

**IN THE MATTER OF A HEARING PURSUANT TO SS.
62.1 AND 66.2 OF *THE LABOUR STANDARDS ACT*,
R.S.S. 1978, c. L-1 (AS AMENDED)**

BETWEEN:

ACANAC INC., MELVIN COHEN, DON
CAVANAGH and LES LORINCZ,

APPELLANTS,

- and -

TOMAS SABAU,

RESPONDENT
(COMPLAINANT)

ADJUDICATOR'S DECISION
August 20, 2012

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

Dates of Hearing: July 10, 13 and 24, 2012

Place of Hearing: Suite 3, 501 Gray Avenue, Saskatoon, SK & Video Conference

Representatives: Gerald Matlofsky, for the Appellants, Acanac Inc., Melvin Cohen, Don Cavanagh and Les Lorincz

Shelley Stretch, Labour Standards Officer, for the Respondent
(Complainant), Tomas Sabau

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I. INTRODUCTION

[1] Wage Assessment No. 4900 (the “Assessment”)–issued pursuant to section 60 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (as amended) (the “Act”) by the Director of Labour Standards (the “Director”) on April 16, 2012–directed the Appellants, Acanac Inc. (“Acanac”), Melvin Cohen, Don Cavanagh and Les Lorincz, to pay \$6,625.13 to the Respondent (Complainant), Tomas Sabau (“Sabau”).

[2] The Appellants appealed the Assessment.

II. THE DISPUTE

[3] The Appellants presented no evidence with respect to and did not challenge the calculation of the Assessment.

[4] Simply stated, the issue at hand is whether Sabau is an employee within the meaning of section 2(d) of the *Act*.

III. FACTS

[5] Normal practice would have called for the Appellants to call their evidence first. However, Sabau offered to call his evidence first. This is not unusual and I decided the hearing could proceed in that manner.

A. RESPONDENT’S EVIDENCE

1. Tomas Sabau

[6] Sabau testified:

- a) Acanac employed him from the first week of September 2009 until the end of August 2010;
- b) the business of Acanac is that of an internet service provider and:
 - i) Acanac employed him as a technical representative; and
 - ii) his duties principally involved answering inbound technical calls dealing with connectivity issues;
- c) he learned about the job at Acanac through an internet advertisement that:
 - i) said Acanac was hiring technical representatives;
 - ii) gave a brief description of the job;
 - iii) did not refer to pay; and
 - iv) asked applicants to send in a resume;
- d) he applied for the job and, after exchange of a couple of e-mails, had a telephone interview during which Acanac advised him of the rate of pay;
- e) he was offered and accepted the job and, at the time of hiring, was given training that involved:

- i) how to meet and greet callers;
 - ii) use of the software that gave access to Acanac's system and billing database; and
 - iii) Acanac's clock system;
- f) Acanac gave no script to use and there was no other training on how to handle a call, however, from time to time Acanac managers would listen in on calls and could provide advice and assistance after a call ended;
- g) he signed an Independent Contractor Agreement ("ICA"),¹ but:
- i) cannot remember when, but says it was toward the end of his employment; and
 - ii) says a person named "Trevor," a supervisor on duty during the morning shift, told him that if he did not sign the agreement, Acanac would fire him;
- h) at the outset, Acanac gave him the option of choosing from two shifts—the morning shift from 8:00 a.m. to 4:00 p.m. and the evening shift from 2:00 p.m. to 10:00 p.m.;
- i) Acanac set these shifts and hours;
- j) he initially chose to work the morning shift and, after approximately two months, began working double shifts;
- k) he worked from home using his own computer and modem—Acanac supplied a VOIP

¹Exhibit E-1

adapter and software;

- l) he would access Acanac's client billing database from time to time for information to help with his calls, but he could have done his job without it;
- m) in order to do his job, he would "clock in" using Acanac's system—he needed to connect to Acanac's servers;
- n) he would "sign out" for coffee, lunch and washroom breaks;
- o) he would consult with other technical representatives on line and they would make collective decisions about when to take breaks;
- p) Acanac expected him to work full time hours and he believed Acanac would discipline him if that did not take place;
- q) there was a manager on duty that "controlled" the work being done;
- r) if he wanted time off:
 - i) he would ask the manager on duty; and
 - ii) some times the manager may have delayed when he took the time off, but his requests were never refused;
- s) an average call would last five to ten minutes—if it took longer, he would get a message asking if he needed help;

- t) he was not able to make outgoing calls;
- u) he reported his time to Acanac by way of completing time sheets² provided by Acanac;
- v) Acanac initially paid him \$10.00 per hour, which it subsequently increased to \$11.00 per hour and again increased to \$12.00 per hour;
- w) he had no GST number and did not charge GST—he did not think he needed it;
- x) Acanac never gave him any criteria for raises:
 - i) so he asked for raises; but
 - ii) Acanac did not give him raises on his first requests;
- y) he never received extra remuneration for handling:
 - i) a high volume of calls; and/or
 - ii) difficult calls; and
- z) Acanac never gave him a performance review, however the technical representatives on line would collectively review their performances at the end of each shift.

[7] In cross-examination, Sabau was asked how he knew how to carry out his job if he signed the ICA at the end. He responded from:

²Exhibit E-1

- a) a description in the advertisement for the job;
- b) telephone conversations at and after being hired; and
- c) conversations in chat rooms.

[8] In cross-examination, Sabau was asked what he meant in his invoices³ by saying “Thank you for your business.” He responded he did not know.

[9] In cross-examination, Sabau acknowledged he:

- a) neither asked for, nor received T-4s from Acanac; and
- b) has worked as an employee before and received T-4’s from employing companies.

[10] In cross-examination, Sabau acknowledged that he had filed income tax returns for the period he had worked for Acanac, but could not recall if he claimed professional income and deducted expenses. He did, however, subsequently provide copies of his Assessments for the 2009 and 2010 tax years.⁴ They show:

- a) business income; and
- b) employment income less than that earned from Acanac.

