

Dockets: 2019-780(EI)
2019-781(EI)

BETWEEN:

ENTREPRISE AGOSTINO INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence on October 8, 2019,
at Montreal, Quebec

Presiding: The Honourable Rommel G. Masse, Deputy Judge

Appearances:

Counsel for the appellant: M^c Kathy Kupracz
Counsel for the respondent: M^c Julien Dubé-Sénécal

JUDGMENT

The appeal filed under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed on the grounds that the work done for the appellant by Stéphane Agostino, from January 1, 2015, to December 31, 2016, and the work done for the appellant by Fabio Agostino, from January 1, 2016, to December 31, 2016, did not hold insurable employment under the Act.

Signed at Kingston, Ontario, this 14th day of January 2020.

“Rommel G. Masse”

Deputy Judge Masse

Citation: 2020 TCC 3
Date: 20200114
Docket: 2019-780(EI)

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REASONS FOR JUDGMENT

Deputy Judge Masse

[1] This case involves appeals filed by the appellant, Entreprise Agostino inc. (hereinafter the “corporation”) against the decisions made by the Minister of National Revenue (hereinafter the Minister) dated November 30, 2018, confirming the determinations dated April 20, 2018, under the *Employment Insurance Act*, S.C. 1996 c. 23, as amended (hereinafter the Act). As a result of these determinations, the following was concluded:

Stéphane Agostino (docket 2019-780(EI)), was employed in insurable employment with the corporation during the period from January 1, 2015, to December 31, 2016, and

Fabio Agostino (docket 2019-781(EI)), was employed in insurable employment with the corporation during the period from January 1, 2016, to December 31, 2016.

[2] The two files were heard on common evidence. Henceforth, Stéphane and Fabio are designated as “the workers” or the “cousins.”

Issue

[3] It is not disputed that there was a contract of employment between the workers and the corporation. It is also not disputed that the corporation and the

workers were not dealing at arm's length. The only issue is whether the workers held insurable employment at the corporation during the periods at issue. Deciding this question entails determining whether it was reasonable for the Minister to conclude that, for each worker, a similar contract of employment had allegedly been entered into with the workers in an arm's length relationship, having regard to all the circumstances, including the remuneration paid, the terms and conditions of employment, the duration and the nature and importance of the work performed, and that, consequently, the workers are deemed not to be dealing with the corporation at arm's length under paragraph 5(3)(b) of the Act.

Statutory provisions

[4] The relevant provisions of section 5 of the Act state the following:

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;

Excluded employment

5(2) Insurable employment does not include

...

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

5(3) For the purposes of paragraph 2(i),

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

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to

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

[5] The relevant provisions of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), stipulate the following:

Arm's length-

251(1) For the purposes of this Act,

- a) related persons shall be deemed not to deal with each other at arm's length;
- b) a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition of *trust* in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to subclauses 248(25)(b)(iii)(A)(II) to (IV); and
- c) in any other case, it is a question of fact whether persons not related to each other are, at a particular time, dealing with each other at arm's length.

Background

[6] The corporation is a legal person headquartered at 3020 Lévesque Blvd. East, in Laval, Quebec. The corporation operates a residential and commercial building rental and management company. The shareholders of the corporation consist of brothers Miguel, Sebastiano and Vincenzo Agostino, as well as the Agostino Family Trust (hereinafter the "Trust"). Miguel and Sebastiano Agostino are the directors and officers of the corporation. The worker Stéphane is the son of Miguel and Sebastiano's nephew. The worker Fabio is the son of Vincenzo and the nephew of Miguel and Sebastiano. Stéphane and Fabio are both beneficiaries of the Trust.

[7] Miguel Agostino testified. He was a credible witness. He resides in Duvernay, Laval, in Quebec. He has civil engineering training and earned an MA in Project Management in 1975. I accept the following from his testimony.

[8] Since 1990, his sole task has been managing the family business—what is today the corporation. The family business was established by his parents in the early 1980s. His father worked in construction and, during the 1980s, the family business acquired old buildings to renovate and later lease them. In 2011, the family business was incorporated. It was at this time that the Trust was also incorporated and became a shareholder of the corporation. Today, the corporation owns five residential buildings, including approximately 1,000 units, as well as three small commercial buildings. The corporation employs approximately thirty employees, including direct employees and subcontractors.

