respect of which vacation pay has not been paid to the employee.

. . .

DIVISION V
General Holidays

. . .

Holiday pay

196(1) Subject to subsections (2) to (4), an employee shall, for each general holiday, be paid holiday pay equal to at least one twentieth of the wages, excluding overtime pay, that they earned in the four-week period immediately preceding the week in which the general holiday occurs.

Employees on commission

(2) An employee whose wages are paid in whole or in part on a commission basis and who has completed at least 12 weeks of continuous employment with an employer shall, for each general holiday, be paid holiday pay equal to at least one sixtieth of the wages, excluding overtime pay, that they earned in the 12-week period immediately preceding the week in which the general holiday occurs.

First 30 days of employment

(3) An employee is not entitled to holiday pay for a general holiday that occurs in their first 30 days of employment with an employer.

Continuous operation employee not reporting for work

(4) An employee who is employed in a continuous operation is not entitled to holiday pay for a general holiday

(a) on which they do not report for work after having been called to work on that day; or

(b) for which they make themselves unavailable to work when the conditions of employment in the industrial establishment in which they are employed

(i) require them to be available, or

(ii) allow them to make themselves unavailable.

Employment

(5) For the purposes of subsection (3), a person is deemed to be in the employment of another person when they are available at the call of that other person, whether or not they are called on to perform any work.

. . .

Holiday work in continuous operation employment

198 An employee employed in a continuous operation who is required to work on a day on which the employee is entitled under this Division to a holiday with pay

(a) shall be paid, in addition to his regular rate of wages for that day, at a rate at least equal to one and one-half times his regular rate of wages for the time that the employee worked on that day;

(b) shall be given a holiday and pay in accordance with section 196 at some other time, which may be by way of addition to his annual vacation or granted as a holiday with pay at a time convenient to both the employee and the employer; or

(c) shall, where a collective agreement that is binding on the employer and the employee so provides, be paid in accordance with section 196 for the first day on which the employee does not work after that day.

. . .

DIVISION XV
Payment of Wages

Payment of wages

247 Except as otherwise provided by or under this Part, an employer shall

(a) pay to any employee any wages to which the employee is entitled on the regular pay-day of the employee as established by the practice of the employer; and

(b) pay any wages or other amounts to which the employee is entitled under this Part within thirty days from the time when the entitlement to the wages or other amounts arose.

. . .

DIVISION XVI
Administration and General

. . .

Appeal

251.11 (1) A person who is affected by a payment order or a notice of unfounded complaint may appeal the inspector's decision to the Minister, in writing, within fifteen days after service of the order, the copy of the order, or the notice.

. . .

Appointment of referee

251.12(1) On receipt of an appeal, the Minister shall appoint any person that the Minister considers appropriate as a referee to hear and adjudicate on the appeal, and shall provide that person with

(a) the payment order or the notice of unfounded complaint; and

(b) the document that the appellant has submitted to the Minister under subsection 251.11(1).

. . .

Referee's decision

(4) The referee may make any order that is necessary to give effect to the referee's decision and, without limiting the generality of the foregoing, the referee may, by order,

(a) confirm, rescind or vary, in whole or in part, the payment order or the notice of unfounded complaint;

(b) direct payment to any specified person of any money held in trust by the Receiver General that relates to the appeal; and

(c) award costs in the proceedings.

. . .

Order final

(6) The referee's order is final and shall not be questioned or reviewed in any court.

B. ANALYSIS

[26] I have reviewed instructive jurisprudence governing this issue.[13] At the outset, I believe it is fair to say there is no one conclusive test that can be applied uniformly to every case to decide whether an individual is an employee or an independent contractor. However, the central question that must be answered in each case is whether the person who is performing services is truly an individual in business on his or her own account.

[27] To answer this central question, we ought to follow a two (2) step process. The first is to decide the intention of the parties in order to ascertain what type of relationship the parties intended to create. The second involves an analysis of the facts of the case to decide if the objective reality reflects that intention. The factors to consider in this second step are control over the work, ownership of tools and equipment, the chance of profit and the risk of loss. However, the relative importance