[11] With respect to the ICA, in cross-examination, Sabau acknowledged:

³Exhibit E-1

⁴Exhibit E-2

- a) he signed and faxed (from his father's business) same to Acanac;
- b) Acanac never told him he could not subcontract, but he was not aware he could and this was never a topic of discussion;
- c) Acanac showed flexibility with hours of work;
- d) when Acanac posted a need for more work, he responded positively;
- e) Acanac never asked him to purchase tools, equipment, etc.;
- f) he paid for his own expenses associated with his work for Acanac;
- g) Acanac never gave him detailed procedures and checklists;
- h) he did not submit payments for EI and GST;
- i) Acanac did not require him to wear a uniform;
- j) he could work from any location he chose, as long as there was no noise;
- k) he chose the shift he wanted to work;
- l) he could tell Acanac if he did not want to work a shift; and
- m) Schedule "A" reflected the work he did for Acanac, except answering e-mails.

[12] In cross-examination, Sabau said he did not think about why he was sending an invoice

if he were an employee. He said Acanac told him to do it and just followed the template provided to him.

[13] In cross-examination, Sabau acknowledged he was aware of DSL reports⁵ and knew they were a means by which the public could provide feedback concerning a technical representative.

[14] In cross-examination, Sabau testified he:

- a) never worked for anyone else while working for Acanac;
- b) has not applied for a job since leaving Acanac;
- c) has not used Acanac as a reference; and
- d) did not gain any expertise from Acanac.

[15] In reexamination, Sabau testified that he just received cheques from Acanac and nothing else.

B. APPELLANTS' EVIDENCE

1. Trevor Kay

[16] The Appellants called Trevor Kay ("Kay") as their first witness. Kay testified:

- a) he is a "contractor" with Acanac in sales and support;

⁵Exhibit C-1

- b) Sabau was a “contractor” at Acanac and he was the supervisor on his shift;
- c) he did not threaten to fire Sabau if he did not sign the ICA;
- d) time sheets were made to help contractors keep track of their time, but while contractors were encouraged to use them, not all did and there were no repercussions if they did not;
- e) contractors could take breaks whenever they wanted, but were encouraged to discuss same with the others to keep everyone organized;
- f) two weeks notice of “vacations” was required, emergencies excepted;
- g) there was no training for technical work, but contractors were given a quick rundown on how to use the system and do tickets;
- h) work comes from a queue to a global ring that contractors answer–there is no protocol for answering;
- i) if a contractor asks for help, he will share his knowledge;
- j) it is Sabau who decides if the problem is solved;
- k) short of having a computer, an internet connection and VOIP, no other equipment is needed–all one needs is a knowledge to take care of problems;
- l) contractors can choose their shifts and there is never a problem to add hours;
- m) Acanac gives no direction where to work and what to wear;

- n) an Acanac Forum⁶ exists for customer feedback and advice of upcoming products;
- o) Acanac does not provide a manual for trouble shooting;
- p) there is no quota for calls;
- q) Acanac did not decide if there was work to be done, the customer did; and
- r) there was no negative feedback with respect to Sabau.

[17] On cross-examination, Kay testified that another employee created the invoice template, not Acanac. Acanac did not require contractors to use it.

[18] On cross-examination, Kay testified that he has access to call logs. Same will show how long calls are. If contractors are consistently on long calls, it may show something is wrong and they need coaching.

[19] On cross-examination, Kay testified that Acanac had developed a bonus system to encourage contractors to put in more time. If contractors worked a full eight hours, they could bill nine hours.

2. Paul Louro

[20] The Appellants called Paul Louro (“Louro”) as their next witness. Louro testified:

- a) he is President and one of the founders of Acanac;

⁶Exhibit C-1

- b) Acanac is based in Ontario and provides VOIP and high speed internet services;
- c) Acanac contracts independent contractors to provide pre-sales and technical support;
- d) the independent contractors work by either the ticket system or telephone system;
- e) with respect to the ICA:
 - i) he does not know when Sabau signed same–however, in cross-examination, he said it was Acanac’s practice to have the ICA signed at the time contractors commence work;
 - ii) Schedule “A” sets forth the manner of carrying on the work;
 - iii) there is no restriction on the amount of work–Acanac prefers contractors to take on more hours and gives incentives for them to do so;
 - iv) using contractors was a risk Acanac took to try to provide better service to clients;
 - v) contractors can work for others;
 - vi) Acanac never requested that Sabau purchase equipment;
 - vii) Acanac does not have the ability to cross check contractors work–if clients complain that is another matter;
 - viii) Acanac terminated Sabau’s contract because his equipment was not functioning well;

- ix) Acanac provided no manual on how to do the job—it just told Sabau how to log in and use the server;
- x) the client calls in, it rings all contractors, and the first to answer gets the call—no one has any idea who is calling or what the person is calling about;
- xi) Sabau complied with section seven, except for the bad VOIP quality;
- xii) Acanac did not request time sheets, an employee produced them;
- xiii) a review of Sabau's time records shows he:
 - came and went whenever he wanted—if he had been an employee, he would not have lasted; and
 - knew he was a contractor and used his rights to work random hours;which was not a problem for a contractor;
- xiv) Acanac offers the bonus hour as an incentive to encourage contractors to work more hours—this is not mandatory, but implemented to address a backlog of work;
- xv) Acanac is only aware of hours when invoices are submitted—it relies on the honour system; and
- xvi) Acanac would only investigate hours if a comparison of invoices would show something abnormal;

- f) Acanac did not require any records from Sabau other than accounts;
- g) the most important tool Sabau could provide was his knowledge and skill set;
- h) Sabau not only picked his shift, but also his random hours;
- i) he is not aware of any advertisement to which Sabau responded—he does not know how Acanac found Sabau;
- j) Acanac has no one to supervise how Sabau does his work—it is based on the honour system until someone complains;
- k) it is the client that decides if the work is OK—if there is a supervisor, it is the client;
- l) Acanac never told Sabau to sign the ICA or it would terminate him;
- m) Acanac did not teach Sabau anything new—he came with all the knowledge he used;
- n) Sabau would get work by telephone and e-mail—95% from the former;
- o) BroadBand Reports provide an independent means by which the client and Acanac can communicate;
- p) Acanac also provides a forum and message board that allows for communication and feedback;
- q) clients and contractors also have a web presence that allows for communication and feedback;

- r) contractors are aware they can be “commented on” –for better or for worse–therefore:
 - i) it is to their advantage the comments are positive;
 - ii) reputation and track record is important; and
 - iii) positive reports are a real investment;
- s) the nature of the work being done and transparency allows for criticism that differs from work being done by others–when it is public, it is there forever and affects them, for others it is closed; and
- t) people want to work as contractors for Acanac to:
 - i) grow their business;
 - ii) control their own hours;
 - iii) have freedom; and
 - iv) make more money.

