Docket: 2015-1919(EI)

BETWEEN:

AE HOSPITALITY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1920(CPP), 2016-3768(EI), 2016-3767(CPP),
Omar Gonzalez, 2016-3782(EI) and 2016-3781(CPP)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Ian R. Dick Stephanie J. Kalinowski
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is allowed on the basis that AE Hospitality Ltd. was not a placement agency pursuant to subsection 6(g) of the *Employment Insurance Regulations* ("*Regulations*"), except for the period of July 1, 2012 to November 30, 2012 with respect to Ms. Sinchi.

For the purposes of the *Regulations* dealing with placement agency, the decisions of the Minister of National Revenue dated January 28, 2015 for the period from January 1, 2012 to December 2, 2013, are modified on the basis that Ms. Rubio was not employed in insurable employment for the period from

January 1, 2012 to December 2, 2013 and that except for the period from July 1, 2012 to November 30, 2012, Ms. Sinchi was not employed in insurable employment for the remaining of period in 2012 up to December 2, 2013.

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Docket: 2015-1920(CPP)

BETWEEN:

AE HOSPITALITY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1919(EI), 2016-3768(EI), 2016-3767(CPP),
Omar Gonzalez, 2016-3782(EI) and 2016-3781(CPP)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Ian R. Dick Stephanie J. Kalinowski
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is allowed on the basis that AE Hospitality Ltd. was not a placement agency pursuant section 34 of the *Canada Pension Plan Regulations* ("*Regulations"*) except for the period of July 1, 2012 to November 30, 2012 with respect to Ms. Sinchi.

For the purposes of the *Regulations* dealing with placement agency, the decisions of the Minister of National Revenue dated January 28, 2015 for the period from January 1, 2012 to December 2, 2013, are modified on the basis that Ms. Rubio was not employed in pensionable employment for the period from January 1, 2012 to December 2, 2013 and that except for the period from July 1, 2012 to November 30,

2012, Ms. Sinchi was not employed in insurable employment for the remaining of period in 2012 up to December 2, 2013.

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Docket: 2016-3768(EI)

BETWEEN:

AE HOSPITALITY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1919(EI), 2015-1920(CPP), 2016-3767(CPP),
Omar Gonzalez, 2016-3782(EI) and 2016-3781(CPP)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Ian R. Dick Stephanie J. Kalinowski
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decisions of the Minister of National Revenue dated June 20, 2016 are confirmed on the basis that the persons listed in Schedule A of the Reasons for Judgment were employed in insurable employment with the appellant pursuant to paragraph 5(1)(a) of the *Employment Insurance Act*, for the period from January 1, 2013 to December 31, 2013.

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Docket: 2016-3767(CPP)

BETWEEN:

AE HOSPITALITY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1919(EI), 2015-1920(CPP), 2016-3768(EI),
Omar Gonzalez, 2016-3782(EI) and 2016-3781(CPP)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Ian R. Dick Stephanie J. Kalinowski
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is dismissed and the decisions of the Minister of National Revenue dated June 20, 2016 are confirmed on the basis that the person listed in Schedule A of my Reasons for Judgment were employed by the Appellant in pensionable employment pursuant to paragraph 6(1(a) of the *Canada Pension Plan* for the period from January 1, 2013 to December 31, 2013.

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Docket: 2016-3782(EI)

BETWEEN:

OMAR E GONZALEZ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1919(EI), 2015-1920(CPP), 2016-3768(EI),
2016-3767(CPP), and Omar Gonzalez, 2016-3781(CPP)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue dated June 20, 2016 is confirmed on the basis that the Appellant was employed by AE Hospitality Ltd. in insurable employment for the period from January 1, 2013 to December 31, 2013 pursuant to paragraph 5(1)(a) of the *Employment Insurance Act.*

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Docket: 2016-3781(CPP)

BETWEEN:

OMAR E GONZALEZ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
AE Hospitality Ltd., 2015-1919(EI), 2015-1920(CPP), 2016-3768(EI),
2016-3767(CPP), and Omar Gonzalez, 2016-3782(EI)
on April 3, 4, 5 and 6, 2018, and October 1, 2018 at Toronto, Ontario.

Before: The Honourable Justice Johanne D'Auray

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	John Chapman

JUDGMENT

The appeal pursuant to subsection 28(1) of the *Canada Pension Plan* is dismissed and the decision of the Minister of National Revenue dated June 20, 2016 is confirmed on the basis that the Appellant was employed by AE Hospitality Ltd. in pensionable employment for the period from January 1, 2013 to December 31, 2013, pursuant to paragraph 6(1)(a) of the *Canada Pension Plan*.

Signed at Ottawa, Canada, this 17th day of May 2019.

"Johanne D'Auray"

D'Auray J.

Citation: 2019 TCC 116
Date: 20190517
Docket: 2015-1919(EI)
2015-1920(CPP)
2016-3768(EI)
2016-3767(CPP)

BETWEEN:

AE HOSPITALITY LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2016-3782(EI)
2016-3781(CPP)

AND BETWEEN:

OMAR E GONZALEZ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

I. Background

[1] During the years under appeal, AE Hospitality Ltd. ("AE") was in the business of providing workers to two catering companies, 1513563 Ontario Ltd., operating as Encore Food with Elegance ("Encore"), and Applause Catering Inc. ("Applause") or collectively ("the catering companies") for events that they catered. AE provided supervisors, servers, bartenders and chefs to the two catering companies and charged the catering companies for such services.

[2] AE has appealed the Minister of National Revenue's ("Minister") decisions with respect to the *Employment Insurance Act* ("*EIA*")[1] and the *Canada Pension Plan* ("*CPP*")[2] dated January 28, 2015 ("2015 decisions").

[3] AE has also appealed the Minister's June 20, 2016 decisions ("2016 decisions"), which are also in respect of the *EIA* and *CPP*.

[4] Mr. Gonzalez has only appealed the 2016 decisions.

[5] The 2015 decisions determined that AE was a placement agency with respect to two workers, Ms. Gladys Sinchi and Ms. Lorena Rubio. The Minister's position is that pursuant to the *Employment Insurance Regulations* ("*EIR*"),[3] Ms. Sinchi and Ms. Rubio were placed in employment by AE, for the period from January 1, 2012 to December 2, 2013, to perform services for and under the direction and control of AE's clients, namely the catering companies. The Minister also determined that AE was a placement agency pursuant to the *Canada Pension Plan Regulations* ("*CPPR*")[4] on the basis that AE placed Ms. Sinchi and Ms. Rubio to perform services for its clients, the catering companies, where the terms and conditions of the employment and the remuneration paid constituted a contract of service or were analogous to a contract of service.

[6] The 2016 decisions dealt with whether the workers hired by AE were "employees" or "independent contractors". Alternatively, the 2016 decisions considered whether AE was a placement agency pursuant to the provisions of the *EIR* and the *CPPR*. The applicable period is from January 1, 2013 to December 31, 2013.

[7] The 2016 decisions apply to 218 workers, including the supervisors, servers, bartenders and chefs that AE provided to the catering companies. The names and job functions of the 218 workers are listed in Schedule A, attached to the Reasons for Judgment. Ms. Sinchi and Ms. Rubio are included in the list of workers listed in Schedule A. Mr. Gonzalez is also included in the list of workers in Schedule A.

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1 SC 1996, c 23.
2 RSC 1985, c C-8.
3 SOR/96-332.
4 CRC, c 385.

II. Position of the Parties

[8] The Respondent's position with respect to the 2016 decisions is that the workers are employed of AE and are under a contract of service pursuant to paragraphs 5(1)(a) of the *EIA* and 6(1)(a) of the *CPP* for the period of January 1, 2013 to December 1, 2013.

[9] Alternatively, the Respondent's position with respect to the 2016 decisions is that if a contract of service does not exist between AE and the workers, AE is a placement agency. The Respondent argues that pursuant to the provisions of the *EIR*, the workers were placed in employment for the period from January 1, 2013 to December 31, 2013 to perform services for and under the direction and control of AE's clients. The Respondent also submits that pursuant to the provisions of the *CPPR*, the workers were placed by AE to perform services for its clients, the catering companies, where the terms and conditions of employment and the remuneration paid constituted a contract of service or were analogous to a contract of service.

[10] AE submits that the 218 workers listed in Schedule A are independent contractors. Accordingly, AE's position is that the workers are not employees under a contract of service pursuant to paragraphs 5(1)(a) of the *EIA* and 6(1)(a) of the *CPP* as alleged by the Respondent. Therefore, the Minister's 2016 decisions are incorrect in fact and in law.

[11] AE also submits that it is not a placement agency since the conditions required for a placement agency pursuant to the provisions of the *EIR* and the *CPPR* are not met. The workers were not under the direction and control of the catering companies, as required by the *EIR*. AE further submits that the workers were not placed by AE to perform services for its clients, the catering companies, where the terms and conditions of employment and the remuneration paid constituted a contract of service or were analogous to a contract of service, as required by the *CPPR*. Therefore, the Minister's 2015 decisions with respect to Ms. Rubio and Ms. Sinchi and the Minister's 2016 decisions with respect to 218 workers are incorrect in fact and in law.

[12] The appeals with respect to the 2015 and 2016 decisions were heard under common evidence.

III. Issues

[13] With respect to the Minister's 2016 decisions, the issue is whether the 218 workers listed in Schedule A are independent contractors or employed by AE under a contract of service pursuant to paragraph 5(1)(a) of the *EIA* and paragraph 6(1)(a) of the *CPP* for the period from January 1, 2013 to December 31, 2013.

[14] Alternatively, if I were to decide there was no contract of service between AE and the workers, whether AE is a placement agency under subsection 6(g) of the *EIR* and section 34 of the *CPPR* and accordingly the employer of the workers for the period of January 1, 2013 to December 31, 2013.

[15] With respect to the Minister's 2015 decisions, the issue is whether AE is a placement agency under subsection 6(g) of the *EIR* and section 34 of the *CPPR* and accordingly the employer of Ms. Sinchi and Ms. Rubio for the period from January 1, 2012 to December 2, 2013.

IV. Facts

[16] The witnesses for the Appellant at trial were Mr. Cary Silber, the president and sole shareholder of AE, Ms. Rebecca Belton, a server, bartender and supervisor, Ms. Robyn Kirsch, a server, bartender, supervisor for AE and a sales representative for the catering companies, Mr. Omar Gonzalez, a server and bartender and Mr. Darrin Green, a chef.

[17] The witnesses for the Respondent were Ms. Sinchi, a server and supervisor and Ms. Amanda Hagerman, a chef.

AE

[18] AE is a staffing company. It was incorporated on June 28, 2012.

[19] AE hires supervisors, servers, bartenders and chefs to work at events catered by Encore or Applause. The workers provide services for various types of events, including weddings, funerals, christenings, Bar/Bat Mitzvahs, fundraisers, trade shows, corporate events and other special events. These events range anywhere from two guests to two thousand guests in attendance.

[20] To avoid confusion, unless I refer to a specific job function, I will refer to the supervisors, servers and bartenders collectively as the "wait staff". I will refer to the wait staff and the chefs collectively as the "workers".

[21] During the years in issue, AE provided workers to only two catering companies, namely Encore and Applause. AE did not have a written agreement with Encore or Applause for providing the workers.