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[13] See *Director of Labour Standards* v *Acanac Inc*, 2013 SKQB 21 (CanLII); *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, [2001] 2 SCR 983, 2001 SCC 59 (CanLII); *Canadian Union of Public Employees, Local 3911* v *Athabasca University*, 2014 ABQB 292 (CanLII); *Wood* v. *Enbridge Gas Distribution Inc., et al*, 2011 ONSC 5494 (CanLII); *1022239 Ontario Inc.* v. *MNR*, 2004 TCC 615; *2177936 Ontario Ltd.* v. *MNR*, 2013 TCC 317 (CanIII); *126873 Ontario Limited o/a Autopark Superstore* v. *MNR*, 2007 TCC 442 (CanIII); *Big Bird Trucking Inc.* v. *M.N.R.*, 2015 TCC 340 (CanIII); *Charles Bednar Investments Ltd (c.o.b. Ron Bednar Trucking)* v. *Langille*, [2000] CLAD No. 78; *City Cab (Brantford-Darling St) Limited* v. *MNR*, 2009 TCC 218 (CanIII); *Coloniale Maid Service Ltd.* v. *MNR*, 2010 TCC 115 (CanIII); *Combined Insurance Company of America* v. *Canada (National Revenue)*, 2007 FCA 60 (CanIII); *1392644 Ontario Inc. (Connor Homes)* v. *Canada (National Revenue)*, 2013 FCA 85 (CanIII); *Craigmyle* v. *Minister of National Revenue*, 2011 TCC 128, 2011 CarswellNat 389; *Dewdney Transport Group Ltd.* v. *MNR*, 2009 TCC 569 (CanIII); *KLR Transportation Service Inc.* v. *Kopka*, [2001] CLAD No. 73; *Knetsch* v. *D.C. Lawson Driver Service*, [1996] CLAD No. 122; *Labrash* v. *MNR*, 2010 T.C.C. 399 (CanIII); *Montreal* v. *Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (PC); *Pearman* v. *Crest Realty Ltd.*, [1984] BCJ No. 823 (S.C.); *Royal Winnipeg Ballet* v. *M.N.R.*, [2007] 1 FCR 35, 2006 FCA 87 (CanIII); *Saindon* v. *MNR*, 2014 TCC 172 (CanIII); *Smith* v. *MNR*, 2011 TCC 20 (CanIII); *Vida Wellness Corporation (Vida Wellness Spa)* v. *MNR*, 2006 TCC 534 (CanIII); *R.* v. *Walker* (1858) 27 LJMC 207, 208; *Warren* v. *622718 Saskatchewan Ltd.*, 2004 SKQB 346; *Wiebe Door Services Ltd.* v. *M.N.R.*, [1986] 3 FCR 553, [1986] 5 WWR 450, 46 Alta LR (2d) 83, [1986] 2 CTC 200, 70 NR 214, [1986] FCJ No 1052 (QL), 39; *1329669 Ontario Inc. and DaSilva, Re*, 2002 CarswellNat 6438; *5652210 Manitoba Inc.* v. *Procter*, 2011 CarswellNat 5131; *Elazrag and Dynamex Canada Ltd. (Wage Recovery), Re*, 2016 CarswellNat 3934; *Bushell* v *Farmers of North America Incorporated*, 2011 SKQB 267 (CanLII); *Ace-J Transportation Inc* v *Liu*, 2012 CanLII 19845 (CA LA)

accorded to each factor will be dependent upon the facts and circumstances presented in each case.

1. Intention

[28] Majha argues there is a written contract–the Agreement–that is determinative of the intention of the parties that Singh was an independent contractor. It further argues this relationship is confirmed by Majha's payment, without deductions, to the # Co.

[29] Singh denies that he had a written contract with Majha. He maintains the signature and initials on the Agreement produced[14] are forgeries.

[30] I have examined and compared the signatures and initials on the Agreement and Specimen Documents. I find as a fact the Agreement does not bear Singh's signature and initials.

[31] I note that the Agreement is dated March 3, 2014. However, the evidence is clear Majha engaged Singh prior to that date. Singh testified it was December 28, 2013. Bajwa testified it was a later date, but was not clear as to a precise date. I prefer and accept Singh's evidence. As a consequence, I am not satisfied the Agreement reflects or could reflect a credible, mutual understanding of the partes as of December 28, 2013. Furthermore, without mutual agreement, Majha cannot unilaterally impose an agreement more than two (2) months after it engaged Singh. Singh denies any such mutuality and I accept that position.

[32] I therefore find as a fact there is no written contract between Singh and Majha.

[33] Singh also argues:

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[14] *Supra*, footnote 6

a) he had no oral contract to be an independent contractor;

b) from the time he began working at Majha, he believed he was an employee; and

c) he did not think or know he was an independent contractor for Majha.

[34] The real question in this matter is what the parties genuinely intended.

[35] It very much appears as though Majha wanted Singh to be an independent contractor. However, Majha tendered no evidence that it discussed such an arrangement and came to an agreement in that regard with Singh.

[36] As for Singh, I am satisfied on the evidence he did not agree to be an independent contractor and always considered himself to be an employee of Majha.

[37] I find the parties were not *ad idem* as far as motivation was concerned. I am not persuaded the intention of both parties was such that Majha was retaining the services of Singh as a person who was performing those services truly as an individual in business on his own account. On the evidence, I am satisfied Singh believed he was performing his services as an employee.

2. Control over the Work

[38] From the authorities,[15] we can glean the following about control:

a) the difference between the relations of a principal and agent and of employer and employee is a principal has the right to direct what the agent has to do, but an employer has not only that right, but also the right to say how it is to be done; and

[15] *Supra*, footnote 8

b) inadequacies with the control test can surface when, for example, in the case of:

i) an independent contractor, we see a contract contain detailed specifications and terms for the task in question is to be carried out–this could cause greater control with an independent contractor, as would be the normal expectation in a contract with an employee, even though a literal application of the test might find the actual control should be less; or

ii) highly skilled and professional employees who possess skills far beyond the ability of their employers to direct.