[21] On cross-examination, Louro testified that:

- a) nobody from Acanac monitored Sabau’s calls;
- b) clients call a 1-800 number on Acanac’s web site;

- c) the client's are Acanac's clients, not Sabau's;
- d) Kay can access the Acanac system to see the number of calls, but Acanac never instructed him to control how Sabau's work was done;
- e) Kay had no authority over Sabau's work;
- f) Acanac never requested time sheets—the time sheets were not Acanac's, but something done between contractors, and were not used for invoices or pay; and
- g) Acanac did not charge Sabau for his orientation.

3. Martin Cleaver

[22] The Appellants tendered Martin Cleaver⁷ (“Cleaver”) as its last witness. The Appellants sought to have Cleaver give opinion evidence concerning the following:

- a) the extent to which individuals having open sites would have the ability of ensuring quality control;
- b) to explain the nature of on-line work and environment and how that has changed from the past;
- c) how the nature of sites go to reliability; and
- d) new quality of work environment—criteria should be revisited re-tweaked and refreshed..

⁷Exhibit E-1, Resume

Sabau did not object to such testimony. I admitted Cleaver as an expert witness.

[23] Cleaver testified:

- a) there is a difference between an employee and the new on-line person;
- b) the question is how well you know the person;
- c) with work on-line, age, etc. does not matter;
- d) knowledge-based work is appropriate for on-line work;
- e) Sabau's work was knowledge based;
- f) with "remote" work:
 - i) it does not matter where you are;
 - ii) one can work for multiple people at the same time; and
 - iii) expectations are different;
- g) vulnerability is different for workers on line as opposed to those at work—this stems from a difference in publication of comments and criticisms;
- h) remote on-line work:
 - i) is growing;

- ii) gives more people an opportunity to work—such as new moms, disabled people, etc.; and
- iii) enables people to make decisions based on input from others;
- i) BroadBand reports are used to distinguish between companies—with feedback, websites are an incentive to do well;
- j) with on-line workers, it is common workers know more about their job than the party paying them—the latter often is more concerned with money, risk and the like, and often does not know the technical details; and
- k) to be a good trouble shooter, one needs to be logical, take good records, have good communication skills and have a good temperament.

[24] On cross-examination, Cleaver conceded employers do hire people as employees to work remotely.

IV. DECISION

A. LAW

1. Statute

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

2. In this *Act*:

...

- (d) “employee” means a person of any age who is in receipt of or entitled to any remuneration for labour or services performed for an employer;
- (e) “employer means any person that employs one or more employees and includes every agent, manager, representative, contractor, subcontractor or principal and every other person who either:
 - (i) has control or direction of one or more employees; or
 - (ii) is responsible, directly or indirectly, in whole or in part, for the payment of wages to, or the receipt of wages by, one or more employees;

...

4(1.1) ... [T]his *Act* applies to employees who work at home.

...

6(1) Subject to section ... 12, no employer shall, unless he complies with subsection (2), require or permit any employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week.

(2) ... [A]n employer who requires or permits an employee to work or to be at his disposal for more than eight hours in any day or 40 hours in any week shall pay to that employee wages at the rate of time and one-half for each hour or part of an hour in excess of eight hours in any day, or 40 hours in any week, during which he requires or permits the employee to work or to be at his disposal.

(3) In applying subsection (2), where the total of the daily excesses differs from the weekly excess, the employer shall make payment in respect of the greater excess.

(4) The hours during which an employee is required or permitted to work or to be at the disposal of his or her employer are deemed not to include any meal break allowed to employees if notice of the meal break is given in accordance with subsection 13.1(1) and if the employee is not in fact at the disposal of his or her employer during the meal break.

(5) For the purpose of calculating the wages of an employee on an hourly basis in order that the employee may receive the wages to which he is entitled pursuant to this Act, the following rules apply:

- 1 Where the employee is paid his wages on a daily basis, the hourly wage of the employee shall be the regular wages of the employee for one day divided by the number of hours of the day during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall the number of hours exceed eight;
- 2 Where the employee is paid his wages on a weekly basis, the hourly wage of the employee shall be the regular wages of the employee for one week divided by the number of hours of the week during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall the number of hours

exceed 40;

3 Where the employee is paid his wages on a monthly basis, the hourly wage of the employee shall be the regular wages of the employee for one month multiplied by 12 and divided by the figure received when 52 is multiplied by the number of hours of the week during which the employee is required or permitted to work or to be at the disposal of his employer, and in no case shall the number of hours exceed 40;

4 Where the employee is paid his wages on a basis other than an hourly, daily, weekly or monthly basis, the hourly wage of the employee shall be determined in accordance with the regulations.

...

8 Where an employer has knowledge that an employee is working and he does not cause him to stop working, he shall be deemed to have permitted such an employee to work within the meaning of the expression "permit any employee to work" as used in sections 6

...

10(1) Where in any week there is a public holiday mentioned in Part VI:

(a) subsections 6(1) and (2) . . . shall be read with the substitution of the word "32" for the word "40" wherever it occurs in those provisions; and

...