[22] Mr. Cary Silber is the sole shareholder, director and president of AE. Mr. Silber testified that he has been in the hospitality industry for almost 40 years.

[23] With respect to AE, Mr. Silber's role is to ensure that skilled workers are provided to the catering companies.

[24] AE does not have any employees. All of AE's workers are independent contractors who work as supervisors, servers, bartenders and chefs. AE's booking coordinator is also an independent contractor.

[25] AE's clerical and accounting work is done for a fee by personnel of the catering companies.

Catering Companies

[26] Encore was incorporated in 2003. Ms. Ruth Silber, Mr. Silber's spouse, is the sole shareholder of Encore. Mr. Silber is also an officer and director of Encore.

[27] Mr. Silber stated that Encore had approximately 25 employees during the years under appeal.

[28] Encore has a production kitchen facility where the food is prepared for the events. All of the workers that AE provides Encore work offsite at external event venues because Encore does not have a banquet facility.

[29] Mr. Silber owns 25% of the shares of Applause via his holding corporation. David Silber, Mr. Silber's son, also owns 25% of the shares of Applause via his own holding company. Two other corporations own the rest of the shares of Applause.

[30] Mr. Silber is also an officer and director of Applause.

[31] During the years under appeal, Mr. Roshan Wanasingha also owned shares in Applause. He was an employee of Encore but acted as the head chef ("Head Chef") for both Encore and Applause. Due to a conflict, Mr. Wanasingha stopped working for the catering companies. He did not leave on good terms. There is ongoing litigation between Mr. Wanasingha and Mr. Silber.

[32] Applause was created to target the high-end kosher catering market. Applause holds most of its events at the Beth Tzedec synagogue, where its kitchen commissary is located. Applause also caters external kosher events. The workers that AE provides Applause work onsite at the synagogue or offsite at external event venues.

[33] Kosher food preparation requires religious supervision to ensure the food is prepared according to Jewish dietary laws. These laws are administered through the Council of Orthodox Rabbis. Applause is required to have a mashgiach present during the food preparation. A mashgiach is a religious supervisor who supervises food preparation and ensures kosher laws are followed. The mashgiach works for the Council of Orthodox Rabbis. AE pays the Council for the mashgiach's services. Since kosher laws require food to be prepared in a specific way, AE workers have to comply with the kosher laws while performing their duties at Applause events.

[34] In addition to managing AE, Mr. Silber is also involved in the day-to-day operations of the catering companies. In this role, Mr. Silber's duties relate to the sales, administration and finances of the catering companies. His sales duties involve going to see venues, creating menus, dealing with all other logistical issues and dealing with the clients of the catering companies, whom I will refer to as the "end user(s)". Mr. Silber sometimes contracts with the end users on behalf of the catering companies. In carrying out these duties, Mr. Silber is also involved in determining how many workers the catering companies will require for an event. However, it is generally the catering coordinators and the salespeople at the catering companies who carry out these tasks. Mr. Silber's administrative duties involve invoicing, checking accounts payable and receivable and dealing with suppliers. The suppliers include rental companies, linen companies and florists. Mr. Silber's financial duties involve checking bank deposits, bank statements and cash flows.

[35] Mr. Silber stated that to a degree, he is more involved in the day-to-day operations of Encore and Applause than AE.

[36] Although, during the years in issue AE worked only with these two catering companies, the catering companies conducted business without AE's involvement.

Workers (Wait Staff and Chefs)

[37] With respect to the wait staff, AE establishes a roster of people by receiving resumes.

[38] Mr. Silber stated that he only hires workers with experience. Experienced workers do not have to be trained. Many of the workers are hired through the referrals of other staff members.

[39] Many of the wait staff that AE hires work multiple jobs in and out of the hospitality industry. AE does not have a policy to prevent wait staff from providing services to competitors in the hospitality industry. Mr. Silber stated that for many of the servers, AE is not their primary source of income and unlike the supervisors, there is high turnover for servers.

[40] However, most of the chefs that work for AE are career chefs. They are employed by Encore and/or Applause. Mr. Silber stated that at times AE had to hire chefs who did not work for Encore or Applause.

[41] Mr. Wanasingha, the Head Chef of the catering companies, hired the chefs on behalf of the catering companies and AE. Due to his expertise, the Head Chef was in a better position than Mr. Silber to hire chefs.

Shifts

[42] Once the AE booking coordinator receives the booking requirements from the catering coordinator of Encore or Applause regarding the number of wait staff required for an event, the booking coordinator will contact the wait staff to offer them a shift for an event. AE uses StaffMate, a software program used in the hospitality industry, to contact the wait staff and to offer them scheduled shifts.

[43] The AE booking coordinator uses StaffMate to send an e-mail to the wait staff, which asks them to check StaffMate for available shifts. The wait staff are then able to accept or decline the shift on StaffMate. Mr. Silber testified that wait staff could refuse a shift without any repercussions.

[44] There are approximately 140 persons on the AE roster. AE selects the wait staff that a shift is offered to from its roster. The people are chosen based on the type of event, the size of the event and the experience required for the event. The end users may request a specific wait staff or chef to work their event and AE will try to accommodate such requests.

[45] A different system is in place for the chefs. AE does not have a roster of chefs. StaffMate is also not used to offer shifts to the chefs. It is either the Head Chef or the kitchen manager of Encore and Applause who selects the chefs that will work at the events. The chefs are employees of Encore and Applause and are chosen based on their level of experience, their qualifications and the type of event. A schedule is prepared on a weekly basis for the chefs. The schedule is posted in the kitchen of the catering companies.

[46] Mr. Silber stated that AE does not guarantee a minimum number of shifts for workers. He also stated AE does not have a minimum requirement for the number of hours each worker must work. However, he stated that under Ontario laws, it is mandatory that the workers be paid at least for four hours per shift.

[47] Mr. Silber testified that if a member of the wait staff needs to cancel a shift, they must advise the AE booking coordinator. The AE booking coordinator is then responsible to find a replacement from AE's roster. AE requests to be notified of a cancellation at least 24 hours in advance, but if the time limit for cancelling is not met, AE still finds a replacement for the worker.

The Day of the Event

[48] As mentioned above, AE's events range from a two guests to two thousands guests.

[49] For a large event, at least one supervisor is required. However, a supervisor is not required for small events.

[50] Before a large event, the catering companies forward a package containing the event details to the AE booking coordinator. The AE booking coordinator then forwards these instructions to the supervisors.

[51] The instructions deal with the room configuration, the table settings, whether the event will have a sit down meal or a buffet, the composition of the menu, the

time for serving the meals, if cocktails will be offered, if special drinks need to be prepared and the list of the workers expected to work at the event.

[52] The supervisor usually advises the bartenders where the bar has to be set up, at what time the bar will open and close and if special drinks are required. The supervisor also communicates with the Head Chef in order to coordinate the timing for serving each meal course.

[53] At large events, the supervisor acts as a liaison between the wait staff, the Head Chef and the end user. On the day of the event, the supervisor introduces herself or himself to the end user as the point of contact throughout the event. The supervisor confirms the instructions received by the catering company with the end user. After meeting with the end user, the supervisor relays the information that he or she receives from the AE booking coordinator to the workers and ensures that the event is taking place pursuant to the instructions he or she had received from the catering company.

[54] The servers and the bartenders, once they arrive at the event, have to report to the supervisor. When servers or bartenders finish a shift, they have to advise the supervisor that they are leaving. The supervisor notes the time that the servers or the bartenders start and finish their shifts. The supervisor forwards the list with the times to the AE booking coordinator, who keeps track of the staff hours.

[55] The wait staff use their own means of transportation to get to the event. However, if the event is outside the Greater Toronto Area, they are paid for their travel time for an hour or an hour and a half, depending on the location of the event.

[56] In order to cut preparation time at the event, the meals for the events are prepared in advance. On the day of the event, either some of these chefs or other employees of the catering companies are required to use the Encore/Applause van to transport the food to the event venue. The chefs who are not required to transport the food must arrive at the venue using their own means of transportation.

[57] At the event, the Head Chef has the instructions from the catering company as to how the end user would like the meals served, and at what time. The Head Chef relays the instructions to the chefs and distributes tasks among the chefs accordingly. The chefs then take apart the order, check the menu and go over the timing with the Head Chef to determine when each meal is required to be served to the guests. The chefs also setup any buffet if that option is chosen by the end user.

For large events, finishing the food generally requires the chefs to be broken down into four sections: salad, garde-manger, hot section and desserts. For consistency, the chefs have pictures of the plated food.

[58] If there are issues at the event, the end user expresses them to the supervisor, who deals with the issues. If there are complaints after the event, the end user generally contacts the salesperson at the catering company; they do not contact AE directly.

[59] For large events, the sales representative of the catering company who dealt with the end user may attend the event. Mr. Silber testified that the sales representative attends the event for the purpose of continuity and because the end users feel more comfortable with them present. He stated that the sales representative is mainly present at the event for public relations purposes and not to supervise the event. If there is an issue, the end user may communicate with the catering sales representative, who will pass the information along to the supervisor. Mr. Silber stated that he also attends some of the events, either small or large, for business development purposes. When he attends an event, the end users may also approach him if they have any changes they would like to make, such as altering the event schedule.

[60] For smaller events, the wait staff receive the instructions for the event by e-mail from the AE booking coordinator, who received the instructions from the catering company. The chefs receive the instructions directly from the catering companies. Depending on the size of the event, sometimes one or two workers may be sufficient. At the event, the workers first meet with the end user and they ensure that the requirements of the end user are met.

Contractual Relationship

[61] There are 50 chefs listed in Schedule A. Only five independent contractor agreements were filed in evidence for the chefs. With respect to the other 45 chefs, Mr. Silber stated that the independent contractor agreements were not available.

[62] With respect to the wait staff, out of 168 wait staff, 166 had signed an independent contractor agreement. It was only Ms. Sinchi and Ms. Rubio who had not signed an independent contractor agreement. Mr. Silber stated that he did not realize until the start of the appeal process that Ms. Sinchi and Ms. Rubio, did not sign an independent contractor agreement. Mr. Silber stated that this was due to an administrative mistake.

[63] The relevant part of the AE independent contractor agreement states as follows:

INDEPENDENT CONTRACTOR AGREEMENT

This INDEPENDENT CONTRACTOR AGREEMENT made as of this _____ day of _____, 201___

BETWEEN:

AE HOSPITALITY STAFFING, a corporation incorporated
under the Laws of Ontario
(the "Company")
And

_____Name

Of the City of _____ Province of Ontario
(the "Independent Contractor")

WHEREAS the Independent Contractor has expertise in the area of the company's business and is willing to provide services to the Company;

AND WHEREAS the Company is willing to engage the Independent Contractor as an Independent Contractor, and not as an employee, on the terms and conditions set forth;

NOW, THEREFORE, it is agreed as follows:

ENGAGEMENT OF INDEPENDENT CONTRACTOR

1. The Company hereby engages the Independent Contractor in accordance with the responsibilities and in accordance with the provisions of this Agreement (hereinafter referred to as the "Services")

RELATIONSHIP BETWEEN THE PARTIES

2. The Independent *Contractor* and the Company expressly agree that the Independent Contractor is a self-employed, independent contractor and is not an employee of the Company for any purpose, including, but not limited to, (i) income tax withholdings, Canada Pension Plan contributions or Employment Insurance premiums; (ii) workplace safety insurance coverage; and (iii) employee benefits.

