

[OFFICIAL ENGLISH TRANSLATION]

Docket: 2002-3350(EI)

BETWEEN:

JOCELYNE ROBITAILLE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 8, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

The appeal is dismissed and the decision rendered by the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 10th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

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Citation: 2003TCC404
Date: 20030610
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JOCELYNE ROBITAILLE,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Québec, Quebec on May 8, 2003.

[2] The appellant institutes an appeal from the decision of the Minister of National Revenue (the "Minister") that the employment held with J.A. Roby Inc., the payer, during the periods in issue, from December 2, 1997, to November 10, 2000, and from March 30 to December 16, 2001, is excluded from insurable employment within the meaning of the *Employment Insurance Act* (the "Act") on

the ground that the appellant and the payer were not dealing with each other at arm's length.

[3] Subsection 5(1) of the *Act* reads in part as follows:

5. (1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[. . .]

[4] Subsections 5(2) and 5(3) of the *Employment Insurance Act* read in part as follows:

(2) Insurable employment does not include

[. . .]

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

(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*;

(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] Section 251 of the *Income Tax Act* reads in part as follows:

Arm's length

(1) **For the purposes of this Act,**

(a) related persons shall be deemed not to deal with each other at arm's length;

[...]

(2) **Relationship defined.** For the purpose of this Act

"related persons", or persons related to each other, are

(a) individuals connected by blood relationship, marriage or adoption;

[...]

[6] The burden of proof is on the appellant. He has to show on a balance of probabilities that the Minister's decision is unfounded in fact and in law. Each case stands on its own merits.

[7] In making his decision, the Minister relied on the following assumptions of fact, which the appellant admitted or denied:

[TRANSLATION]

- (a) The payer, which has been incorporated since 1984, operates a fireplace and wood-burning stove manufacturing and sales business; it also distributes chimneys and accessories. (admitted)
- (b) Alain Robitaille, the appellant's spouse, was the sole shareholder of the payer. (admitted)
- (c) The payer operates its business year-round, with peak stove and chimney sales periods. (admitted)
- (d) Fireplaces and wood stoves are manufactured from August to November, while sales are made year-round. (admitted)

- (e) The payer's turnover is approximately \$1.3 million. (admitted)
- (f) The payer employs two to 12 persons. (admitted)
- (g) The payer occupies a building in which the manufacturing plant and display room are on the ground floor and administrative offices on the second. (admitted)
- (h) The appellant has rendered services to the payer as an accounting clerk since 1989. (admitted)
- (i) The appellant's main duties were to do the payer's bookkeeping, using the computer, and to perform some secretarial duties (statements of account, deposits). (denied)
- (j) In addition to the appellant, the payer hired an outside accountant to prepare the year-end financial statements and, until 2000, to do the month-ends. (admitted)
- (k) In 1999, the payer hired Josée Boudreau to assist the appellant with the accounting. (admitted)
- (l) Ms. Boudreau was paid \$11.50 an hour. (admitted)

- (m) On December 13, 2001, the appellant stated in a signed statutory declaration that Josée Boudreau was more qualified than she.
(denied)
- (n) From the moment another person was hired in accounting, the appellant mainly did secretarial work. (admitted)
- (o) In 2001, the appellant purportedly redid the payer's product catalogue and price lists and managed collections. (admitted)
- (p) Unlike the payer's other workers, the appellant did not have to record her hours of work; her schedule could vary with the payer's needs.
(admitted)
- (q) In 1999, the appellant's remuneration increased from \$13.29 an hour to \$15 an hour on May 10 and to \$20 an hour on October 25.
(denied)
- (r) In 1999, the appellant received a \$5,000 bonus on August 22 and a second bonus of \$2,000 on December 19. (denied)