[9] The corporation is strictly a family business intended to remain in the hands of family members. The shareholders want to preserve the family nature of the corporation and they also want to ensure the well-being and future of their children. In my view, this is family patrimony. Thus, the Trust was incorporated to benefit the family's children and to prepare them to take over when the officers—Miguel and Sebastiano—decide to retire.

[10] Given the family ties binding them, a significant relationship of trust exists between the workers and the shareholders. Thus, the Trust was put in place to integrate the workers into the business. The workers are two of the Trust beneficiaries and, in the future, they will be asked to become shareholders, officers and directors of the corporation. Integrating the workers into the business was done with this goal in mind.

[11] Stéphane and Fabio are building managers. They are each responsible for a building. Stéphane manages a building with 300 apartments and Fabio manages a building with 206 apartments. The workers exercise nearly absolute discretion and autonomy in terms of managing their building. They are responsible for negotiating all leases, ensuring that rents are collected, and arguing cases before the Régie du logement, etc. They hire all the employees and subcontractors, such as plumbers and electricians. They decide when work is required; for example, renovations. The workers rarely rely on the corporation's officers. They make approximately 90% of all decisions related to the management of their building. The officers only intervene when refinancing negotiations arise, which is rare. The last time there was a refinancing was ten years ago.

[12] The workers are not supervised and receive no direction in carrying out their duties and they benefit from substantial autonomy. This autonomy is certainly higher than that of a standard building manager, corporation employee, who is not a family member. The officers leave full discretion in the hands of the workers. As

an example of autonomy, Miguel described a major project involving Stéphane's building—replacing the elevators, a project costing approximately \$600,000. Stéphane undertook all negotiations and steps to carry out this project, with no interference from the officers. The same holds for renovation projects at Fabio's building. The workers had no expense limits, but it was reasonably expected that there would be shareholder discussions when it came to costly major projects.

[13] The workers and Miguel met daily every evening for dinner at a restaurant. Discussions were held and the workers actively participated in corporate decision-making together with the corporation's officers. All decisions were made by consensus.

[14] Miguel was unaware of the workers' work schedules. They set their own schedules. They took vacation at their discretion at their desired time. They did not maintain a log of hours worked. According to Miguel, the two cousins work between 30 and 50 hours per week. However, they must be available 24/7. Emergencies always arise, such as fire alarms, water leaks or power or mechanical outages, etc., which require them to work in the evenings, on weekends, or even during vacation—even if they are out of the country. They must stay on the job until the emergency is resolved. So, they have to work very long hours based on the corporation's needs. They are not paid for overtime hours.

[15] They both have approximately four weeks of vacation. They do not request permission to take vacation; they simply have to notify Miguel when they will be away on holidays.

[16] The workers earn the same salary, which is determined by Miguel. The salary increases above the normal range once the workers acquire more experience and responsibility. They received substantial salary increases in the range of 10% each year; more than the other employees. They told us that their salary was almost double that of the person who managed the building before them; that person was more or less a secretary and did not exercise discretion as the workers did. The corporation assumed no costs related to training the workers, but it would probably do so, at the workers' request. The workers have access to all of the corporation's financial information if they wish. They hold key positions in the corporation and the relationship of trust is very important. According to Miguel, it is extremely important to have a family member in each building to ensure company efficiency. It is not a question of a non-family member holding a significant position such as those of the workers.

[17] On cross-examination, Miguel explained to us that the workers hire all the employees related to their building, such as the secretaries, custodians, cleaners, painters, plasterers, electricians, etc. Other family members work at the corporation; thus, the family aspect is very important. Miguel concurred that the corporation issued T-4 slips to the workers for the 2016 tax year in the amount of \$55,000. This amount allowed the cousins a decent standard of living. This salary is more significant than that of a person who would hold the same position. According to Miguel, another person, with a lot of experience, would be paid \$35,000 or \$40,000. Today, the workers earn approximately \$66,000 per year. They are paid a good salary because they are family. He agreed that some employees received T-4 slips in the range of \$52,000, but this was for a couple who acted in the capacity of custodians, residing in an apartment in a building. The cousins had to go to the buildings they manage every day. The cousins did not sign expense cheques, even though they are the ones who negotiated major expenses and approved the invoices. The workers fully handled projects valued from \$20,000 to \$30,000. Major projects, such as the elevator project costing \$600,000, rarely occur. However, Stéphane had great autonomy regarding this project. The workers discussed projects of this scope with Miguel and Sebastiano—it is certainly reasonable to discuss them with the officers. When family discussions occurred regarding the corporation, decisions were made by consensus. Although Miguel and Sebastiano had veto rights, they did not exercise this option.