12(1) Notwithstanding any other provision in this Act, no employer shall, without the consent of the employee, require an employee to work or to be at his disposal for more than 44 hours in any week or, in the circumstances referred to in clause 10(1)(a), 36 hours in any week, except in the case of emergency circumstances.

...

13.1(1) An employer shall give notice to employees of:

- (a) the time when work begins and ends over a period of at least one week;
- (b) where work is done in shifts, the time when each shift begins and ends; and
- (c) the time when a meal break begins and ends.

...

30(1) Every employee to whom this Act applies is entitled:

(a) subject to clause (b), to an annual holiday of three weeks after each year of employment with any one employer;

- (b) to an annual holiday of four weeks after the completion of ten years of employment with one employer and after the completion of each subsequent year of employment with that employer.

...

33(1) An employee is entitled to receive annual holiday pay in the following amounts:

- (a) if the employee is entitled to an annual holiday pursuant to clause 30(1)(a), three fifty-seconds of the employee's total wages for the year of employment immediately preceding the entitlement to the annual holiday;

...

35(1) If the employment of an employee terminates, the employer of the employee shall, within fourteen days after the effective date of termination, pay to the employee the annual holiday pay to which he or she is entitled pursuant to this Act.

(2) If the employment of an employee terminates, the employee is entitled to annual holiday pay calculated in accordance with section 33 with respect to all total wages earned by the employee with respect to which the employee has not previously been paid annual holiday pay.

(3) Subsection (2) applies whether or not an employee has completed a year of employment.

...

39(1) The minimum sum of money to be paid for a public holiday or for another day designated for observance of the public holiday by an employer to any employee who does not work on that day:

(a) where the employer pays to the employee the employee's regular wages for the period that includes that day, is equal to those wages;

(b) in any other case, is the amount A calculated in accordance with the following formula:

$$A = W/20$$

where W is the total of the wages earned by the employee during the four weeks immediately preceding the public holiday, exclusive of overtime.

2. Cases

[26] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,⁸ the Supreme Court of Canada held that the term "employee" must be interpreted in the light of the particular policy objective of the statute in which it appears. In the Manitoba Court of Appeal decision of *Imperial Taxi Brandon (1983) Ltd. v. Hutchison*,⁹ Twaddle, J.A. defined the policy objective of such legislation in the context of labour standards as follows:

The purpose of the employment legislation is to prevent the exploitation of those who, to earn a living, have no choice other than to follow the direction of an employer as to the hours they must work and the manner in which the work is to be done. It is with the statutory purpose in mind that the definitions in the legislation must be construed.

[27] In *Re Rizzo and Rizzo Shoes Ltd.*,¹⁰ the Supreme Court of Canada ruled that Courts and tribunals should give a broad, generous and liberal interpretation to the language of the statute to expand the safeguards available to workers.

[28] With this overall purpose in mind, there is no single test or factor that the Courts and tribunals view as conclusive in determining the status of a person to be an employee rather than an independent contractor.

[29] I start with *Montreal (City) v. Montreal Locomotive Works Ltd.*¹¹ Speaking for the Judicial Committee of the Privy Council, Lord Wright considered four criteria—control, ownership of tools, chance for profit and risk of loss—when determining whether a worker was an employee or a subcontractor.¹²

⁸(2002), C.L.L.C. 210-013 (S.C.C.), at para. 141, 148 & 150

⁹[1987] M.J. No. 551,46 D.L.R. (4d) 310 (C.A.), at p. 313

¹⁰[1998] 1 S.C.R. 27, at p. 36

¹¹[1946] 3 W.W.R. 748 (P.C.)

¹²*Ibid.*, at para. 17

[30] I then move to *Jacques v. 96955 Saskatchewan Ltd. (The Drapery Shoppe)*.¹³ There, Harabinsky, J. referenced a fifth criterion—the organization test.¹⁴ In essence it asks what business does the company provide, how the person fits into the organization, what work he or she does and how it fits with the service the business provides.

[31] In *Wolf v. Canada*,¹⁵ Desjardins, J.A. queried:

Must . . . the oft-quoted principles . . . which serve . . . to distinguish a contract of employment or of services from a contract of enterprise or for services be revisited in light of the globalization phenomena which increases the mobility of workers?

He appears to think so. In making that case concerning the control test, he says:

74 The control test, as it is commonly referred to, purports to examine who controls the work and how, when and where it is to be done. In theory, if the worker has complete control over the performance of his work once it has been assigned to him, this factor might qualify the worker as an independent contractor. On the other hand, if the employer controls in fact the performance of the work or has the power of controlling the way the employee performs his duties . . . the worker will be considered an employee.

75 In practice, such a distinction is difficult to apply as both the worker and the employer usually hold some measure of control over the work that is performed. A pilot hired by an air carrier, for instance, is generally an employee, although no one tells him how he should fly the plane A doctor working in a clinic may be an employee although he is the master of his professional conduct. The control test can therefore be inadequate in situations like these where, because the skills and expertise of the worker exceeds those of the employer, little control or supervision can be exercised over the manner in which the work is performed.

76 While the control test is the traditional civil law criterion of employment, it is often inadequate because of the increased specialization of the workforce. The Court in *Wiebe Door*, supra, essentially stated that the control test, while still important, is no longer regarded as conclusive on its own. In agreeing that there is no "magic" test to be applied, Major J. reiterates the necessity of examining the total relationship of the contracting parties in order to determine "whose business is it?"

¹³[1984] S.J. No. 952 (Q.B.)

¹⁴*Ibid.*, para 36

¹⁵[2002] FCA 96

[32] In *Royal Winnipeg Ballet v. Canada*,¹⁶ the Federal Court of Appeal dealt with an instructive fact situation that I will not repeat here. In deciding that case, the Federal Court of Appeal appears to hold that the intention of the parties is a relevant consideration. I see it as beneficial to include that as a consideration and will call it a fifth test.