SERVICES TO BE PROVIDED BY THE INDEPENDENT CONTRACTOR

3. During the term of this Agreement, the Independent Contractor shall have the full and complete obligation and responsibility for the performance of the services as set forth on the company, pursuant to the terms and conditions set forth in this Agreement, and the Independent Contractor shall be obliged to the Company for the performance of all such duties and /or work.

4. The Independent Contractor agrees to perform all services, as defined by the company, in compliance with all federal, provincial or local statutes, laws, ordinance and regulations, judicial orders or decisions that are applicable now or in the future to the Services.

PAYMENT FOR SERVICES

5. The Independent Contractor shall be paid the Independent Contractor rate according to the hours based on a bi-weekly payment. If a question or dispute arises as to the qualification of hours worked by the Independent Contractor in performing the Services, it will be resolved by the Company acting reasonably. The Independent Contractor understands and agrees that any and all future changes to the amount payable to the Independent Contractor will not be considered a repudiation of this Agreement by the Company.

The Independent Contractor acknowledges and agrees that the sole compensation for its services under this Agreement shall be payment described above, and not entitled to any other compensation for such services.

INCOME TAX DESIGNATION AND INDEMNIFICATION

6. The Company shall not withhold from sums becoming payable to the Independent Contractor under this Agreement, any amounts for federal, provincial, or local taxes including federal or provincial income taxes and employment taxes (including Canada Pension Plan contributions and Employment Insurance contributions). The Independent Contractor agrees that any tax obligation of the Independent Contractor arising from the payments made under this Agreement will be the Independent Contractor's sole responsibility. The independent Contractor will indemnify and save harmless the Company and each of its directors by any taxing authority based upon the Company's failure to withhold any amount form the payment for tax purposes.

[…]

10. Immediately upon the termination of this Agreement or of the Independent Contractor's services for the Company, or upon the Company's request, the Independent Contractor agrees to return to the Company all uniforms and other tangible items.

> […]
>
> 17. Upon termination of this Agreement, Independent Contractor shall not engage in any further written or oral communication with any of the Company's customers concerning the Company, its products, its employees or its business.
>
> […]
>
> 22. This Agreement may not be assigned by the Independent Contractor without the Company's prior written consent. The Independent Contractor shall not assign any portion of the work to be performed hereunder without any prior written consent of the Company. This Agreement may be assigned by the Company in connection with a merger or sale of all or substantially all of its assets, and in other instances with the Independent Contractor's consent, which consent shall not be unreasonable withheld or delayed.
>
> […]
>
> [Emphasis added.]

V. Analysis

A. Minister's 2016 Decisions – Contract of Service between AE and the Workers

[64] Under this heading, I will only address the issue as to whether there was a contract of service between AE and the workers with respect to the Minister's 2016 decisions. I will address the Minister's 2015 and 2016 decisions with respect to the placement agency issue under a separate heading below.

(1) Relevant Provisions

[65] Paragraph 5(1)(a) of the *EIA* sets out what insurable employment is for the purposes of a contract of service. It reads as follows:

> 5. (1) Subject to subsection (2), insurable employment is
>
> > (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[66] The relevant provisions of the *CPP* that deal with pensionable employment read as follows:

> 2. (1) In this Act,
>
> "employment" means the state of being employed under an express or implied contract of service or apprenticeship, and includes the tenure of an office;
>
> 6**.** (1) Pensionable employment is
>
> (a) employment in Canada that is not excepted employment;

(2) General Case Law Principles

[67] The Supreme Court of Canada in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*[5] discussed the analysis that must be undertaken in order to determine if a contract of service exists between a worker and an employer. Justice Majors, delivering the reasons for judgment for the Court, referred to the principles enunciated by Justice MacGuigan of the Federal Court of Appeal in *Wiebe Door Services Ltd. v Minister of National Revenue*.[6] Justice Major stated as follows:

> 44. According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374, *per* Lord Griffiths, at p. 382):
>
> > The observations of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "*Is the person who has engaged himself to perform these services performing them as a person in business on his own account?*". If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry

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5 *671122 Ontario Ltd. v Sagaz Industries Canada Inc*., 2001 SCC 59 [*Sagaz*].

6 *Wiebe Door Services Ltd. v Minister of National Revenue,* [1986] 3 FC 553 [*Wiebe Door*].

> in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

[…]

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 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.

[Emphasis added.]

[68] With respect to the integration test, Justice Majors in *Sagaz* confirmed Justice MacGuigan's approach that the integration test can still be of assistance, but that it must be addressed from the point of view of the employee and not the employer. Justice Majors stated:

> 43. Despite these criticisms, MacGuigan J.A. acknowledges, at p. 563, that the organization test can be of assistance:
>
> > Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the

> business of the employee that Lord Wright [in *Montreal*] addressed the question "Whose business is it?"

[Emphasis in original.]

[69] The decisions in *Sagaz* and in *Wiebe Door* make it clear that the central question that a court must assess in determining if a worker is an employee or independent contractor is: *whether the worker who has been engaged to perform services is performing them as a person in business on his or her own account*.

[70] In determining if a person is in business on his or her own account, Justice Majors stated that the level of control that the employer exercises over the worker will always be a factor. Other factors are whether the person performing the services provides his or her own equipment, whether he or she hires his or her own helpers, the degree of the financial risk taken, the degree of responsibility for investment and management that he or she has, whether and how far he or she has an opportunity of profiting from sound management practices in the performance of his or her task and whether the employees are integrated into the employer's business. These factors are not exhaustive and the weight given to each factor will depend on the facts and the circumstances of the case.

[71] In most cases that deal with whether a person is an independent contractor, there will be compelling points suggesting that a worker is an employee and other compelling points suggesting that a worker is an independent contractor. As Justice MacGuigan stated in *Wiebe Door*, the plain fact is that in a large number of cases the court can only perform a balancing operation by weighing the factors that point in one direction and balancing them against those pointing in the opposite direction. That said, what must always remain is *the search for the total relationship of the parties*.

[72] More recently, the Federal Court of Appeal considered the intention of the parties in determining whether a person is an independent contractor or an employee. In *1392644 Ontario Inc. o/a Connor Homes v Minister of National Revenue*,[7] Justice Mainville of the Federal Court of Appeal reviewed the cases in which the intentions of the parties were considered. Justice Mainville stated that the intention should be the first step in the analysis. The second step is to ensure that the facts and the behaviour of the parties confirm their intentions. He stated the following:

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[7] *1392644 Ontario Inc. o/a Connor Homes v MNR*, 2013 FCA 85 [*Connor Homes*].

> [37] Because the employee-employer relationship has important and far reaching legal and practical ramifications extending to tort law (vicarious liability), to social programs (eligibility and financial contributions thereto), to labour relations (union status) and to taxation (GST registration and status under the *Income Tax Act*), etc., the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties. Consequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties[’] declaration as to their intent. That determination must also be grounded in a verifiable objective reality.
>
> [38] Consequently, *Wolf* and *Royal Winnipeg Ballet* set out a two step process of inquiry that is used to assist in addressing the central question, as established in *Sagaz* and *Wiebe Door*, which is to determine whether the individual is performing or not the services as his own business on his own account.
>
> [39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256 (CanLII), 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the Wiebe Door factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties[’] intent as well as the terms of the contract may also be taken into account since they colors [*sic*] the relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, i.e[.] whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.
>
> [Emphasis added.]

[73] I will now apply the principles set out by the Supreme Court of Canada in *Sagaz* and by the Federal Court of Appeal in *Connor Homes* to the facts of the appeals at bar.

[74] The question to be answered is whether the workers hired by AE were working under a contract of service pursuant to paragraph 5(1)(a) of the *EIA* and

paragraph 6(1)(a) of the *CPP* or whether the workers were independent contractors for the period from January 1, 2013 to December 31, 2013.

(a) FIRST STEP: INTENTION OF THE PARTIES

[75] The first step, pursuant to the decision of *Connor Homes*, is to ascertain the subjective intent of each party to the relationship. Were the parties intending to be independent contractors?

[76] With respect to the wait staff, the Respondent acknowledges that the workers had the intention to work as independent contractors. Except for Ms. Sinchi and Ms. Rubio, all the wait staff signed AE's independent contractor agreement.

[77] Except for Ms. Sinchi, who was under the impression that she was an employee while working for AE, the other witnesses who worked as supervisors and servers testified that they knew they were independent contractors. They also stated that they understood that as independent contractors, AE was not responsible for their source deductions. Some stated that they operated their own businesses and they offered their services to AE.

[78] In light of the evidence, I find that AE and the wait staff had the intention to enter into an independent contractor relationship.

[79] With respect to the chefs, the Respondent argues that there is insufficient evidence to establish that the intention of the chefs was to be in an independent contractor relationship with AE. Since only five out of 50 contracts were available for the chefs, the Respondent is asking the Court to draw a negative inference. The Respondent's position is that AE should have called the Head Chef of the catering companies, Mr. Wanasingha, or some of the other chefs listed in Schedule A as witnesses to establish their intentions to be independent contractors.

[80] The Respondent also relies on the testimony of Ms. Hagerman, a chef at AE and an employee of the catering companies during the years under appeal. She stated that she always assumed that she was an employee while working for AE. At trial, when counsel for the Respondent showed Ms. Hagerman AE's independent contractor agreement, she testified that she had never seen, nor signed such agreement.

[81] Mr. Silber testified that it was AE's policy that all workers, including the chefs, must sign the independent contractor agreement upon starting work. It is important to AE that the workers understand the nature of their working relationship. Mr. Silber stated that he had signed the chefs' contracts on behalf of AE. He had returned them to Mr. Wanasingha. He testified that the contracts went missing around 2016 when Mr. Wanasingha left the catering companies on bad terms to start a competing business.

[82] Mr. Green, a chef for the catering companies and for AE, signed an independent contractor agreement and his intention was to be an independent contractor while working for AE. At trial, the Respondent acknowledged that Mr. Green's intention was to be an independent contractor while working for AE.

[83] I agree with the Respondent that it would have been easy for AE to call some of the chefs listed in Schedule A to establish that the chefs had the intention to be independent contractors. However, Mr. Silber stated that he had signed the independent contractor agreements for the chefs. Therefore, the contracts were signed but simply not available at trial for the reasons I mentioned above. I am of the opinion that the testimonies of Mr. Silber and Mr. Green are sufficient to establish that the chefs' intentions were also to work as independent contractors while working for AE. I do not have any reasons to not believe the testimonies of Mr. Silber and Ms. Green. Ms. Hagerman's testimony was less reliable on that issue as she did not remember signing any employment documents when hired by the catering companies or AE, which is quite unlikely.

(b) SECOND STEP – OBJECTIVE FACTS

[84] The second step, pursuant to the decision of *Connor Homes*, is to ascertain whether the objective reality sustains the subjective intent of the parties. In doing so, I will analyze the factors set out in *Sagaz* to determine if the facts confirm the intention of the parties to be independent contractors. It is clear from the case law that the subjective intent cannot trump the reality of the relationship as ascertained through objective facts.

(i) Level of Control

[85] The first factor is to determine if AE exercised control over the workers.