[18] Fabio Agostino testified. He was a credible witness. He received his training in commerce, specializing in finance. He earned a bachelor's degree at Concordia University in 2001. He carved out his professional career before he began working for the corporation in 2015. He testified that he was the one who determined his daily schedule. No one manages him in his responsibilities and no one supervises his work. He was responsible for making the decisions affecting management of the building he was in charge of. He possessed very broad autonomy when he undertook major renovation or repair projects of his building costing thousands of dollars; for example, changing the building's plumbing, an outlay in the range of \$20,000 to \$30,000. He was not required to ask his uncles' permission. He was never required to obtain his uncles' approval before embarking on such projects. The corporation's decisions were all made by the family, by discussing problems and arriving at a consensus. His uncles, Miguel and Sebastiano, really did not have any veto rights. His work schedule was flexible and he decided when he should work. He had no set hours. During the period at issue, he worked approximately 40 to 50 hours per week. However, he had to be available 24/7 to respond to emergencies. He is not paid for overtime.

[19] He has a cellphone—a necessity to perform his work. The corporation paid for the cellphone fees. He gets four weeks of vacation and takes them when he wishes. He simply has to notify his cousins when he is taking them. He is not obliged to seek approval from anyone to be absent from work, but prudence dictates that he notifies his cousins accordingly. In 2015, he earned a salary of \$47,000 and today it is at \$71,500. He has access to the corporation's financial information at all times.

[20] On cross-examination, he indicated that he received emergency calls at all hours. In such a case, he handled the emergency even if he was out of the country on vacation, because it was a family business. Since 2015, he has hired all his staff, be it full or part time, such as secretaries or cleaners. He also hires all subcontractors for building renovations or repairs. He also fired employees when necessary. Even though the corporation paid the employees, he negotiated the salaries or compensation contracts.

[21] Stéphane Agostino also testified. He was a credible witness. He was trained as an electrical engineer and received his bachelor's degree at Concordia University in 2015. He began working for the family business in September 2007. He has held the position of building manager since 2015. He essentially performs the same work as Fabio. Like Fabio, he is a beneficiary of the Trust. He said that, some day, the workers will continue the business when the uncles are no longer able to do so. The corporation is truly a family business.

[22] He has very thorough knowledge of the building he is responsible for and knows precisely what he has to do to ensure proper management of that building. He exercises almost full autonomy in managing that building. He negotiates the rent increases for his building. In general, he handles the Régie du logement cases for the corporation. He negotiates all renovation and repair contracts. He is never obliged to obtain approval from anyone prior to proceeding with major renovation or repair projects. In the past, he managed a very major renovation project, i.e., replacing the building's elevators, a project that cost approximately \$600,000. Of course, he discussed it with his father and uncle, which was prudent. However, he made all decisions regarding the project. In general, decisions regarding management of the corporation were made by consensus among the family members.

[23] Stéphane did not really have a work schedule. He worked when he wanted to, depending on the requirements of his position. He estimated that he worked between 40 and 60 hours a week, but he clearly did not maintain a log of hours

worked. Like Fabio, he has to be available 24/7 to respond to emergency situations. He was not paid for overtime hours. Even when he is out of country on vacation, he has to manage the building's affairs.

[24] As regards his salary, it was not important to him. It was understood that he would work for the corporation and that he would have a salary. He earned the same salary as Fabio. Quite often, he paid for minor expenses out of his own pocket, such as a socket, as he knew that it was for the family. He did not ask to be reimbursed even though he was entitled to do so. He did not receive any paid training from the corporation. He had access to the corporation's financial information at will. He told us that the other employees were not authorized to make major decisions as the workers could. Stéphane would apparently not agree to work within the same parameters for another employer. He did not calculate the overtime he worked, as he works for the family. The workers help one another out when needed if the other is unavailable.