B. ARGUMENTS

1. Intention of the Parties

[33] With respect to “intention of the parties”:

a) The Appellants take the position:

- i) the common intent of the parties can be set forth in a written contract or by the acts of the parties showing the existence of such common intent;
- ii) Sabau and Acanac entered into an ICA—both executed it;
- iii) Sabau issued accounts to Acanac according to the ICA and Acanac paid them;
- iv) Sabau stated that Acanac would agree to the days off that he proposed;
- v) Sabau negotiated for and asked for a raise and one was agreed to by the parties;
- vi) the orientation session at the start of the contract was on how to meet and greet on the telephone and how to use an IP Address so that Sabau could learn if the

¹⁶[2006] FCA 87

person he was serving was a customer, but not to teach how to troubleshoot;

- vii) Sabau stated that the "time sheets" he had were not submitted to Acanac;
- viii) the software Sabau needed could be downloaded free from the internet;
- ix) Sabau brought his own computer and set up his own office and could work where he wanted;
- x) Sabau had a choice of his shifts, was paid more to work through lunch and breaks ("Bonus Hour") and worked variable hours;
- xi) in general, Acanac contracts had a one year term, but in this case, inadvertently the end date was not written into the contract;
- xii) Sabau was not subject to any restriction to subcontracting the work, nor was he required to work exclusively for Acanac;
- xiii) Sabau did not ask for a T-4 slip at any time and on his 2009 and 2010 Income Tax Return reported business income and less employment income than earned from Acanac; and
- xiv) Sabau's evidence indicated that he was acting according to the requirements of the ICA and therefore he intended to be an independent contractor and Acanac treated him as such.

b) The Respondent takes the position:

- i) Acanac provided an ICA that shows Sabau's signature on the final page—there are many errors and omissions in that copy, one of which is the date same was signed;
- ii) Louro testified that some terms of the ICA do not apply to Sabau;
- iii) if Acanac is going to rely on that contract as proof that Sabau was self-employed, how can we be sure which parts of the ICA apply and which do not;
- iv) there is no proof that Sabau was even notified or told which parts of the ICA applied to him;
- v) it would be reasonable to assume that Sabau would have signed the contract with the belief that all parts applied to him;
- vi) Louro referred to "training" as incorrect language and that it should have read "orientation" in the ICA;
- vii) again, how can Acanac rely on the ICA as proof of the relationship if the wording is incorrect or inaccurate;
- viii) further, Sabau has testified that he did not sign the ICA when he was first hired by Acanac—there is no proof when the ICA was signed and as far as we know, it may not have been signed until just before Sabau left Acanac;
- ix) the fact that the ICA states Sabau would be performing his work as an independent contractor is therefore debatable;
- x) even so, because the Courts do prefer a holistic approach to the question of who

is an employee, the mere existence of a written contract of employment or the mere assertion in a written contract that a worker is an independent contractor does not transform the employment relationship into that of an independent contractor—all employment relationships are contractual arrangements, whether or not the contract is written down;

- xi) furthermore, a written contract may not describe the whole of the employment relationship—nor is self-characterization as "self-employed" for income tax purposes determinative of a worker's status for the purposes of the *Act*;
- xii) the case here is distinguishable from *Wolf v. Canada*,¹⁷ as several factors are different:
 - on page 16 [87], Madam Justice Desjardins states "In consideration for a higher pay, the appellant, in the case at bar, took all the risks of the activities in which he was engaging;
 - he was not provided health insurance benefits nor a pension plan by Canadair;
 - he had no job security, no union protection, no educational courses he could attend, no hope for promotion; and
 - the profit and the risk factors were his;
- xiii) in the case here, Sabau did not receive a higher pay—when he was hired, he was

¹⁷*Supra*, footnote 15

paid \$10.00 per hour, he did not enjoy any of the benefits that would normally have been provided to employees, but the \$10.00 per hour that he did receive could in no way be described as "higher pay";

- xiv) further, Wolf agreed to sign the contract and it should be noted that he agreed to the terms and argued vigorously that he was an independent contractor;
- xv) Wolf was a temporary worker who worked until the project was completed, whereas Sabau hired on with Acanac with the belief that he was working for an undetermined period of time;
- xvi) like many employees, Sabau went into the relationship believing that he would work there until he either made a career out of it or he chose to leave to pursue other avenues;
- xvii) Sabau did not agree to working as a temporary worker—even the contract that he eventually signed does not show a specific end date and, as such, there certainly was no foreseeable end to the project;
- xviii) in more than one of the cases provided by Acanac, conclusions were reached based on not only the fourfold test, but based on the common intent of both parties; and
- xix) Sabau testified it was not his intention to be an independent contractor and, as such, this case is distinguishable in that the intent was clearly one-sided.

2. Control

[34] With respect to “control”:

a) The Appellants take the position:

- i) Acanac did not have the ability to and did not supervise or control the work Sabau did;
- ii) Acanac does not have guidelines, troubleshooting charts or manuals to give to the technicians—it cannot do that due to the myriad connectivity, hardware and software issues that its customers may have and for that reason it hires technicians such as Sabau;
- iii) since the troubleshooting work is done remotely and on line and in the internet context, this causes the technician to carry out an enhanced supervisory and control function—more so than if the work was not subject to the transparency of the workplace engendered by the internet;
- iv) it is in the technician’s personal interest to ensure that the work done on line is of the highest standard than would be in any other industry or work environment, since the technician cannot hide behind the name of the company to which he has contracted;
- v) the technicians’ work online gives rise to transparency of his work due to on line feedback mechanisms;
- vi) there is a spectrum of work situations between employee and independent contractor—some more likely to be categorized as employment and others more likely to be categorized as independent contracting;