AE's Position – Level of Control

[86] AE submits that it does not exercise any control over the workers. AE only hires experienced people. It does so because experienced workers can carry out their duties without training, instructions or supervision.

[87] At a large event the supervisor does not control the servers or the bartenders. The supervisor's role is to act as the liaison between the wait staff, the Head Chef and the end user. For example, if the end user wants to modify the time table, the supervisor's role is to relay the demands of the end user to the wait staff and the Head Chef and to ensure that the end user's requests are met. The supervisor also acts as a coordinator and divides the work amongst the servers. He or she tells the wait staff what to do but not how to do it. The wait staff are experienced. They do not have to be told how to do their jobs. With respect to the bartenders, the supervisor's role is to advise them where to setup the bar, when to open and close the bar and if special drinks are required for the event. AE submits that the supervisors do not tell the bartenders how to do their job but simply inform them as to what needs to be done.

[88] AE submits that the supervisor at the event is acting as a conduit by relaying the information he or she receives from the catering companies to the wait staff and the Head Chef, since the catering companies' instructions reflect the requests of the end user. Accordingly, AE argues that it is the end user, not the supervisor, who has the ultimate say.

[89] AE submits that the same applies for the chefs. The chefs know how to do their jobs. The role of the Head Chef at large events is to coordinate and divide up the responsibilities amongst the different chefs and to ensure that the timing for food preparation is followed.

[90] The supervisor and the Head Chef ensure that the level of quality expected by the end user is met. AE argues that monitoring the work or ensuring a level of quality does not amount to control.

[91] AE does not prevent the wait staff from working for its competitors. Working for AE is not, for most of the wait staff, their main job. They have other jobs such as acting, entertaining and some even have full-time jobs.

[92] AE does not guarantee any of its workers a minimum number of hours. In addition, AE submits that the wait staff can accept or refuse a shift for an event without any repercussions.

[93] AE does not do any performance reviews.

[94] Except for an information session that was given on kosher laws when Applause first started its operations, AE does not offer any training.

[95] AE pointed out that the evidence shows that the workers negotiated their hourly rate before starting to work for AE. Mr. Gonzalez stated that if he had not been able to negotiate an hourly rate to his satisfaction, he would have left and offered his services to other companies in the same business as AE.

[96] The wait staff submit invoices to AE on a bi-weekly basis to account for the services they have provided.

[97] For smaller events, no supervisors are required. The information with respect to the event is transmitted to the wait staff by the AE booking coordinator, who receives the information from either Encore or Applause.

Analysis – Level of Control

[98] Before the event, the supervisor has already received the package from the catering company via the AE booking coordinator. The package contains detailed instructions regarding how the event should function, the names and number of wait staff for the event, the timing of the event, how the tables must be setup and any special requirements for buffet setups or serving dinner. At the event, the supervisor meets the end user to confirm the instructions he or she has received from the AE booking coordinator. Although it may not have been a policy of AE, the witnesses who acted as supervisors testified that at the beginning of each event, the supervisor holds a briefing to relay the information they have received from the AE booking coordinator. For an Applause event, the supervisor also explains the kosher laws to ensure that the wait staff comply with them. At the briefing, it is common for the supervisor to setup a sample table to show to the servers how the remaining tables must be setup.

[99] It is not contested that the wait staff have experience and that they know how to do their jobs. The testimonies of the wait staff are consistent on this point. They all stated that they knew how to do their work and they did not have to be told by the supervisors how to perform their duties.

[100] However, the testimonies of the supervisors and the servers are also consistent with respect to the supervisors having the ability, if required, to correct the servers and tell them how their tasks must be done.

[101] Ms. Belton, in cross-examination, stated as follows:[8]

> Q. But the supervisors are able to intervene if things go wrong?
>
> A. Of course. That's part of their job being there.
>
> Q. And do they -- they're able to correct the servers' work if they don't agree with how it's done.
>
> A. Yeah, -- yeah.

[102] When Ms. Belton was asked in re-examination if the example of the place setting only occurred in instances where it was not the standard place setting that was used, she answered as follows:[9]

> A. Usually, it's a pretty standard thing. With table settings there are so many variables, too. There are 20 different ways to fold a napkin, right, for place settings. You have to set an example set out for the staff in the way that they want it that day.

[103] Ms. Kirsch stated as follows with respect to her role as a supervisor:[10]

> Q. But as the extra set of eyes, you were in a position to correct things that were not properly placed on the table?
>
> A. That was part of my job, yeah. And some are pickier than others. I am very OCD when it comes to that. I work for the client, I have to make sure it's perfect for them.

[104] Mr. Gonzalez stated as follows regarding the role of the supervisor at an event:[11]

> Q. The supervisor could – if you were not complying with the kosher rules, the supervisor could tell you had to comply with them?

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8 Transcript, Volume 1, p. 173, line 5.
9 Transcript, Volume 1, p. 182, line 28.
10 Transcript, Volume 2, p. 306, line 20.
11 Transcript, Volume 2, p. 362, line 11.

> A. Yes, as an example like don't drink that coffee inside the synagogue, or you are not allowed to use your own knife.

[105] Mr. Gonzalez also stated that the supervisor starts by setting up a sample place setting, which needs to be followed by the servers.[12]

[106] Ms. Sinchi stated as follows with respect to her role when working as a supervisor:[13]

> Q. You said that would set an example place setting?
>
> A. Mm-hmm.
>
> Q. What did the servers do after the example place setting? Sorry, the servers in charge of setup, what did they do after the example of place setting was made?
>
> A. They have to follow whatever we do.

[107] Ms. Sinchi also added that as a supervisor, she had to push people to work otherwise the work would not have been done. Ms. Sinchi stated:[14]

> A. Mm-hmm. And also watch the time, right? Because we have a specific time to do. It's no -- we don't take forever, here is two hours for setting. No, we have to do quick, quick, quick and also we try to push the people to make sure everything is perfect.
>
> Q. You said you have to push the people to make sure everything is perfect.
>
> A. Mm-hmm.
>
> Q. What do you mean by that?
>
> A. It's like sometimes people on the phone, it's like, you know, is hiding beside the doors, talking about. No, this one, this one we have to like, you know, sell start to work, is work, it's time to work. Otherwise we don't call anymore.
>
> Q. You said that in addition to pushing people you said we have to look around to make sure they're doing the right thing.
>
> A. Mm-hmm.

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12 Transcript, Volume 2, p. 366.
13 Transcript, Volume 3, p. 455, line 12.
14 Transcript, Volume 3, p. 456, line 19.

[108] With respect to the chefs, Mr. Green explained that the catering industry strives for consistency. For example, it does not matter if it is a small or a large event, if the end user orders one of the salads on the menu, that salad must have the same look no matter the size of the event and when it is ordered. Consistency on plating is of utmost importance for Encore and Applause. In cross-examination, Mr. Green stated:[15]

> Q. But when plating for example the beet salad, the chefs are required to make it look like it does in the photograph?
>
> A. Correct. And for the larger events we would have those pictures.
>
> Q. And if you or for if that matter any chef noticed that the food item did not look or was not plated in the way it was intended to, you would correct that?
>
> A. We would have the ability to do that, yes.
>
> Q. And I assume since you would have the ability to make those corrections, the head chef would also have that ability?
>
> A. If -- I mean, the chef -- the head chef is in charge of everything. So if he doesn't like it, if it's not even close to the picture, then of course you've got a chance to tweak it. But we've done things first without supervision.
>
> Q. And at smaller events, I understand that they wouldn't always be the photographs of the food items, but they were available if chefs did not know how to plate?
>
> A. Correct.

[109] There is also an element of control at a smaller event where a supervisor is not present. Mr. Green testified that at the small events "when in doubt, the chef is in charge."[16] In addition, instructions that are sent by e-mail to the wait staff and chefs are quite specific. For example, one of the instructions stated, "do not touch wine fridge, do not use anything in the house – check with Venette before using – Do not use credenza."[17]

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15 Transcript, Volume 3, p. 428, line 19.

16 Transcript, Volume, 3, p. 394, line 11.

17 See: Appellant's Exhibit A-3.

[110] As it was stated in *Hennick v Minister of National Revenue*,[18] control does not mean the actual exercise of control, but rather, the right or the ability to exercise control. I do not accept the testimony of Mr. Silber that the role of the supervisors and the Head Chef was only to coordinate the work and to relay the information or the requests of the end user to the workers. The evidence shows that when required, the supervisors and the Head Chef have the ability to exercise control over the workers.

[111] AE also argues that the supervisor acts as a conduit by relaying the requests of the end user to the wait staff. In other words, AE's position is that the wait staff are under the control of the end user, not under the control of the supervisor. The information package prepared by the catering companies and forwarded to the supervisor includes the requests and instructions of the end user. Therefore, it is the instructions given by the end user, not AE, which the supervisor executes during the event.

[112] I do not accept the argument of AE. The success of AE and the catering companies depend on the end user's satisfaction. It goes without saying that the supervisor's role is to ensure that the requests of the end user are met. This is the "raison d'être" of AE and the catering companies. The methods used to complete the necessary work are those of AE and the catering companies. Clearly, the working relationship is not between the wait staff and the end user. The end user does not have the authority to tell a server what to do and how to do it. Therefore, I do not agree that the supervisor merely acts as a conduit to relay the information of the end user.

[113] The same argument is put forward by AE with respect to the information session on the kosher laws. According to AE, the 2012 session on kosher laws did not amount to training. It was nothing more than AE taking steps to ensure that the wait staff and the chefs were aware and complied with the wishes of the end user, for whom religious laws were extremely important and were expected to be observed. Accordingly, AE submits that when a supervisor tells the wait staff how to comply with kosher laws, they also act as a conduit by relaying the requests of the end user, or possibly of an even higher authority.

[114] I do not agree with AE. Applause was incorporated to cater high-end kosher events. In order to be successful, it is important for AE and Applause that the wait

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[18] *Hennick v Minister of National Revenue*, 1995 CarswellNat 124, [1995] FCJ No. 294 [*Hennick*].

staff and the chefs comply with the kosher laws in performing their duties. I agree with AE that the kosher laws must be respected irrespective of whether the workers are employees or independent contractors. That said, AE and Applause do not leave it to the individual workers to learn about the kosher laws. AE offered a general training in this regard in 2012. AE sends e-mails to new workers regarding how to perform their duties during kosher events and before each event the supervisor explains the kosher laws.

[115] The evidence also shows that AE and the catering companies put mechanisms in place that have the effect of exerting control over the workers for both small and large events. First, it is AE that selects who is offered a shift for an event. It is also AE that decides which function the wait staff will occupy at an event, namely whether they will work as supervisors, servers or bartenders.

[116] Although the wait staff can decline a shift without repercussions, which is more akin to a contractual relationship than an employee relationship, it is AE that is responsible for finding a replacement. In addition, there is no ability for the wait staff to subcontract their work without the approval of AE. Not being able to find one's own replacement or to subcontract the work points to an employment relationship rather than an independent contractor relationship.

[117] With respect to the chefs, it is the Head Chef or the kitchen manager of Encore and Applause who selects the chefs who will work at each event and the role they will have at the event. The chefs, while working at the AE events, do not necessarily have the same roles as they do for Encore or Applause.