- (s) In 2000, the appellant worked for the payer without remuneration from February 21 to May 21 because the payer was experiencing financial problems. (admitted)
- (t) The appellant's remuneration then rose from \$250 a week from May 22 to July 30 to \$400 a week from August 1 to 27, to \$600 a week from August 28 to September 17 and to \$800 a week from September 18 to November 12. (admitted)
- (u) In addition, in 2000, the appellant received a \$1,000 bonus on August 27 and a bonus of \$1,000 a week between September 17 and October 29, in addition to a bonus of \$2 an hour between May 29 and November 12. (admitted)
- (v) On November 10, 2000, the appellant was laid off. (admitted)
- (w) In 2001, the appellant resumed work at a rate of six hours a week between March 25 and June 2, 20 hours a week between June 3 and July 14 and, lastly, 40 hours a week from June 15 to November 17, without any justified change in her duties. (denied)
- (x) In 2001, the appellant received remuneration of \$16 an hour; she also received a bonus of \$1 an hour from September 16 to November 17,

a \$2,000 bonus on September 22 and bonuses of \$753 on November 10 and 17. (denied)

(y) The payer closed its doors for the two-week construction holiday, and, unlike the other workers, the appellant continued receiving her remuneration during that period. (denied)

[8] The appellant alone testified in support of her appeal.

[9] The payer, which has been incorporated since 1984, operates a fireplace and wood-burning stove manufacturing sales business; it also distributes chimneys and accessories. The appellant's spouse was the sole shareholder of the payer.

[10] The payer's business is operated year-round, with peak stove and chimney sales periods. Fireplaces and wood stoves are manufactured from August to November, while sales are made year-round. The payer employs two to 12 persons and has turnover of approximately \$1 million. The manufacturing plant and showroom are on the ground floor and administrative offices on the second.

[11] The appellant has rendered services to the payer as an accounting clerk since 1989. Her main duties were to do the payer's bookkeeping, using the computer,

perform some secretarial duties (statements of account, deposits), establish the price list and promote the payer's products to customers.

[12] The payer hired an outside accountant to prepare the year-end financial statements and, until 2000, to do the month-ends. In 1999, Josée Boudreau was hired to assist the appellant in her accounting duties. Ms. Boudreau received remuneration of \$11.50 an hour from the payer.

[13] The appellant admitted that she had signed a statutory declaration in which she said that Josée Boudreau was more qualified than she, and she stated in her testimony in Court that Ms. Boudreau spoke better English than she did, which, in her view, made her more qualified.

[14] From the moment another person was hired in accounting, the appellant mainly did secretarial work. In 2002, she purportedly redid the payer's product catalogue and price lists and managed collections.

[15] Unlike the payer's other workers, the appellant did not have to record her hours of work; her schedule could vary with the payer's needs.

[16] In 2000, the appellant worked for the payer without remuneration from February 21 to May 21 because the payer was experiencing financial problems. The appellant's remuneration then rose from \$250 a week from May 22 to July 30 to \$400 a week from August 1 to 27, to \$600 from August 28 to September 17 and to \$800 a week from September 18 to November 12. In addition, in 2000, the appellant received a \$1,000 bonus on August 27 and a bonus of \$1,000 a week between September 17 and October 29, in addition to a bonus of \$2 an hour between May 29 and November 12.

[17] The appellant stated that, in 1999, her hourly wage was \$14 for approximately 15 weeks, \$15 starting on May 10 and \$20 as of October 30. As to her bonuses, she explained that she had received \$5,000 in December 1999 and that the other \$2,000 represented the eight percent of her wages for vacation pay.

[18] The appellant stated that, in 2001, she resumed work on March 25 and worked six days a week until June 2; she worked 20 hours a week from June 3 until July 14 and 40 hours a week between July 15 and November 17, performing the same duties.

[19] Again in 2001, the appellant received remuneration of \$16 an hour, a bonus of \$1 an hour from September 16 to November 17, a \$2,000 bonus on September 22 and bonuses of \$753 on November 10 and 17.

[20] In cross-examination, the appellant explained that other employees of the payer had also received bonuses based on the work overload and their performance.

[21] According to a document entitled "Jocelyne Robitaille's Income", filed as Exhibit A-1, the appellant received \$20,656.78 in bonuses and \$31,822.88 in "vacation pay" during the years 1998 to 2001.

[22] According to another document entitled "Michel Côté's Income" filed as Exhibit A-2, that worker, who had been employed by the payer for six years and was in charge of production and orders, received \$3,282.50 in bonuses and \$21,761.84 in "vacation pay" from 1998 to 2001. According to that same document (Exhibit A-2), another employee of the payer, Richard Racine, received \$2,169 in bonuses and \$19,108.51 in vacation pay for those same years. Josée Boudreau, who was hired by the payer to assist the appellant, received \$55 in bonuses and \$4,039.66 in vacation pay in 1999 and 2000.