- vii) the nature of the work and the location where the work is carried out are important factors of the analysis that is pertinent to the determination of whether there is direction and control exercised over the worker by the person who has engaged the worker;
- viii) with respect to the nature of the work:
- in traditional work (for example bookkeeping), the control and direction are carried out by the person engaging the worker to carry out the work (the "Engaging Party");
 - traditional work has set formal procedures and guidelines that can be supervised and controlled by the Engaging Party due to the well-defined nature of the work—in bookkeeping, the work is the interpretation of the *Income Tax Act*;
 - even if the person is working on line or at a distance, the work can be supervised and controlled as the bookkeeper must follow strict objective guidelines;
 - on the other hand, in knowledge based work (such as the connectivity troubleshooting online as in this case) done remotely, there can be no supervision and control by the party contracting the worker as that person has no ability to supervise the work due to the specialization of the worker and the immense number of variables and connections that must be considered;
 - essential to this the work is creativity, intuition and resourcefulness—each

technician's approach must therefore be unique as he applies his creativity and resourcefulness to solve the problem at hand;

- that is the indispensable element of the work he performs—the work of a troubleshooting contract is infinitely varied and each call can be totally different from the prior one;
- the goal is to solve the problem;
- there are no guidelines or checklists or troubleshooting manuals possible;
- this is not comparable to the work of a bookkeeper or accountant who must follow set formal well known rules, regulations and guidelines how to interpret technical material;

ix) with respect to the physical location of the work:

- in traditional work where work is carried out at the place of work of the Engaging Party, there is actual physical supervision and observation of the manner that the work is carried out;
- the fact that the traditional worker may be criticized online in an email post or in some other online forum is less important to their work prospect, since such comments constitutes hearsay, but also that there are checks and balance to the comments due to the first-hand experience of the worker by the Engaging party and the set guidelines, technique criteria, Rules and Regulations for carrying on the work;

- however in knowledge based work in an on line environment, there is and can be no supervision and control by the Engaging Party that would be exercised if work was done in the place of business of the Engaging Party;
- in this environment, there is a heightened concern for an on line reputation and the worker is more vulnerable to comments made on line;
- the workers can be identified in the mails they send to customers;
- furthermore, the on line worker will need to safeguard his or her on line reputation for the purposes of obtaining future work;
- therefore the worker's supervision and control in this context is self-generated due to the transparent nature of the work environment and the concomitant risk he or she bears to their future work prospects—as stated at the hearing, "if you are naked you better be buff";
- the knowledge based worker working on line in an internet environment of chat rooms, feedback and on line open text forums relies more on his or her reputation for future business than the traditional worker and is much more vulnerable than the traditional worker to on line comments posted by customers and also more reliant on positive comments at open text sites and forums than would be a traditional worker;
- this had a chastening and disciplining effect on Sabau as his reputation was on the line each time he worked; and
- this is an essential and novel aspect of knowledge based work done over

the internet.

- b) The Respondent takes the position:
- i) testimony from Kay revealed that he was given the authority by Acanac not only to monitor the hours that Sabau worked, but to speak with him if it appeared there were difficulties with telephone enquiries;
 - ii) it is rather troublesome that this was later denied by Lauro in his testimony where he stated that no one was given authority from Acanac to monitor either Sabau's work or the hours he submitted;
 - iii) Sabau testified he was hired as an employee of Acanac—he:
 - responded to an advertisement he found on the internet that advertised a position at \$10.00 an hour with lots of overtime available;
 - as per the website, submitted a resume over the internet;
 - was subsequently hired after he had a job interview over the telephone;
 - indicated that during the job interview, he was told the amount he would be paid, \$10.00 per hour and that there was an expectation he work eight hours per day;
 - iv) Sabau also testified that when he answered telephone inquiries, he represented Acanac;

- v) the customers were routed to Sabau through Acanac to deal with computer problems they had with Acanac programs and software;
- vi) Sabau did not bill the customers, nor did he discuss with them anything to do with payments for the service;
- vii) it was Acanac. that guaranteed the quality of the work and dealt with customer complaints—if the customers were not satisfied with Sabau's service, they contacted Acanac;
- viii) Sabau continued to receive \$10.00 per hour regardless of the type of service he provided—he was never charged or deducted for poor advice to customers and simply did the work and received his regular rate of pay regardless;
- ix) although Sabau initially chose to work from 7:00 a.m. to 3:00 p.m., Monday through Friday, it was only one of two choices that he was given—he was never told he had other choices and, in fact, the ICA indicates Acanac will choose the shifts that he would work;
- x) the customers for whom Sabau performed work were customers of Acanac;
- xi) when the customers were billed, they were billed by Acanac and they paid Acanac;
- xii) it is true that Sabau chose to work from his own home, but even that is contemplated in *Act* where section 4(1.1) states that ". . . this *Act* applies to employees who work at home";

- xiii) Acanac dictated the amount of pay that Sabau would be receiving—he did not receive anything more or less than his hourly rate of pay for the hours that he worked; and
- xiv) even if a customer was not satisfied with the work that Sabau performed, he still received his hourly rate of pay.

3. Ownership of Tools

[35] With respect to “ownership of tools”:

- a) The Appellants take the position:
 - i) the great majority of the tools Sabau needed for his work at Acanac were his knowledge, experience and creativity and a computer with internet access;
 - ii) by obtaining practical experience and knowledge in his field and working in the field, Sabau made his capital investment in his business—he brought this knowledge, experience and creativity to Acanac and this was what Acanac contracted for;
 - iii) Sabau stated that he learned nothing at Acanac—he brought to the job all the technical knowledge he needed; and
 - iv) as well, Sabau bore the costs of the equipment needed to carry on his business, such as his computer, his office set up all of his home office costs as set forth in the contract.

- b) The Respondent takes the position:
- i) it is true that Sabau owned his own computer and worked from his own home;
 - ii) however, to assist the customers of Acanac, Sabau needed access to their customer account–this was handled by way of software required to do his job and was provided by Acanac;
 - iii) even the so-called free downloaded software required that Sabau enter an IP address for Acanac and they provided him with a user name and password from Acanac to access and use the software;
 - iv) further, Acanac offered to pay up to \$50.00 toward Sabau’s internet connection;
 - v) as far as Sabau’s knowledge and expertise, many jobs require a specialized skill, but certainly not all of those jobs would be considered independent contractor positions;
 - vi) the skills and talents that Sabau needed to perform his job, such as keeping good records, thinking logically and having good people skills, are not inconsistent with the skills that are required to do any job when working directly with people;
 - vii) the scales are tipped in the direction of Acanac providing the tools for the job.