[118] Ms. Hagerman and Mr. Green, both full-time employees of the catering companies during the years under appeals, testified about how the chefs become aware of the AE shifts. Mr. Green is still employed by the catering companies but Ms. Hagerman is not. They explained that a schedule for the chefs is posted in the Encore/Applause kitchen each week. The schedule is prepared by either the Head Chef or the kitchen manager of catering companies. The schedule has three columns, one column indicates the days and the hours that the chefs will work for Encore, the other column has the same information but for Applause and the third column indicates the days and the hours that the chef will work for AE at an event

that is catered by either Encore or Applause.[19] The chefs are not consulted prior to the preparation of the work schedule.

[119] During his testimony, Mr. Green stated that the shifts for an event belong to the chefs on the schedule unless they decline the shift. Accordingly, if a chef does not explicitly reject a shift, he or she is required to work that shift. In response to the question about whether the chefs are expected to accept shifts, Mr. Green stated:[20]

> A. Yeah, it was expected because, you know, Encore and Applause are trying to put their best team together to send out. So if you turn them down, they have to come up with plan B or plan C. They want best representation all the time, so if they're your first spot, then the secondary -- then it's going to be disappointing to them, right?

[120] In response to whether he feels obliged to accept shifts, Mr. Green responded as follows:[21]

> A. Obligation? I took it more as honour. They trust your work, they're going to give you shifts, and give you functions. They don't trust you, you're not reliable, you're not going to get anything.

[121] Ms. Hagerman testified that it was her understanding that if a chef refused an event, he or she would not be scheduled for as many shifts in the future. However, Mr. Green stated that there are no repercussions if a chef does not accept a shift. Both Mr. Green and Ms. Hagerman had never refused an AE shift. Therefore, their answers were based on their perceptions of the situation. Mr. Silber responded as follows to the question:[22]

> Q. And as far as you're aware, where there ever any repercussions, any discipline imposed by the catering company -- I'm not sure how AE could -- with respect to chefs for failure to sign up for anything?
>
> A. Not that I know of, no.

[122] Even if I were to accept that there are no consequences for the chefs if they decline an AE shift, the system put in place for the chefs by the catering companies

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19 It was either three columns or three separated sheets: one for Encore, Applause and AE's shifts.

20 Transcript, Volume 3, p. 417, line 20.

21 Transcript, Volume 3, p. 418, line 3.

22 Transcript, Volume 1, p 67.

puts pressure on them to accept shifts and makes it difficult for them to decline shifts. The shift is theirs unless they decline it. The chefs are also not consulted prior to the preparation of the schedule. This is also, in my view, a form of control.

[123] Even if the chefs are permitted to work for the competitors of AE, realistically speaking, they simply do not have any time left to do so. The chefs work full time as employees of Encore and/or Applause, in addition to the AE shifts for which they are scheduled. Both Mr. Green and Ms. Hagerman testified that during the years under appeal, they did not work for a company similar to AE or for any other catering companies.

[124] In addition, the system put in place by the catering companies to ensure consistency of service from event to event, small or large, is a form of exerting control over the workers. At the events, the meals must taste the same and must be plated in a certain manner. To that end, pictures are provided at events by the catering companies. As it was explained by Mr. Green in his testimony, "[w]e always try to make our food look the same, no matter who does it. So yes, there is some guidelines."[23] The same applies to the wait staff. The supervisor must ensure that the instructions in the package received from the catering company, via the AE booking coordinator, are followed. For example, the tables must be set up and the napkins must be folded in a certain manner. To ensure consistency, a table is set up as an example and the servers must duplicate the set up.

[125] AE also exerts control by requiring the servers and the bartenders to wear an apron with the logo of either Encore or Applause. The chefs also testified that they are required to wear a white chef coat with the logo of the catering companies on it. I understand that this is a way of promoting the catering companies. That said, the workers did not have a choice, they have to wear the company's logo.

[126] In light of the above facts, I am of the view that the control factor is more akin to an employee relationship than an independent contractor relationship.

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[23] Transcript, Volume 3, p. 395, line 19.

(ii) Ownership of Tools

AE's Position – Tools

[127] AE relies on the Federal Court of Appeal decision in *Precision Gutters*[24] to submit that this factor plays in favour of an independent contractor relationship in these appeals.

Analysis – Tools

[128] In *Precision Gutters*, the workers/installers were engaged by Precision Gutters to install building gutters. Precision Gutters owned five gutter-roll forming machines. Some workers owned their own gutter rollers. Others uses Precision Gutters' gutter rollers. Precision Gutters also provided the aluminum gutters used for the installations. However, the workers owned their own tools, which typically had a value of $2,000.

[129] Justice Sexton of the Federal Court of Appeal held in *Precision Gutters* that "if the worker owns the tools of the trade which it is reasonable for him to own, this [tools] test will point to the conclusion that the individual is an independent contractor even though the alleged employer provides special tools for the particular business."[25]

[130] AE submits that the servers testified that they use their own tools while working at the events. For example, the servers bring some of the following tools: a bottle opener, a wine opener, a lighter, a notepad, a pen, an apron and a tie.[26] The bartenders bring their own bar kits. As for the chefs, some of them bring some of their own knives. Accordingly, AE argues that the tools factor points to the conclusion that the workers are independent contractors, since as pointed out in *Precision Gutters*, the workers own the tools of the trade that are reasonable for them to own.

[131] Mr. Silber testified that AE does not require the servers and supervisors to provide tools at events and that only the bartenders are required to provide their own bar kits. Mr. Gonzalez also testified that AE does not require the wait staff to bring any tools. However, he stated that although it is not a requirement for servers

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24 *Precision Gutters Ltd. v Canada (MNR),* [2002] FCJ No. 771 [*Precision Gutters*].

25 *Ibid* at para 25.

26 The servers and supervisors' testimonies were not consistent as to what tools they had to bring to perform their duties.

to bring their own tools, the experienced servers know that it is useful to at least have a lighter to perform their duties in a more efficient manner. The same applies for the chefs; it may not be a requirement for the chefs to bring their own knives to events, but some chefs prefer working with their own knives. Mr. Green stated that he brings his own knives. He admitted, however, that knives are available at the event premises. Ms. Hagerman never brought any tools to events.

[132] Unlike the servers and chefs, the bartenders are required to bring their own bar kits. The bartenders are also required to have a valid Smart Serve certification, as it is a requirement from the Government of Ontario for serving alcohol. AE does not assist the bartenders in obtaining the Smart Serve certification, nor does it pay or reimburse the bartenders for obtaining such certification.

[133] AE provides the chefs with a white chef coat that has the logo of the catering companies. The chefs must pay for their own non-slip shoes. The wait staff must buy an apron and a tie from AE. Once they stop working for AE, the wait staff must give back the apron and the tie and AE will reimburse them.[27] The apron has the logo of the catering companies. One side of the apron has the Encore logo and the other side has the Applause logo. The apron can also be worn without showing any logo.

[134] The wait staff also have a dress code. They must wear a black shirt, black pants and black shoes. The wait staff pay for their own uniforms. However, this uniform is the industry standard.

[135] The catering companies provide the larger equipments such as stoves, ovens, fridges and pots and pans. Rental companies provide most of the other equipment such as tables, dishes, tablecloths, napkins and cutlery.

[136] Applause provides all the tools and equipment at its events. The workers cannot use their own tools in light of the kosher laws.

[137] I do not find that the decision of *Precision Gutters* applies in these appeals. In *Precision Gutters*, if the installers did not have their own tools, they could not have performed their duties. This is not the case in these appeals. The evidence in these appeals is that, except for the bartenders, AE does not require the workers to bring their own tools. Unlike the installers in *Precision Gutters*, the workers in these appeals can still perform their duties without bringing any tools. As it was

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[27] See paragraph 10 of the Independent Contractor Agreement.

revealed from the evidence, a server can borrow a lighter from someone else in order to light candles.

[138] In any event, the tools factor does not play an important factor in these appeals. For Encore events, the supervisors and the servers are not required to bring any tools and can perform their duties without them. Only the bartenders are required to bring their bar kits. For kosher events, the workers are not allowed to bring their own tools.

[139] Taking into account the evidence, I find that the tool factor is a neutral factor.

(iii) Chance of Profit and Risk of Loss

AE's Position – Chance of Profit and Risk of Loss

[140] AE's position is that the evidence with respect to this factor points to an independent contractor relationship. The workers are able to negotiate their hourly rate when AE hires them, or at a later point. In addition, the wait staff can also work for competitors of AE or other catering companies. The more hours and the more shifts that the workers accept, the more profit they make. In addition, the end user can require a certain server, bartender or chef for an event based on their previous performance and this gives the worker more opportunities for a chance to profit. Furthermore, the workers are able to accept tips from the end user, which has the effect of increasing their profit. The wait staff are also responsible for sending invoices for their services to AE on a bi-weekly basis.

[141] AE also argues that it does not guarantee the workers a minimum number of work hours per week or per month. Accordingly, the workers do not have any guarantee of income. In addition, the workers can take shifts that fit their lifestyle and their career ambitions. This does not usually happen in an employee relationship.

[142] AE relies on the decision of *Precision Gutters* to support its position. In this decision, Justice Sexton concluded that the installers had the ability to accept or refuse a job, work alone, employ others to assist them, negotiate the terms of the contract and repair the job's defects at their own costs. Additionally, the installers did not have any guarantee of work and therefore had no minimum pay guarantee. This led to the conclusion that the workers were independent contractors. Justice Sexton stated as follows:

> [27] The Tax Court Judge concluded, because at the time the rates were agreed upon between Precision and the installer, that there was no further opportunity for profit. As a result he concluded that this criteria favoured characterization of the installers as employees. In my view, this ignores certain important aspects of the relationship between the installer and Precision. In particular each installer used his own judgment to decide when to work and whether to accept or decline any particular job. He was of course free to take jobs with other gutter manufacturers. The contract price, although it was not negotiated on all occasions, was nevertheless negotiated 20%-30% of the time. In my view, the ability to negotiate the terms of a contract entails a chance of profit and risk of loss in the same way that allowing an individual the right to accept or decline to take a job entails a chance of profit and risk of loss. The installers were not given any set time for performance of the contract and hence efficient performance might well lead to more profits. An installer could choose to work alone or employ others to help him. Obviously, the more work he could do on his own the more profits he could make. The installer was responsible for defects in work done and had to return to repair the defects at his own expense. There was no guarantee of work from day to day, no guaranteed minimum pay and no fringe benefits. All of these things have led other courts to conclude that an independent contractor relationship exists. See *Société de Projets ETPA Inc. v. Minister of National Revenue,* 93 D.T.C. 510. I am therefore of the view that the Tax Court Judge erred in holding that chance of profit and risk of loss criteria favours characterization of the installers as employees.[28]
>
> [Emphasis added.]

Analysis – Chance of Profit/Risk of Loss

[143] AE argues that as in the case of *Precision Gutters*, the workers in these appeals are not guaranteed a minimum number of work hours. Consequently, the workers have no guarantee of earning income. In my view, having no guarantee of hours and income point in favour of an independent contractor relationship.