[23] The appellant admitted she had received an \$8,000 bonus in the fall of 2000 to compensate for the weeks she had worked without pay in the spring of that same year; however, she admitted that the wages owed her for the said weeks amounted to \$11,000.

[24] The appellant admitted that the business was not in operation during the two-week construction holiday and that the employees on vacation had received their four percent vacation pay, whereas she had received her full wages. She added that she had at times received four percent vacation pay. She also admitted that the hourly bonuses granted to the payer's other employees were lower than hers.

[25] The appellant also admitted that Michel Côté, an employee of the payer for six and a half years, had received an hourly wage of \$15, whereas hers had varied between \$13.29 and \$20, and she explained that her wage was higher because it was based on her seniority (14 years in the payer's service).

[26] Nathalie Dorais-Pagé, an appeals officer, testified at the hearing of this appeal and filed her report on an appeal in evidence (Exhibit I-1) along with a table

(Exhibit I-2) and excerpts from the payroll journal (Exhibit I-3) showing the amounts paid to the workers, to the appellant and to Alain Robitaille, the appellant's spouse and sole shareholder of the payer. According to the appeals officer who met Alain Robitaille and the appellant, the appellant had enjoyed better conditions than the payer's other employees. The appellant admitted that she had been treated differently from the other employees and explained that that was as a result of her 14 years of service with the payer.

[27] The appeals officer stated that the workers employed by the payer had had to punch a time card, whereas the appellant was not subject to that obligation. According to the facts gathered, the appellant's wage was determined on the basis of the payer's financial situation, her bonuses were higher than those awarded to the other employees, and she received her full wages during the Christmas vacation, unlike the other workers.

[28] In 2000, the appellant and her spouse were on the payroll, whereas the other employees were not. From February 27 to May 21, 2000, the appellant and her spouse were not paid, whereas the appellant worked and, during that same period, Josée Boudreau was on the payroll.

[29] In *Ferme Émile Richard et Fils Inc. v. The Minister of National Revenue*, [1994] F.C.J. No. 1859, the Federal Court of Appeal held that, in determining whether subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act*, now paragraph 5(3)(b) of the *Employment Insurance Act*, applies, the Court must consider whether the Minister's decision resulted from a proper exercise of his discretion. The Court must first require that the appellant "present evidence of wilful or arbitrary conduct by the Minister".

[30] The appellant referred to the decision by Associate Chief Justice Bowman of our Court in *Judy A. Steeves and M.N.R.* of March 20, 2001 (docket 2000-3619(EI)). I note the following principles stated in that decision:

The Federal Court of Appeal has said on a number of occasions that the words "if the Minister is satisfied [. . .]" confer on him a form of administrative discretion and that a two-step process is required in appeals from such a determination.

The first step is to decide whether discretion has been properly exercised. If it has been, the Court has no right to substitute its judgment for that of the Minister.

[31] The Court must acknowledge that the facts set out in *Steeves, supra*, are not similar to those in the case under study.

[32] The appellant's wage increased with the payer's financial capability, whereas Josée Boudreau's wage was stable. The appellant explained that her wages were higher than the payer's other employees because of her 14 years of service with the payer, not because of her duties. The payer's employees were always remunerated, whereas the appellant worked without pay for a period in 2000.

[33] The appellant admitted that she was treated differently from the other employees. The payer's other employees had to punch a time card, whereas the appellant was not subject to that obligation. The appellant received considerably higher bonuses than those paid to the other employees, particularly Michel Côté. During the construction holiday, the appellant received her full wages. The other workers received only four percent of their pay in lieu of vacation, whereas the appellant received eight percent.

[34] For the aforementioned reasons, the appellant did not show on a balance of probabilities that the Minister acted in a wilful or arbitrary manner. The appellant's

conditions of employment would not have been similar if she and the payer had been dealing with each other at arm's length.

[35] Accordingly, the appellant's employment is excluded from insurable employment under paragraph 5(2)(i) and subsection 5(3) of the *Act*.

[36] The appeal is dismissed, and the decision rendered by the Minister is confirmed.

Signed at Ottawa, Canada, this 10th day of June 2003.

"J.F. Somers"

D.J.T.C.C.