4. Chance for Profit & Risk of Loss

[36] With respect to “chance for profit and risk of loss”:

- a) The Appellants take the position:
- i) Sabau had control over how much money he earned—he chose when to work and how much;
 - ii) Sabau could take work from other persons as well;
 - iii) Sabau negotiated his contract;
 - iv) Sabau was given no set time limits to carry out the work (subject to Acanac ascertaining that an account was fraudulent) and therefore efficient performance might lead to greater profits;
 - v) Sabau could increase his earnings and chance of profit by taking on more hours;
 - vi) Sabau negotiated for and obtained a contract that allowed him a business opportunity without any limit as to how many hours he could work and without any restriction on for whom he could work—he could have hired helpers and further subcontract work;
 - vii) this was what he received when he entered into the ICA;
 - viii) the fact that subsequently Sabau may not have followed up on these opportunities was not due to any restrictions imposed on him by Acanac—he had an unlimited chance of profit had he applied the rights he obtained in the ICA, he had the opportunity to become financially independent and he was running his own business;

- ix) due to the transparency of the work he did and the nature of the internet, Sabau risked losing his greatest asset in this work context–his reputation–in the event that he did not work effectively;
 - x) contractors of Acanac can be searched by their names and on their email addresses and a record of their feedback is available to the world; and
 - xi) by risking and losing his reputation, Sabau risks losing his business opportunities.
- b) The Respondent takes the position:
- i) in its Notice of Appeal, Acanac indicates that bonuses were available and yet the testimony of Kay indicates otherwise;
 - ii) when questioned, Kay, who by admission was one of the first two technical support persons hired by Acanac, denied any knowledge of bonuses made available for answering more difficult calls, for answering a larger volume of calls or for any type of reward for better performance;
 - iii) as such, the only bonuses ever paid were for an extra hour each day if the workers completed a full eight hours–there was absolutely no way this could be construed as a chance for Sabau to profit;
 - iv) Sabau was earning \$10.00 an hour and so if he had chosen to start his own call center or to hire someone to work for him, he would have had to pay them out of his \$10.00 an hour–he would have then earned nothing for his performance of the work;

- v) it is ludicrous to believe there was any chance for Sabau to profit under these circumstances—in keeping with this argument, there was also no risk of loss; and
- vi) Sabau did not invest anything that he could lose—he was receiving \$10.00 an hour, nothing more and nothing less.

5. Organization

[37] With respect to “organization”:

- a) The Appellants take the position:
 - i) Acanac provides VOIP and high speed internet and it operates its own server infrastructure and lines and bills its clients for the services it provides;
 - ii) Acanac’s business is to ensure that until its signals arrive at the client’s interface, the service functions efficiently;
 - iii) the ability of Acanac’s signals to function with the customer’s hardware and software after passing the client interface is in no way part of Acanac’s service;
 - iv) in a manner similar to other service providers such as Rogers Communication, Telus Communications and Bell Canada, Acanac contracts with persons to deal with the customers’ connectivity problems;
 - v) that is a totally different aspect of its commercial activity;
 - vi) that work is the work of the contractors who deal with those challenges;

- vii) these are two separate stand alone businesses; and
 - viii) Sabau's business was accessory to Acanac, but not integrated to it.
- b) The Respondent takes the position:
- i) in *Jacques v. 96955 Saskatchewan Ltd.*,¹⁸ the Court stated that "The four-fold test has been enlarged more recently by the 'organization test.' This test feeds into the question raised by Lord Wright as to "whose business is it?";
 - ii) Sabau was an integral part of Acanac and his work was subject to the coordination of telephone calls routed to him by Acanac;
 - iii) Acanac provided the software and internet connections and without the technical support of Sabau and other technicians, it would have been next to impossible for Acanac to guarantee the products they provided;
 - iv) the Respondent agrees that technology is changing and that we must look at all areas of the employment contract to determine employment status;
 - v) however, it must be considered that many employees are required to work remotely;
 - vi) the use of iPads, laptop computers, iPhones, teleconferencing and videoconferencing makes it possible for work to be performed from almost any location in the world;

¹⁸*Supra*, footnote 13

- vii) the use of such technology by no means ensures that an employer/employee relationship does not exist;
- viii) the so-called "new quality" under which independent contractors deal is really no different than what employees must face;
- ix) as Cleaver agreed, employees are possibly more vulnerable to on-line criticism than are independent contractors;
- x) each and every one of us is at risk of on-line speculation and criticism;
- xi) simply because Sabau worked remotely does not mean that his reputation was at risk any more than the waitress at the local restaurant or the retail clerk at the local grocery store.

C. ANALYSIS

1. Intention of the Parties

[38] The Appellants argue that the ICA is evidence of the existence of the common intent of the parties that Sabau was engaged as an independent contractor. The appellants further argue that Acanac created an environment of work flexibility that was consistent with same. The Appellants further argue that such an understanding was corroborated by Sabau's subsequent actions such as exercising flexibility as to when he worked, tendering invoices to Acanac thanking it for its business and filing income tax returns that can only be interpreted as showing he claimed remuneration received from Acanac as business income.

[39] On the other hand, Sabau says he only signed the ICA shortly before his departure from

Acanac and only after being threatened by dismissal if he did not. Acanac denies the threat, but cannot say when the ICA was signed, even though it says its practice is to attend to same before or contemporaneous with commencement of service. Sabau says little should be inferred from the invoices—he was only using a template supplied by Acanac. Though he says he always considered himself to be an employee, he appeared to lack concern about never being provided with pay stubs and T-4s. As well, he did not ask for same. In addition, Sabau provided no explanation as to why his tax returns did not reflect full employment income from Acanac.