[144] AE also argues that the workers have the ability to negotiate the terms of the contract since they have the ability to negotiate their hourly rate. In respect of the workers being able to negotiate the terms of the contract, AE relies on the comments of Justice Sexton where he sates, "the ability to negotiate the terms of a contract entails a chance of profit and risk of loss in the same way that allowing an individual the right to accept or decline to take a job entails a chance of profit and risk of loss."[29] Accordingly, they have a chance to profit since a higher negotiated

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28 *Precision Gutters*, *supra* note 24 at para 27.

29 *Ibid.*

rate and accepting more shifts leads to an increase in profit. In addition, they can also accept or refuse a shift without any consequences.

[145] Although, the evidence establishes that not all the workers negotiated their hourly rate, some of the witnesses testified that they did in fact negotiate their rates. Mr. Silber testified that AE is willing to negotiate the hourly rate within a certain range. AE's negotiation range at the time of these appeals was between $16 and $20 per hour for the wait staff. Mr. Silber stated that hourly rate paid to workers is based on the worker's experience. Once the hourly rate is set, that is the rate that the worker receives when working at both Encore and Applause events. Additionally, it does not matter if a worker is working for a small or a large event, he or she is paid the same rate.

[146] I find it difficult to apply the findings of Justice Sexton in *Precision Gutters* to these appeals. In *Precision Gutters*, the installers were not paid an hourly rate. They were paid per gutter installation. The contract rate was based on a per-foot amount. Around 70-80% of the time, installers would accept the contract amount offered by Precision Gutters. Around 20%-30% of the time, installers would negotiate with Precision Gutters over the contract amount.

[147] In *Precision Gutters*, installers would individually assess each job to determine if they should accept or reject the job. Depending on the amount of time the installers estimated was required to complete the job, they could either accept or reject the job based on the amount of money offered by Precision Gutters. If, taking into account the location and the complexity of the job, the installers felt that Precision Gutters did not offer enough money for the job, they could refuse the job. Also, since the installers did not have to work a fixed number of hours to complete a job, a profit could be made if their estimate of the time required to complete the job was correct. For example, the installers could either work by themselves to save costs or they could hire helpers to complete a job in less time and make a profit. That said, if the installers did not estimate the time needed for a job correctly or if they had to repair previous installations, the installers could lose money. In addition, the installers could decide to subcontract the job and earn a profit.

[148] This is not the situation in these appeals. The workers are offered a shift with a precise number of hours. The workers know the amount of hours that they will work and how much they will be paid for an event. A shift cannot be accepted or rejected based on profit. It can only be accepted or rejected based on the numbers

of hours in the shift. The only way that the workers are able to make more money is to work more hours.

[149] In my view, working more or less hours does not equate to a chance of profit or a risk of loss. In *627148 Ontario Limited o/a Daily Care Health Services v MNR,*[30] Daily Care Health Services argued the same argument that AE argues in the appeals at bar, namely that the workers had a chance of profit if they worked more hours and a risk of loss if they worked less hours. Justice V. Miller did not agree with the argument put forward by Daily Care Health Services. She stated that the term "chance of profit and risk of loss" had to be understood in the entrepreneurial sense.[31]

[150] The AE workers, who are paid a fixed hourly rate, cannot do anything to render a shift more profitable once it has been accepted. Even if the workers are able to find efficiencies in performing their tasks, it will not have an impact on the amount of income they receive. Therefore, the workers do not have an opportunity to profit in an entrepreneurial sense.

[151] The evidence also shows that the chefs do not prepare their own invoices. It is the Head Chef who notes on a sheet the hours that the chefs work at an event. AE handles the payments. For the wait staff, the witnesses testified that they invoice AE every two weeks. That said, no one could state if the invoicing system was implemented during the periods under appeal. No invoices were filed in evidence.

[152] The workers were not financially responsible for breakage.

[153] In the appeals at bar, unlike the situation in *Precision Gutters*, the workers do not have an obligation to find a replacement when they have accepted a shift but can no longer work the shift. When this occurs, AE is responsible for finding a replacement. Therefore, the workers do not have to bear the cost of finding a replacement. The workers cannot subcontract the work. In *Johnson v MNR,*[32] which is an appeal dealing with similar facts to the appeals at bar, BDI was

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30 *627148 Ontario Ltd. (Daily Care Health Services) v Minister of National Revenue*, 2013 TCC 169 [*Daily Care Health Services*].

31 *Ibid* at para 27.

32 *Johnson v MNR,* 2018 TCC 201 [*Johnson*], under appeal before the Federal Court of Appeal.

providing workers to catering companies. In *Johnson*, Justice Archambault stated as follows:

> [132] Ms. Johnson had no employees and this is more consistent with her being an employee. She could only earn her salary for each hour that she worked, like an employee. Unlike BDI, she had no opportunity for profit. It should be added that she did not have an obligation to find a replacement whenever she could not attend an event after having accepted an assignment. Her only obligation was to notify BDI. She therefore did not run the risk of having to assume the financial cost of finding a replacement. This risk was assumed by BDI, which would assign 105 butlers to an event when only 100 were needed. By experience, BDI knew that some butlers would not show up and it, not Ms. Johnson, would assume the cost of those five additional butlers. It was BDI that carried on the business, not Ms. Johnson. When she did not show up for an event, she did risk incurring a loss in that she simply did not earn a salary, as is the case with many employees who do not work for employers that provide benefits such as paid sick leave.

[154] In the appeals at bar, the workers are not promoting themselves as being in business during the events. On the contrary, the workers, by wearing the logo of the catering companies, are promoting Encore and Applause, and AE to a certain extent.

[155] In addition, the evidence did not show that there is a degree of responsibility for investment and management held by the workers. There is no evidence that the workers have to borrow money or invest money in order to fulfill their duties. There is no opportunity for profit in the performance of their duties, since the workers cannot profit from exercising sound management practices in performing their duties. Being paid an hourly rate for a fixed period of time, the workers cannot make a profit in an entrepreneurial sense. Equally, the risk of the workers incurring a business loss is inexistent since the workers' activities do not require taking any financial risk.

[156] Therefore, I am of the view the chance of profit and risk of loss factor plays in the favour of an employment relationship.

(iv) Integration Factor

[157] The integration factor has to be analyzed from the point of the view of the workers. AE is in the business of providing workers to the two catering companies. The workers are providing services to the catering companies through AE. Therefore, the integration factor is met.

(c) OVERALL ASSESSMENT OF THE FACTS

[158] Taking into account the facts, I am of the view that the workers were employed by AE. Although the intention of the workers may have been to be independent contractors, the facts do not substantiate such intention. I will not repeat what I have already stated in the analysis of the factors. The factors assisting in determining if a worker is an employee or an independent contractor, namely the control, the chance of profit and risk of loss and the integration factor all point to an employment relationship. In my view, the workers are not operating a business on their own account. The only parties that are operating a business and bear business risks are AE and the catering companies.

[159] As it was stated by Justice Abella in the recent decision of the Supreme Court of Canada in *Modern Cleaning Concept Inc. v Comité Paritaire de l'entretien d'édifices publics de la région de Québec*,[33] in order to qualify as an independent contractor, a person has to bear the business risk, in the sense of being able to organize his or her business venture in order to make a profit. This is not the situation in these appeals.

[160] Accordingly, the Minister's 2016 decision is confirmed. The appeals of AE and Mr. Gonzalez are dismissed for the period of January 1, 2013 to December 31, 2013.

B. Minister's 2015 and 2016 Decisions – Placement Agency

(1) Relevant Statutory Provisions

[161] Subsection 6(g) of the *EIR*, section 7 of the *Insurable Earnings and Collection of Premiums Regulations* ("*IECPR*")[34] and section 34 of the *CCPR* state as follows:

> *EI Regulations*
>
> 6. Employment in any of the following employments, unless it is excluded from insurable employment by any provision of these Regulations, is included in insurable employment:
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> …

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33 2019 SCC 28.

34 SOR/97-33.

(*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.

Insurable Earnings and Collection of Premiums Regulations

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.

CPP Regulations

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.

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.

[Emphasis added.]

(2) Analysis common to the Minister's 2015 and the Minister's 2016 decisions with respect to placement agency

[162] Despite the similarities in the *CPP* and *EI* legislations, the legislator has not drafted the placement agency rules in the same manner.

[163] For example, the term "placement agency" is not defined in the *EIR* but it is defined in subsection 34(2) of the *CPPR*. However, Justice Boyle in *Wholistic Child and Family Services Inc. v MNR*, stated that to achieve consistency, the

definition of placement agency found at subsection 34(2) of the *CPPR* can also be applied to the *EIR*.[35]

[164] In addition, the conditions set out in subsection 6(g) of the *EIR* and section 7 of the *IECPR* are different from the conditions found in subsections 34(1) and (2) of the *CPPR*.

[165] Under the *EIR*, a person must have been placed by an agency to perform services for and under the direction and control of a client of the agency. In these appeals, this would mean that AE placed the workers to perform services under the direction and control of either Encore or Applause.

[166] Under the *CPPR*, an individual is placed by a placement agency in employment with or for the performance of services for a client of the agency and the terms and conditions on which the services are performed and the remuneration thereof is paid constitute a contract of service or are analogous to a contract of service. In these appeals, this would mean that the workers would work for the catering companies under a contract of service, if they work under terms and conditions and the remuneration paid constitute a contract of service or are analogous to a contract of service.

[167] In summary, under both legislations the conditions for a placement agency are:

1. The agency is acting as a "placement agency" as defined in subsection 34(2) of the *CPPR*.

2. Pursuant to subsection 6(g) of the *EIR*, the persons placed in employment are under the direction and control of the client of the agency. Pursuant to subsection 34(1) of the *CPPR*, the workers are placed to perform services for the clients of the agency, where the terms and conditions and the remuneration paid for the services performed constitute a contract of service or are analogous to a contract of service.

3. The agency must receive a fee, reward or other remuneration from its client.

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[35] 2016 TCC 34 at para 16 [*Wholistic Child and Family Services*]. See also, *Carver PA Corporation v MNR*, 2013 TCC 125.

4. Under subsection 6(g) of the *EIR*, remuneration has to be paid by the agency. Under section 7 of the *IECPR*, if the agency is paying the remuneration and the other conditions are met, the agency is the deemed employer of the workers.

5. Under subsection 34(1) of the *CPPR*, remuneration has to be paid by either the agency or the client of the agency. If the other conditions are met, the party who pays the remuneration is the deemed employer of the workers.

[168] Conditions 1, 3, 4 and 5 are met.

[169] AE has only one activity and it is the placement of individuals with the catering companies, Encore and Applause. Mr. Silber testified that AE was incorporated with the purpose of being a staffing company. Therefore, the first condition is met.

[170] The catering companies pay AE to provide the workers. Therefore, the third condition is met.

[171] AE pays the remuneration of the workers. Conditions four and five are met.

[172] The only condition remaining is the second condition. The question is whether the workers are under the direction and control of the catering companies under the *EIR* and whether the workers are working under terms and conditions and remuneration that constitute a contract of service or are analogous to a contract of service under the *CPPR.*

(a) MINISTER'S 2016 DECISIONS WITH RESPECT TO THE PERIOD FROM JANUARY 1, 2012 TO DECEMBER 31, 2013

[173] I will start with the Minister's 2016 decisions. I have already found that there is a contract of service between AE and the workers. In light of my conclusion with respect to the workers listed in Schedule A, I do not have to analyze the Respondent's alternative argument that AE is a placement agency. However, I decided to analyze the alternative position of the Respondent as it was fully argued by both parties.