[39] Majha presented no evidence and made no argument concerning the control it exerted over the manner in which Singh performed his work.

[40] However, Singh did present evidence and argue:

a) Majha did exert control over the manner in which his work was to be performed;

b) Majha instructed him on what goods were to be delivered, how it was to be delivered and at what time or date and in what condition; and

c) while on the road, Majha's level of control could only be minimal, but in all other respects, it had full control and direction of him.

[41] On the issue of control, the evidence points to Singh carrying out the duties one would expect of an employee. Majha has not persuaded me the evidence points to control consistent with what is expected for an independent contractor.

3. Ownership of Tools and Equipment

[42] The authorities[16] say an examination of the ownership of tools and equipment is a long-standing conceptual element to be considered by the trier of fact in determining whether or not there is employee status.

[43] Majha presented no evidence and made no argument concerning this issue.

[44] On the other hand, Singh presented evidence and argued that:

a) Majha owns and supplies all aspects of the business–including the tractors;

b) Majha pays all expenses, including repairs and fuel; and

c) he owns and supplies nothing.

Consequently, he argues this issue must be resolved in his favour.

[45] The tools and equipment that most relate to the essence of the work Singh performed for Majha–namely, driving–are a properly equipped, maintained, and insured tractor. Majha was responsible for ensuring the same were provided to Singh. Without these tools/equipment, Singh would not have been able to perform work as a driver for Majha. As such, I prefer and accept Singh's argument.

4. Chance of Profit and Risk of Loss

[46] Majha presented no evidence and made no argument concerning this issue.

[47] On the other hand, Singh presented evidence and argued that:

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[16] *Ibid.*

a) all aspects of the business are owned by Majha;

b) he made no capital investment;

c) his income came from percentage wages or mileage, not a business invoice;

d) he had no chance of profit;

e) he had no liability for the business–that was Majha's responsibility and it answered to its customers; and

f) he had no risk of loss.

[48] I find this point to be really no different from that of a commissioned agent. I am satisfied:

a) Singh was limited exclusively to the service of Majha;

b) Singh was subject to the control of Majha, not only as to the items to be hauled, but also as to when, where and how it is hauled;

c) Singh did not have an investment or interest in the tools relating to his service;

d) Singh has not undertaken any risk in the business sense and has no expectation of profit associated with the delivery of his service as distinct from a fixed percentage or mileage;

e) Singh's activity is not part of Majha's business organization–in other words, it is Majha's business.

[49] I am satisfied on the evidence that Singh took no risk from performance of the business. His income came from a percentage or mileage wage. There was no

chance of profit and loss in the traditional business sense.

5. Conclusion

[50] In addressing the two steps, including the fourfold test for the latter, and, more to the point, in determining the debate in this matter, it is necessary to view the totality of the relationship between Majha and Singh from an "above the forest" perspective. In that context and on a focussed examination of the true nature of the components of the relationship between Majha and Singh, the analysis leads me to the conclusion that Singh was, in real terms, an employee of Majha.

[51] The fact that Majha make payments to the # Co. does not change my conclusion. I find that such payment was undertaken unilaterally by and for the sole convenience of Majha.

[52] It bears noting that even if I had found the Agreement to have been signed by Majha and Singh, my conclusion would not have been different. Statements in the Agreement that purport to establish the relationship of independent contractor are not determinative of the issue.[17] I would still need to consider same in the context of the same two steps, including the same fourfold test for the latter. In so doing, I would have come to the same conclusion considering the language of the Agreement in the context of the evidence and arguments of the parties.

[53] Majha focussed its evidence and argument on the issue of whether Singh was an independent contractor or employee. It did not present evidence and argument that took issue with the calculation and quantum of the Order should I find Singh to be an employee. In any event, I find that Majha did not have just cause to dismiss Singh.

[54] I find Majha owes Singh two thousand five hundred and seventy-six dollars and eighty-five cents ($2,576.85), comprising:

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[17] *Bushell* v. *Farmers of North America Incorporated*, [2011] SKQB 267

a) two thousand and three dollars and five cents ($2,003.05) for payment of wages from March 25, 2014, to April 23, 2014, pursuant to section 247 of the *Code*;

b) twenty-one dollars and eighty-seven cents ($21.87) for overtime pursuant to section 174 of the *Code*;

c) one hundred and thirty-nine dollars and ninety cents ($139.90) for general holiday pay (Good Friday, April 18, 2014) pursuant to section 198 of the *Code*; and

d) four hundred and twelve dollars and three cents ($412.03) for vacation pay pursuant to section 188 of the *Code*.

[55] Under the circumstances, I do not believe this is an appropriate case to award costs and I decline to do so. I note that neither party asked for costs.

Dated at Saskatoon, Saskatchewan, on May 26, 2017.

T. F. (TED)KOSKIE, B.Sc., J.D.,
REFEREE