[40] I cannot be certain from the evidence when the ICA was signed. However, I am not persuaded on the evidence that it was signed under a threat of dismissal. Though I do not believe Sabau gave a great deal of thought to the content of the ICA before he signed it, I do find on the evidence that its content confirmed the basic terms of his engagement. This was reflected in Sabau’s subsequent conduct.

2. Control

[39] Acanac is a corporation based in Mississauga, Ontario. The bulk of its business is that of an internet service provider. It engages technical representatives—of which Sabau was one—to “troubleshoot” problems reported by its clients. The nature of these problems was quite basic and usually related to connectivity matters resulting from hardware and software issues. If the matters were more complex or involved third parties, there was a mechanism to refer them to different people.

[40] The technical representatives do not carry out their work at Acanac’s business premises. They work off site at any location they choose, as long as that site is conducive to an environment that not only allows for an internet connection, but businesslike telephone conversations. Acanac’s evidence was that they have engaged representatives that are providing services similar to that of Sabau from locations all over the world.

[41] Acanac provided no training and/or materials to Sabau. It relied upon his existing knowledge and expertise. It did provide an orientation and software to allow for connection to its servers. That would allow for Sabau to report or follow up on problems. Certain other minor items of hardware for connectivity were available upon request.

[42] Sabau was given a choice of what shift to work and was encouraged to work more hours and even more shifts. He was given flexibility as to when to take breaks. However, Acanac expected that all representatives would coordinate their breaks to ensure that calls were being covered.

[43] Sabau would receive his work from a telephone queue. Acanac's clients would call a 1-800 number listed on Acanac's web site. These calls would go into the system and be routed to the representatives. In essence, the first representative to answer gets the call.

[44] Acanac required representatives to invoice the hours they worked. It had no mechanism in place to routinely cross check these hours against other records. Acanac relied on the honour system. The only time it questioned invoices was when they were significantly inconsistent with either past invoices or the norm.

[45] Acanac was of the view supervision was next to impossible. While it did have more senior people engaged on each shift, they played little or no supervisory role. The more senior representative had the ability to listen in on a call. However, I find the evidence was such that such a practice was infrequent and designed to facilitate mentoring purposes rather than control. In essence, Acanac relied upon its clients for performance feedback. If clients complained, they would look into it.

[46] Without question, this is not a case where there was a substantial degree of control exercised by Acanac over the W4—who, what, when and where—of the relationship. As well,

Acanac did not exercise a substantial degree of control over the manner of performing the work. Also, there was not a high degree of subordination of Sabau to Acanac. Acanac says this is a byproduct of the new developing networked economy on the internet and strengthens the case for independent contractor status. I agree.

3. Ownership of Tools

[47] Acanac really only provided Sabau with access to its system and the telephone calls from its clients. Sabau provided not only the equipment used to do his work, but the location. In addition, he supplied his knowledge, experience and creativity. In the context of the “globalization phenomena,” I find these to be tools as well. On this issue, I find the scales tip in the direction of Sabau providing the tools for the task.

4. Chance for Profit & Risk of Loss

[48] Acanac argues Sabau had control over how much money he made. Even though we are not talking about large sums of money, the evidence supports this position.

[49] Acanac says Sabau chose when to work and how much. Sabau does not really disagree.

[50] Acanac says Sabau had the freedom to subcontract and work for others. Sabau says he was not aware of this. I do not believe Sabau on this point. Rather, I am of the view Sabau simply did not give this point any thought. Based on Cleaver’s evidence, I am persuaded that it is common for technical representatives to work for multiple people. If Sabau did not know this, he ought to have known it.

[50] Acanac says Sabau’s risk of loss stemmed principally from the exposure of his reputation over the internet. While bad or poor reviews will no doubt have a negative effect, perhaps this

issue goes more to the question of control than risk of loss. However, one cannot say Sabau did not invest anything. He did have to acquire equipment. He did have to commit space for its use. He did have to pay the cost of an internet connection. He did spend his time on Acanac's client problems when he could have gainfully spent it elsewhere. I find he did have both a chance for profit and a risk of loss, even though both were not large.

5. Organization

[51] Acanac argues Sabau's work was accessory to Acanac. The evidence supports that proposition. I find Sabau was not functionally integrated within Acanac's business.

V. AWARD

[44] I therefore find Sabau was an independent contractor and not an employee within the meaning of the meaning of the *Act*.

[45] I allow the Appellants' appeal and revoke wage assessment 4900.

Dated at Saskatoon, Saskatchewan, on August 20, 2012.



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

VI. NOTICE

The parties are hereby notified of their right to appeal this decision pursuant to section 62.3 of *The Labour Standards Act*, R.S.S. 1978, c. L-1 (as amended), which reads as follows:

- (1) An employer, a corporate director, an employee named in a wage assessment or a decision of the director pursuant to subsection 62.4(2.1) or the director on behalf of employees may, by notice of motion, appeal a decision of the adjudicator on a question of law or of jurisdiction to a judge of the Court of Queen's Bench within 21 days after the date of the decision.
- (2) An employer, a corporate director, an employee named in a wage assessment or a decision of the director pursuant to subsection 62.4(2.1) or the director on behalf of employees may, with leave of a judge of the Court of Appeal, appeal the decision of a judge of the Court of Queen's Bench on a question of law or of jurisdiction to the Court of Appeal within 30 days after the date of the decision.
- (3) Unless otherwise ordered by a judge of the Court of Queen's Bench, or in the case of an appeal taken pursuant to subsection (2), a judge of the Court of Appeal, enforcement of the decision of the adjudicator or the decision of the judge of the Court of Queen's Bench is not stayed by the appeal.
- (4) The record of an appeal consists of:
 - (a) the wage assessment or a decision of the director pursuant to subsection 62.4(2.1);
 - (b) the notice of appeal served on the registrar of appeals;
 - (c) the written decision of the adjudicator;
 - (d) the notice of motion commencing the appeal to the Court of Queen's Bench;
and
 - (e) in an appeal to the Court of Appeal, the decision of the Court of Queen's Bench and the notice of appeal to the Court of Appeal.