[25] Only one witness testified on behalf of the respondent. Mathieu Cooper is an excise duty officer for the Canada Revenue Agency. Over time, he became a determination officer. He received insurability requests and his role was to review the file and decide whether the employment was insurable.

[26] On February 8, 2018, he received a request regarding Fabio. He contacted the parties and gathered the information he felt was necessary. He then prepared a report which appears at Tab 10 of Exhibit I-1. In determining whether the employment was insurable, despite the non-arm's length relationship, he considered the four criteria under the Act to determine whether Fabio was engaged in insurable employment, which are as follows: 1) remuneration; 2) terms and conditions of employment; 3) the duration of the work performed; and 4) the nature and importance of the work performed.

Income

[27] Mr. Cooper stated that Fabio worked Monday to Friday, approximately 40 hours a week. His salary in 2016 was \$55,000. He received a salary increase of approximately 8% every year. He received a \$10,000 increase in 2017, which represents an 18.18% increase. In Mr. Cooper's opinion, the increases are similar to the other employees. Miguel, Stéphane and Fabio do not agree with this claim. According to Mr. Cooper, the salary paid is comparable to market rates. Based on the Emploi-Québec website, individuals engaged in the real estate management profession earned an income of \$15.00 to \$32.22 an hour between 2015 and 2017.

Presuming that Fabio worked an average of 40 hours per week, he earned the equivalent of \$31.25/hour. Therefore, according to Mr. Cooper, his income falls within the range, but certainly at the upper end of the range. Mr. Cooper is of the view that it is reasonable to conclude that the payer offered remuneration conditions similar to an arm's length employee—Miguel, Stéphane and Fabio disagreed.

Terms and conditions of employment

[28] In his report, Mr. Cooper indicates that Fabio had a work schedule from Monday to Friday and that he worked approximately 40 hours per week based on the business hours of the building where he worked. According to Miguel, Stéphane and Fabio, this is inaccurate; Fabio did not work based on business hours. Fabio was entitled to three weeks' vacation a year. He was not entitled to any bonuses and had no benefits. He was not financially involved in the corporation and did not provide any services without compensation. Mr. Cooper determined that the terms and conditions of employment reflected what one would find for an unrelated employer: i.e., work performed at the payer's premises during the corporation's hours of operation. Moreover, the responsibilities of the worker were proportional to his experience acquired over the years. Thus, it is reasonable to conclude that the payer allegedly offered similar employment conditions to an arm's-length employee. Miguel, Stéphane and Fabio did not agree.

Duration of the work performed

[29] The worker's period of employment corresponded to the payer's operational requirements. Mr. Cooper determined that the duration of the work was reasonable.

Nature and importance of the work

[30] The tasks and nature of the work are comparable with those of the business's other employees; however, I want to emphasize that the other building managers employed by the corporation are also cousins. Mr. Cooper is of the view that the worker's employment and the time he devoted to it are essential to the smooth functioning of the business. The worker's employment has existed for a long time and if the worker was unable to perform his tasks, the payer had to hire someone else to replace him. However, according to Miguel, the Agostino family only wanted family members in such a position, not an unrelated person, because it was extremely important that the management of the buildings remain in family hands. Mr. Cooper is of the view that the nature of the work performed is an integral part

of the payer's activities. The nature and importance of the work performed are reasonable.

[31] After analyzing these four criteria, Mr. Cooper determined that the worker and the corporation allegedly entered into a contract of employment similar to as though they had been dealing at arm's length. Therefore, Mr. Cooper found that the work was insurable under paragraph 5(1)(a) of the Act.

[32] In the case of Stéphane, the same analysis was conducted, with the same result. Mr. Harvey from the Agency handled Stéphane's file. Mr. Harvey's report is in Tab 5 of Exhibit I-1.