[174] As I have already stated, the only questions left to determine are:

i. for *EIR* purposes, whether the workers are under the direction and control of the catering companies; and

ii. for *CPPR* purposes, whether the workers provide services to the catering companies where the terms and conditions and the remuneration constitute a contract of service or are analogous to a contract of service.

(i) Whether the workers were under the direction and control of the catering companies pursuant to subsection 6(g) of the *EIR*

Wait staff

[175] Under the *EIR*, AE will be found to be a placement agency if the wait staff are working under the direction and control of the catering companies.

[176] In my view, the wait staff are not under the direction and control of the catering companies. The Respondent argues that representatives of the catering companies often attend large events and can direct and control the wait staff at the events. I do not agree. Mr. Silber testified that the representative of the catering company attends the event mainly for marketing purposes. This also has the benefit of reassuring the end user since the latter has worked with the sales representative in the preparation of the event. Ms. Kirsch, who acted as a sales representative for Encore, testified that it was not her role to direct or control the workers while she attended the event as a sales representative. If the end user was not satisfied and he or she felt that something needed to be corrected, Ms. Kirsch would advise the AE supervisor, who would take care of correcting the problem. Ms. Kirsch stated that she would not directly correct a server. In my view, the presence of the sales representative at events does not amount to the level of direction and control over the workers that is required by subsection 6(g) of the *EIR*.

[177] In addition, it is the AE booking coordinator, not the catering companies, who gives the instructions of the supervisors for the events. The evidence does not establish that the servers and the bartenders have much contact with the catering companies. It is the AE supervisor, not the catering companies, who is responsible for running the event. For the smaller events, it is the AE booking coordinator, not the catering companies, who sends the information package to the wait staff. In his argument, counsel for the Respondent admitted that the wait staff are under the

control of AE, and not the catering companies, with respect to the Minister's 2016 decisions. He stated as follows when addressing the wait staff:[36]

> Now, the remaining workers, I think the evidence suggests that they're under the control of the appellant, AE, rather than Applause and Encore. First, it's AE that arranges with the workers to accept shifts. The instructions, such as the timing and description of the event, are sent from AE to the workers.

[178] Based on the above analysis, I find that the catering companies did not exert the requisite direction and control over the wait staff. Accordingly, AE was not a placement agency under the *EIR* provisions for the wait staff.

[179] Since this was argued by the Respondent as an alternative argument, this finding is only applicable if I was wrong in finding that there was a contract of service between AE and the wait staff pursuant to paragraph 5(1)(a) of the *EIA*.

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[36] Transcript, Volume 5, p. 38, line 3.

Chefs

[180] I find that the situation is different with respect to the chefs. The chefs are employees of the catering companies and workers for AE. The chefs remain under a continuum of control when moving from their jobs at the catering companies to their jobs with AE. It starts with the chefs being hired by the Head Chef of the catering companies. The Head Chef of the catering companies also creates the work schedule for the chefs for both the catering companies' shifts and for shifts at the events. In addition, the Head Chef selects the chefs who will work at the events and the role of the chefs at the events. The chefs start to carry out their duties in the kitchen of the catering companies under the control of the Head Chef and they continue working under the control of Head Chef at the events. The evidence shows that during the events, the Head Chef has the ability to direct and control the chefs. In addition, some of the chefs are required to transport the food from the catering companies' kitchen to the event in vans owned by the catering companies. The Head Chef notes the time worked by the chefs at events and AE pays the chefs in accordance with the timesheets prepared by the Head Chef. At both the small and large events, the chefs are required to plate the food exactly as decided by the catering companies. To that end, pictures that demonstrate how the meals have to be plated are available at the events. In addition, the chefs must wear a chef coat with the logo of the catering companies.

[181] In light of the above evidence, the chefs are under the direction and control of the catering companies while working at events. AE acts as a placement agency, and accordingly, AE is the deemed employer of the chefs, since the chefs are remunerated by AE.

[182] Since this is an alternative argument of the Respondent, this finding is only applicable if I was wrong in finding that there was a contract of service between AE and the chefs pursuant to paragraph 5(1)(a) of the *EIA*.

(ii) Whether the workers provide services to the catering companies where the terms and conditions and the remuneration constitute a contract of service or are analogous to a contract of service pursuant to subsection 34(1) of the *CPPR*

Wait staff

[183] With respect to the *CPPR*, the question is whether the wait staff are performing their services for a client of the agency where the employment is

performed or the services are performed under terms and conditions and the remuneration paid constitute a contract of service or are analogous to a contract of service between the wait staff and the catering companies.

[184] The Respondent takes the position that the intention of the parties should not be considered when applying subsection 34(1) of the *CPPR* since the provision does not only require a contract of service; the provision can also be satisfied if terms and conditions are analogous to a contract of service. However, AE argues that I must consider the intention of the parties to be independent contractors in applying subsection 34(1).

[185] I agree with the Respondent. Subsection 34(1) of the *CPPR* refers not only to a contract of service. Subsection 34(1) also refers to something analogous to a contract of service, namely when the terms and conditions and the remuneration paid are akin to a contract of service. In addition, the intention does not have to be taken into account in light of the wording and purpose of subsection 34(1). Subsection 34(1) is a deeming provision. It deems either the agency – AE – or the clients of the agency – the catering companies – to be the employer. This determination depends on who pays the remuneration. It would be difficult to find that there was an intention for a worker to be an independent contractor vis-a-vis a third party, namely the client of the agency. Under subsection 34(1) of the *CPPR*, the working relationship that is required by the Court to be analyzed is between the wait staff and the catering companies.

[186] That said, in the event that I am wrong in interpreting these provisions, I have decided for the purpose of my analysis to take into account the intention of the parties. With respect to the wait staff their intentions were to be independent contractors.

[187] With respect to the control factor, I have determined in my analysis that the evidence shows that the catering companies do not have the ability to control the wait staff. This factor does not militate in a favour of a contract of service or something analogous to a contract of service between the catering companies and the wait staff.[37]

[188] The tools factor is not an important factor for the wait staff. Encore does not require the wait staff, except the bartenders, to bring their own tools. During the

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37 See my reasons at paragraphs 98 and following.

Applause events, the tools used by the wait staff are provided by Applause due to kosher laws. Accordingly, the tools factor is a neutral factor.

[189] Regarding a chance of profit or a risk loss, for the reasons that I already explained above, the wait staff do not have a chance to profit or incur a loss. The wait staff do not bear the business risk.[38] Therefore, this factor points to an employee relationship between the wait staff and the catering companies.

[190] With respect to the integration factor, the wait staff do not form part of the catering businesses.

[191] In my view, for subsection 34(1) of the *CPPR* to apply, the client of the agency needs to have control over the workers who have been placed by the agency to perform services. How could a contract of service exist between the wait staff and the catering companies if the later do not have control over the wait staff? This is why I find that the language of the subsection 6(g) of the *EIR*, which states, "[…] to perform services for and under the direction and control of a client of the agency […]" is better suited in the context of a placement agency than the language used in 34(1) of the *CPPR*. In my view, to be a placement agency, the people placed to perform services have to fall under the control of the client of the agency. In the appeals at bar, in trying to achieve some consistency between the legislations and still respecting the language of subsection 34(1), I will give more weight to the control factor. The catering companies do not have control over the wait staff and taking into account that the wait staff are not integrated into the catering companies, I find that AE is not a placement agency. Accordingly, AE is not deemed to be an employer of the wait staff under subsection 34(1) of the *CPPR*.

[192] Since this was argued by the Respondent as an alternative argument, this conclusion is applicable only if I was wrong in deciding that the wait staff are employees of AE under a contract of service pursuant to paragraph 6(1)(a) of the *CPP*.

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38 See my reasons at paragraphs 143 and following.

Chefs

[193] The circumstances are different in respect of the chefs. I have already found that the chefs intended to be independent contractors.

[194] With respect to the control factor, the chefs are under the control of the catering companies for the same reasons that I have mentioned under my analysis with respect to the *EIR* provisions on placement agency.[39]

[195] With respect to the tools factor, for the kosher events, the tools and the larger equipment such as stoves and fridges are provided by Applause. Encore also provides the chefs' tools and the larger equipment. Even if some chefs use their own knives at Encore's events, this is a matter of preference; it is not a requirement. Accordingly, the tools factor with respect to the chefs points to an employee relationship between the chefs and the catering companies.

[196] In addition, for the reasons that I have already stated, the chefs cannot make a profit or incur a loss in an entrepreneurial sense. Therefore, this factor points to an employee relationship between the chefs and the catering companies.

[197] The chefs are also clearly integrated in the business of the catering companies.

[198] In light of these factors, a contract of service existed between the catering companies and the chefs. Therefore, AE was a placement agency with respect to the chefs. In addition, since AE paid the remuneration of the chefs, it is deemed to be the employer of the chefs pursuant to subsection 34(1) of the *CPPR*.

[199] Since this was argued by the Respondent as an alternative argument, this conclusion is applicable only if I was wrong in deciding that the chefs are employees of AE under a contract of service pursuant to paragraph 6(1)(a) of the *CPP*.

(b) MINISTER'S 2015 DECISIONS WITH RESPECT TO MS. SINCHI AND MS. RUBIO FOR THE PERIOD OF JANUARY 1, 2012 TO DECEMBER 2, 2013

[200] The Minister only relied on the placement agency provisions for the 2015 decisions in respect of Ms. Sinchi and Ms. Rubio.

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39 See my reasons at paragraph 180.

(i) Whether Ms. Sinchi and Ms. Rubio were under the direction and control of the catering companies pursuant to subsection 6(g) of the *EIR*

[201] Ms. Sinchi testified at the hearing but Ms. Rubio did not. Ms. Sinchi did not sign an independent contractor agreement. She was under the impression that she was an employee of Applause, not AE. At first glance, this is somewhat surprising since she received her paycheques from AE. However, taking into account that the corporations are related, that Mr. Silber plays an active role in all three corporations and the fact that Ms. Sinchi had to wear an apron with logo of Applause, I understand why she was confused about the situation. Ms. Sinchi did not sign an independent contractor agreement. It was clear from the evidence that Ms. Sinchi's intention was to be an employee and not an independent contractor.

[202] Ms. Sinchi worked as a server and supervisor for AE. Ms. Sinchi stated that she was working under the control of Ms. Pumarino, who was employed by Applause as a banquet manager.

[203] Ms. Sinchi's testimony was that Ms. Pumarino was an extremely detail-oriented and strict person. She gave Ms. Sinchi directions on every aspect of the work and how the work needed to be done. However, the evidence showed that Ms. Pumarino worked for Applause for only five months, from the period of July 2012 to November 2012. Mr. Silber stated that the other banquet managers did not operate in the same manner as Ms. Pumarino. He added that it is not the role of a banquet manager to control the supervisors hired by AE. Despite this, Ms. Pumarino was an employee of Applause and she was also the one who hired Ms. Sinchi. Some authority had to be given to her by AE. The evidence establishes that Ms. Sinchi was clearly under the direction and control of Ms. Pumarino from the period of July 1, 2012 to November 30, 2012. Accordingly, for this period, AE acted as a placement agency with respect to Ms. Sinchi. AE was the deemed employer of Ms. Sinchi, as it remunerated Ms. Sinchi.