[33] Mr. Harvey's report indicates that Stéphane worked Monday to Friday, approximately 40 hours per week, but, when necessary, could be called upon to travel for service calls at any time. In 2015, Stéphane earned \$52,000 and in 2016 he earned \$55,000. Similar to Fabio, Stéphane received a \$10,000 salary increase, thereby earning \$65,000 in 2017. According to the Government of Canada Job Bank, individuals engaged in the real estate manager profession earned an hourly rate varying between \$12.00 and \$23.00 an hour, or between \$26,000 and \$28,000 per year on average in Quebec. Stéphane has been employed by the corporation since summer 2007. The hours of operation are between 9:00 a.m. and 5:00 p.m., but these are the administrative office hours. The hours of work are certainly different for building managers such as Stéphane. Stéphane does not have a set work schedule. Mr. Harvey indicated that Stéphane should be on site from 8:00 a.m. to 4:00 p.m. or 5:00 p.m., but it could vary. The schedule was based on current needs. The worker was always "on call" because he had to be available outside of these hours to respond to emergencies. The worker had absolutely no supervision. No one gave him instructions on the work or tasks he had to do; he made all the decisions to carry out the work. He was not accountable to, nor did he have to prepare reports for officers. The payer did not assess Stéphane's work. Stéphane could be absent when he wished without informing the company and without having to be replaced. If he had to be absent for several weeks or during major work periods, the company would not hire another person. The other building managers would share the time needed to take care of his building.

[34] In his report, Mr. Harvey indicated that Stéphane's salary was above average, but was not the maximum paid out on the Quebec market. During the periods in question, Stéphane was the company's best-paid employee, as was Fabio. Stéphane had very wide freedom in terms of his schedule in performing his tasks and his work method. Stéphane and Fabio received arbitrary salary increases

that were raised every year by approximately 8%. Moreover, in 2017, they received an 18% salary increase, i.e., \$10,000 higher than in 2016, whereas the others received their usual increase. Mr. Harvey determined that the terms and conditions of employment do not reflect that of an unrelated employee: namely, an unrelated employee would be supervised more directly, i.e., there would be an activity report or expense tracking, the employee's salary would be lower than that of the worker. The employee would receive no significant salary increase unless justified by their work. Despite all this, Mr. Harvey found that Stéphane held insurable employment.

[35] Mr. Cooper told us that the family context was taken into consideration, yet, in studying his and Mr. Harvey's reports, it is clear that they examined the family context but they granted it little weight. They mainly relied on four statutory factors to draw their conclusions.

Analysis

[36] I begin my analysis by first stating that I accept the testimonies of Miguel, Stéphane and Fabio Agostino. Although Mr. Cooper was also a credible witness, when he made his determination, he had not considered the scope of all the testimonies under oath, which I heard.

[37] In *Légaré v. Canada* (M.N.R.) [1999] FCJ No. 878 (QL), the Federal Court of Appeal describes the respective roles of the Minister and the Tax Court of Canada with respect to the issue of insurability of a worker in a non-arm's length relationship with their employer. The Court instructed us as follows:

[4] The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[38] The role of the Tax Court of Canada judge was clearly explained by Chief Justice Richard in *Denis v. Canada (M.N.R.)*, 2004 FCA 26, where he ruled in paragraph 5 of his judgment:

[5] The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood.

[39] My colleague, Judge Tardif, reiterated this principle at paragraphs 4 to 7 of his reasons for judgment in *F. Ménard inc. v. M.N.R.*, 2009 TCC 208, where he explains:

[4] Thus, if there is no arm's length relationship, the Minister must analyse the file in more detail than a simple verification for the presence of the classic conditions, which are compensation, the performance of work and the relationship of subordination.

[5] He must decide whether the non-arm's length relationship influenced the performance of work; in other words, the analysis must consider whether the work in question was carried out in a manner similar and under conditions comparable to those that would have existed with a person with an arm's length relationship with the employer.

[6] This is unusual in another respect; the case law has established that the Tax Court of Canada does not have jurisdiction to review such a decision when the discretionary power was exercised correctly and lawfully.

[7] In other words, when the discretionary power is exercised responsibly and judiciously, all the relevant facts were taken into consideration and the conclusion is reasonable, the Tax Court of Canada cannot amend the decision, even if the Court does not necessarily agree with it.

[40] The Minister holds discretion. In such a case, the Tax Court of Canada must show judicial deference to the Minister's decision. The person who wishes to challenge the Minister's decision must therefore demonstrate that this power was exercised in an unreasonable manner: *Pérusse v. Canada* [2000] CanLII 15136 (FCA). According to the Federal Court of Appeal, the Tax Court of Canada is justified in amending the decision rendered by the Minister by examining the merits of that decision when it was established, as the case may be, that the

Minister (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, or (iii) took into account an irrelevant factor: see *Canada (Attorney General) v. Jencan Ltd.* (C.A.), [1997] FCJ No. 876 (QL).

[41] It is with these principles in mind that I address the insurability issue of the workers.

[42] The appellant argues that the workers' jobs are excluded from insurable employment under paragraph 5(2)(i) of the Act and that paragraph 5(3)(b) of the Act does not apply. The appellant argues that:

- a. the Minister misunderstood certain facts, by relying on irrelevant, inaccurate or ambiguous factors; and
- b. the Minister failed to consider the relevant facts, in particular, the entire context of the family history.

[43] The appellant asserted that the Minister misunderstood certain assumed facts in the Reply to the Notice of Appeal in making his determinations. On behalf of the appellant, Counsel Kupracz provided a list of erroneous findings of fact in the Reply, which are listed in his submissions:

- a. Paragraph 15b [translation] "The appellant's business hours were from 8:00 a.m. to 4:00 p.m., Monday to Friday," but in reality, the workers had no set schedule and they worked when they wanted;
- b. Paragraph 15e [translation] "Miguel and Sebastiano made important decisions for the appellant," but in reality, all of the corporation's decisions were made based on consensus. I find that the workers actively participated in all decisions made by the corporation. Although Miguel and Sebastiano had veto rights, they did not exercise this option.
- c. Paragraph 15k for Stéphane and paragraph 15l for Fabio: [translation] "the worker received paid training from the appellant"; however, the testimonies of Miguel, Stéphane and Fabio indicate otherwise.
- d. [translation] "the workers' schedule was 8:00 a.m. to 4:00 p.m., Monday to Friday (for Stéphane) and 7:30 a.m. to 4:00 p.m. (for Fabio)" (Paragraph 15k for Stéphane and paragraph 15l for Fabio)—the workers had no work schedule. Their work was done based on the needs of the corporation and the building for which they were responsible.

e. [translation] “the worker had to consult and obtain permission from the appellant for large-scale projects” (paragraph 15x for Stéphane and paragraph 15y for Fabio)—although discussions were held with family members, the workers did not need permission prior to embarking on major projects. Replacing the elevators, at a cost of approximately \$600,000 in Stéphane’s building, and the renovation or repair or plumbing in Fabio’s building, at a cost of between \$20,000 and \$30,000, are examples.

f. [translation] “the worker had to notify the appellant in case of absence” (paragraph 15y for Stéphane and paragraph 15z for Fabio)—the testimonies of Miguel, Stéphane and Fabio indicate otherwise.

g. [translation] “there is no major difference in the working conditions of the appellant’s other employees carrying out work similar to that of the worker.” (paragraph 15dd for Stéphane and paragraph 15ee for Fabio); the appellant’s other employees engaged in similar work did not enjoy the same autonomy as the workers. Moreover, there are many other differences between the workers’ terms and conditions of employment compared to other employees, which I already discussed.

[44] These are not the most serious errors. However, the cumulative effect of the errors interferes with the reasonableness of the Minister’s decisions.

[45] Furthermore, I find that the Minister did not take into account all of the relevant circumstances and misunderstood certain facts in considering the criteria set out in paragraph 5(3)(b) of the Act. As regards the legislative criteria, I would note the following observations.

[46] The corporation paid the workers a good salary. However, the salary did not take into account the constant availability of the workers: 24/7, even while on holidays. The many overtime hours worked by the workers were not recorded, nor compensated. According to the corporation, in an arm’s length relationship, the corporation would not pay such a high salary. In an arm’s length relationship, the workers would not devote their leisure time, their weekends and their holidays to the business. Miguel, Stéphane and Fabio are certain of this.