[204] With respect to the remaining period in 2012 and up to December 2, 2013, Ms. Sinchi's evidence was not clear. She did not remember working for Encore as a server. In my view, the finding that I made with respect to the wait staff regarding the Minister's 2016 decisions pursuant to subsection 6(g) of the *EIR*

applies to Ms. Sinchi, such that it was AE, not the catering companies, that directed and controlled the work of Ms. Sinchi.[40]

[205] Accordingly, Ms. Sinchi was in insurable employment from the period of July 1, 2012 to November 30, 2012. For the remaining period in 2012 and up to December 2, 2013, Ms. Sinchi was not in insurable employment.

[206] Ms. Rubio did not testify. The finding that I made with respect to the wait staff regarding the Minister's 2016 decisions[41] applies to Ms. Rubio, such that she was under the direction and control of AE, not the catering companies. Therefore, Ms. Rubio was not in insurable employment for the period of January 1, 2012 to December 2, 2013.

(ii) Whether Ms. Sinchi and Ms. Rubio were performing services for the catering companies where the terms and conditions and the remuneration paid constituted a contract of service or were analogous to a contract of service pursuant to subsection 34(1) of the *CPPR*

[207] Neither Ms. Sinchi nor Ms. Rubio had signed an independent contractor agreement.

[208] With respect to the control factor, the evidence established that Ms. Pumarino, as an employee of Applause, had the ability to control Ms. Sinchi but only for the period from July 1, 2012 to November 30, 2012. For the remaining period up to December 2, 2013, Ms. Sinchi was under the control of AE, not the catering companies.[42]

[209] Ms. Rubio did not testify. The finding that I made for the wait staff with respect to Minister's 2016 decisions on control applies to Ms. Rubio. As such, Ms. Rubio was not under the control of the catering companies.

[210] With respect to the tools factor, Encore did not require any tools from the wait staff. With respect to the kosher events, the tools were provided by Applause. In my view, the tools factor does not play an important role and is neutral.

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40 See my reasons at paragraphs 176 and following.

41 See my reasons at paragraphs 176 and following.

42 See my reasons as to why the wait staff including the supervisors where under the control of AE in my reasons under the heading Minister's 2016 decisions at para. 98 and following - Level of Control.

[211] With respect to the chance of profit and risk of a loss, as I have already explained in my reasons for the wait staff, Ms. Sinchi and Ms. Rubio did not bear any business risk.[43] Therefore, this was more akin to an employment relationship.

[212] With respect to the integration factor, Ms. Sinchi and Ms. Rubio were not integrated in the business of the catering companies.

[213] For the reasons that I have already mentioned in my reasons for the 2016 decisions with respect to subsection 34(1) of the *CPPR*, the control factor plays a major role in determining if the conditions for a placement agency are met.[44]

[214] Neither Ms. Sinchi nor Ms. Rubio was under the control of the catering companies, except for a period of five months where Ms. Sinchi was under the control of Applause. In addition, neither Ms. Sinchi nor Ms. Rubio was integrated into the business of the catering companies.

[215] Therefore, I find that for a period of five months, namely July 1, 2012 to November 30, 2012, Ms. Sinchi was under the control of Applause. For the remaining period, Ms. Sinchi was not in pensionable employment. Ms. Rubio was not in pensionable employment for the period of January 1, 2012 to December 2, 2013.

VI. Disposition

[216] The appeals of AE and Mr. Gonzalez with respect to the Minister's 2016 decisions for the period of January 1, 2013 to December 31, 2013 are dismissed.

[217] The appeals of AE with respect to the Minister's 2015 decisions are allowed, except for Ms. Sinchi, where the Minister has to consider that Ms. Sinchi was in insurable employment pursuant to subsection 6(g) of the *EIR* and in pensionable employment pursuant to subsection 34(1) for the *CPPR* for the period of July 1, 2012 to November 30, 2012.

Signed at Ottawa, Canada, this 17th day of May 2019.

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43 See my reasons at paragraphs 143 and following.

44 See my reasons at paragraph 191.

"Johanne D'Auray"

D'Auray J.

SCHEDULE A

Appendix A
Re: AE HOSPITALITY LTD.
JEFF B ABBOTT
CRAIG S ADAMS
FRANCES AGLIALORO
FRANCISCO AGUILAR
MANOJ G AMARASINGHE
MICHAEL AMATULLI
ROSE AMORE
JENNIFER ANDERSON
STEPHANIE ANDRADE
MIGLOLA ANILLO RADA
ANNETTE ARCHAMBAULT
ROSALIND ASMAH
ROMAN AUQUILLA
BRYAN M BAILLIACHE
RAMANDEEP K BAINS
THANANJAN BALACHANDRAN
DAVID T BEAULIEU
HECTOR BEDOYA ARANGO
REBECCA BELTON
ADAM BERGER
DAVID BERHOLZ
ADRIAN R BIRCH
NICHOLAS BOLTON
OKSANA BONDARENKO
LAUREL BOWEN
TALLY BROOKS
CLEO BROWN
JOSHUA BROWN
LINDSAY BROWN
ALICIA CASTRO
MARVIN ROQUE CAYANAN
SUSAN CHANG
GIA HUE CHAU
PATRICK WAI FOR CHENG
KATHLEEN CHEUNG
LUCAS CHIMISKI
NADIA COOK
MARISSA ZINNI
VITOR COSTA
CATHERINE CRAMER
CHARMAINE M D'SILVA
DANIELLE DA SILVA
SAHAR DOROODGAR JORSHERY
PATRICK DEAN

ROVINHOOD DELOS REYES
GIOVANNI DIPINTO
QUINCY DONENFELD
DEIGHTON DUBLIN
PETER DUONG
EDDIE ELIZAGA
PATRICK EVANGELISTA
ANDREA FIGUEIREDO
ELVIRA FILIPCHUK
RAMONA MILLER
DESMOND FRANCIS
ALEXANDRE FRANKLIN
MICHAEL FUNG
STEVEN FUNG
JAGATH GAMAGE
JENNINE GASKIN
MAKSYM GAVRYLYUK
DWAYNE GAYLE
MATTHEW GELOSO
ROBERT GIANCOLA
JESSE GILMOUR
ANH THU GIVENS
TIBOR GOCSAL
ELLA GOLD
ROMEO GOMES
OMAR GONZALEZ
NATALIE GOR
DARRIN J GREEN
BRANDI L GREENWOOD
DIANA GUERRERO
ERNESTINA GUTIERREZ
FREDDY GUZMAN
MOJTABA HADDADIAVALBEJESTANI
AMANDA HAGERMAN
KELLI HARDING
COLIN HATCHER
EVA HAYES
ALI HEJRIPOUR
SEBASTIEN HERVE
NEIL HIMMEL
DEREK HOLLAND
KATHARINE HOLLAND
ANDRE HOOPER
LOIS LIU
MOHAMMED N ISLAM
KEITH JAGLALL

KELSEY JOHNSON
ALYSSA JOHNSTON
JENNIFER JOHNSTON
MARIA JULES
KAJANDRAN KANAGAVINAYAGAM
TOMAS KARGOL
MARIA KARPIK
STEPHANIE M KERZNER
ROBYN KIRSCH
LIVIA KNAPIC
MICHAEL KOBAYASHI
DANIEL KRONGH
SHARON ANDREA KRONGH
MELANIE E KUSHNER
SHIRLEY LAM
THOMAS LAM
TU ANH LAM
LAURIE LAPID
AMBER LAURIE
MEGAN LEACH
WEN-TING IRENE LEE
LUIS A LEMUS ORTIZ
IRENA LIBER
RENATA LIMA
SIMON LIOTARD
JEFFREY LIU
SANDRA LOPEZ
AMY M LOWES
LAUREN MACDONALD
BRUCE MACKLIN
RUSTICO MANALO
THANUSIKKANTH MANOGARAN
MARINA MARTINS
CARLOS M MARTINEZ
ANASTASIA K MARUNCHAK
PATRICK MARUSINEC
RADICA MATTHEWS
KADIAN CHANEAL MAYNE
NADIA MCFARLANE
LAHANNA R MCFARLANE
CARMEN MEDINA
ABRAR AHMED MEHTER
EVELYN C MENA ZURITA
ANA MENDEZ
ALEKSANDRA MIHAJLOVIC
MARIO MIJACEVIC

LISA MITCHELL
VICTORIANO BASTES MODESTO
ABDUL AZEEZ MOHAMED
DIEGO MORAIS
GARRETT S MORAN
OMAR RAY MICHAEL MURRELL
RACHEL NAFTOLIN
UDAYA KUMARA NILWELLA GAMAGE
FRANCIS J O'TOOLE
JUAN PABLO OSORIO LOPEZ
CHEN OUYANG
ALEJANDRO PAEZ
MARIJA PAMIC
LEO PAMULAKLAKIN
DAVID PARADIS
FRANCISCO PARREIRA
ROSANA PAULAS
JULIA PAVLENKO
MARKO PAVLOVIC
SAHIRA PEREZ
SONYA PETKOV
CORTLAND PICKERING
ROSANNA E PIZZO
JOSE B PRICE
RUPINDER M QUIAMBAO
MEAGHEN QUINN
JEAN P QUINTERO
ABDALRAHMAN HNEIHEN
CHANDRASEGAR RAJARATNAM
ERIC ROBERTSON
ALIONUSKA RODRIGUEZ
CLAUDIA RODRIGUEZ
LISA ROOT
LORENA RUBIO
LUIS A RUIZ
NATALIA SAKHNOVA
SABRINA SALVATORE
MUNA SAMATER
DENVER SAMERESINGHE
RICARDO O SANCHEZ
SANRAJ BALACHANDRASRI
KAYLIE SCHWARTZ
OLHA SENKIV
ELIZABETH SIERRA
RYAN SILBER
GLADYS SINCHI

RAJKUMARAN SRITHARAN
LIANE SLYFORD
MICHELE SAMMARCO
BRANDON SPEARS
SHANNON STEINWALD
BEATA M STRZYZEWSKA
BRIAN SUFFOLK
JESSICA SWITZER
SVETLANA TABOUEVA
MARI TAKEDA
STEPHANIE NY HONG TANG
MARY CLAIRE THOMPSON
ANNA TIKHONOVA
ZINZI TOUSSAINT
RADOMIL TREFNY
ROCIO TUPAC YUPANQUI
JAMES TURNBULL
LYNNE UPPER
VAN BOI TRAN
MARIA E VELA
KEVIN WAILOO
TASHA WALDRON
JARED WALL
SHALINI WANASINGHA
CHRISTOPHER T WEYMAN
STEFANI Y WIDYA
SANTANA WISDOM
CHARLES R WONG
TIN CHAK ERICE WONG
JING XIE
DANIELLE YOO
DORA ZGANJER
A EJIGU
C QUINTERO
T HAYES
and B TAHLI

CITATION:	2019 TCC 116
COURT FILE NO.:	2015-1919(EI), 2015-1920(CPP), 2016-3768(EI), 2016-3767(CPP), 2016-3782(EI), 2016-3781(CPP)
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 3, 4, 5 and 6, 2018, and October 1, 2018
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	May 17, 2019

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