[47] The workers have worked for the corporation since 2015. They decided to dedicate themselves to the family business and, therefore, they enjoy exceptional job security given the family relationship. They are certain to work for the corporation for a long time, possibly until they retire, as they will take over for Miguel and Sebastiano. They carry out their duties with full autonomy and do not consult the shareholders. They have full discretion in carrying out work undertaken in managing their building and their tenants. They are not accountable to the

corporation and they have no set schedule. The workers actively participate in corporate decisions, as do the shareholders. They have access to the corporation's financial information—an arm's length employee would never have access to this unless they were the accountant. The profitability of the corporation's business is at the heart of the workers' concerns given that they are beneficiaries of the Trust and are intended to assume management of the family business when the officers and directors retire.

[48] In reality, the contract of employment was entered into because of the family relationship between them and for that sole reason. The corporation placed a great deal of trust in the workers, something that it would not do with an unrelated person. According to Miguel, the corporation placed extreme importance on the fact that a family member be a building manager and it is clear that only family members could become building managers.

[49] Having considered all of the evidence as well as the four statutory criteria, I came to the conclusion that the respondent erred in almost completely disregarding the family context surrounding the workers' employment. The family context is an extremely important factor for the corporation and for the workers. The Minister gave very little weight to this factor. The family ties are the reason why the workers were hired and were granted so much autonomy. The corporation exists for the family and the workers' employment, as well as their financial interests, are inextricably connected to the financial interests of the corporation. Mr. Harvey states the following on page 6 of his report:

[TRANSLATION]

The payer indicated that an unrelated person would not have the same conditions as the worker. The person would be supervised in a certain manner, i.e., through an activity report or expense tracking. The person would have a lower salary than the worker, possibly lower than other building managers. The person would surely be paid an hourly wage. The person would surely not receive substantial salary increases unless their work so justified.

Thus, it is clearly evident that the corporation would never have entered into a similar contract of employment with an unrelated person.

[50] In *Dumais v. Canada (National Revenue)*, 2008 FCA 301, Justice Létourneau of the Federal Court of Appeal explained the purpose of paragraph 5(2)(i) of the Act at paragraph 25 of his Reasons for Judgment:

One of the undeniable and undoubtedly laudable objectives of the provision is thus to provide the employment insurance system with protection against claims for benefits based on artifice, fictitious employment contracts or real employment contracts containing fictitious or farfetched conditions: . . . It is in that context that the issue of work that is allegedly unpaid and that is performed while the person performing it is receiving employment insurance benefits arises.

[51] In this case, it is not a question of the workers submitting a claim for benefits based on artifice, fictitious employment contracts or real employment contracts containing fictitious or farfetched conditions. In truth, the opposite is true. The workers held genuine, full-time employment. They had extraordinary job security within the family business and there was no risk that they would be laid-off or fired. I anticipate that they will never find themselves in a position where they will need to submit a benefits claim, as they are beneficiaries of the Trust and, as such, are intended to become shareholders and officers of the corporation. A non-arm's length worker would have no hope of becoming a shareholder unless they invested a significant capital amount in the business.

[52] I find that the Minister completely ignored this very important fact. Having considered the pleadings, all of the evidence and the submissions made by the parties, I am of the opinion that the Minister's decisions are not reasonable in this case. In my opinion, in deciding as he did, the Minister misunderstood certain facts and he also failed to take into account the material facts. In light of all the evidence on record, the Minister should not have rendered the decisions he made. These decisions are not reasonable, given all the circumstances. Consequently, the decisions made by the Minister declaring that Stéphane Agostino and Fabio Agostino held insurable employment are set aside. I find that their employment is not insurable employment.

[53] The appeals are therefore allowed.

Signed at Kingston, Ontario, this 14th day of January 2020.

“Rommel G. Masse”
Deputy Judge Masse

CITATION: 2020 TCC 3

COURT FILE NO.: 2019-780(EI)

STYLE OF CAUSE: ENTREPRISE AGOSTINO INC., AND
M.N.R.

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: October 8, 2019

REASONS FOR JUDGMENT BY: The Honourable Rommel G. Masse, Deputy
Judge

DATE OF JUDGMENT: January 14, 2020

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