Dockets: 2001-570(EI)
2001-571(EI)

BETWEEN:

BRIGITTE PAQUET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on May 26, 2003, at Matane, Quebec.

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Counsel for the Appellant: Alain Poirier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeals are dismissed and the Minister's decision is upheld in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 11th day of August 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 18th day of March 2004.

Shulamit Day-Savage, Translator

Citation: 2003TCC526
Date: 20030811
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REASONS FOR JUDGMENT

Savoie, D.J.

[1] These appeals were heard on common evidence at Matane, Quebec, on May 26, 2003.

[2] These are appeals from two decisions by the Minister of National Revenue (the "Minister") dated January 24, 2001, that the Appellant's work during the periods at issue, from July 10 to November 6, 1999, when in the service of Donald Marin and Charles-Antoine Marin, operating La Seigneurie Dam Enr., the "Payor", and from June 11 to July 29, 2000, when in the service of Donald Marin, operating the Bar le Vieux Marin, the "Payor", was not insurable.

[3] According to the Minister, the examination of the circumstances of the employment during the periods at issue show that this employment was not insurable because they would not have entered into a substantially similar contract if the Appellant and the Payors had been dealing with one another at arm's length.

[4] However, the Minister, in the Replies to the Notices of Appeal, determined that the Appellant's employment was not insurable because, during the periods at issue, this employment did not meet the requirements for a contract of service according to the *Employment Insurance Act* (the "Act").

[5] These are both appeals of the decisions by the Payors, but since they did not attend the hearing, their appeals were rejected by failure to appear, at the request of Counsel for the Minister.

[6] Paragraph 5(1) of the Act reads in part as follows:

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;
>
> . . .

[7] The burden of proof is on the Appellant, who must establish, on the balance of probabilities, that the decisions of the Minister are without foundation in fact and in law. Each case stands on its own merits.

[8] In making his decisions, the Minister relied on the following assumptions of fact:

> In docket 2001-571(EI)
>
> [TRANSLATION]
>
> (a) On December 11, 1998, Donald Marin and Charles-Antoine Marin registered the business name "La Seigneurie Dam Enr.";
>
> (b) Donald Marin is Charles-Antoine Marin's brother;
>
> (c) Donald Marin was the Appellant's boyfriend and lived with her for several months;
>
> (d) The Payor operated a restaurant and a bar;

(e) The bar began operations in February 1999;

(f) The Appellant was a server;

(g) The Appellant did not have a set work schedule;

(h) The Appellant's work hours were not recorded;

(i) On November 11, 1999, the Payor issued a record of employment to the Appellant for the period from August 8, 1999, to November 6, 1999, indicating 530 insurable hours and insurable earnings of $5,748.16;

(j) The record of employment does not reflect reality;

(k) The Appellant began her work for the Payor on July 17, 1999;

(l) According to the statement by Donald Marin on January 8, 2001, the Appellant provided services to the Payor before and after the periods indicated on her record of employment, without pay;

(m) The period allegedly worked by the Appellant does not correspond to the period actually worked;

(n) The Appellant endorsed her pay cheques; she returned them to Donald Marin so that he could deposit them to the business account;

(o) The Payor and the Appellant had an arrangement in order to enable the Appellant to qualify for employment insurance benefits.

The Appellant admitted paragraphs (a) to (f), (i) and (k); She denied the assumptions set out in paragraphs (g), (h), (j) and (l) to (o).

In docket 2001-570(EI)

[TRANSLATION]

(a) On March 10, 2000, Donald Marin registered the business name "Bar Le Vieux Marin";

(b) Donald Marin was the sole owner of the business name;

(c) Donald Marin was the Appellant's boyfriend and he lived with her for several months;

(d) The Payor operated a bar/restaurant that was open seven days a week from 3 p.m. to 2 or 3 a.m.;

(e) The bar began operations on April 14, 2000;

(f) The Appellant was a server;

(g) The Appellant did not have a set work schedule;

(h) The Appellant's working hours were not recorded;

(i) On August 14, 2000, the Payor issued a record of employment for the Appellant for the period from June 11, 2000, to July 29, 2000, indicating 437.5 insurable hours and insurable earnings of $4,651.41;

(j) The record of employment does not reflect reality;

(k) In May, 2000, the Appellant signed receipts in the Payor's name;

(l) According to the Payor's statement dated January 8, 2001, the Appellant provided services to the Payor without pay, before and after the periods indicated on her record of employment;

(m) The period during which the Appellant allegedly worked does not correspond to the period actually worked;

(n) According to the Payor's statement dated January 8, 2001, the Payor did not have the financial ability to pay the Appellant;

(o) During the period at issue, the Appellant did not cash her pay cheques; she waited until the Payor had the necessary liquidity;

(p) The Payor and the Appellant had made an arrangement for the purpose of enabling the Appellant to qualify for employment insurance benefits.

The Appellant admitted the assumptions in paragraphs (a), (b), (d), (e), (f) and (i); she denied those in paragraphs (c), (g), (j), (l), (m), (o) and (p) and she said she had no knowledge of the assumptions in paragraphs (h), (k) and (n).

[9] On December 11, 1998, Donald Marin and Charles-Antoine Marin, two brothers, registered the business name "La Seigneurie Dam Enr." They operated a restaurant and a bar. The Appellant, Donald Marin's girlfriend, was a server at the bar, which began operations in February 1999. This business only operated in 1999. Charles-Antoine Marin withdrew from the business and his brother Donald Marin closed the restaurant. In March 2000, Donald Marin registered the business name "Bar Le Vieux Marin" and began to operate this business on April 14, 2000, where the Appellant became a server, according to her record of employment, beginning on June 11, 2000. Her relationship with Donald Marin was sporadic. They broke up and got back together three times between the summer of 1999 and the fall of 2000.

[10] It was established that the Appellant did not have a work schedule. Sara Santerre, an employee of the Payor, La Seigneurie Dam Enr., in her statutory declaration dated June 22, 2000, affirmed the following:

> [TRANSLATION]
>
> . . . Brigitte did not have a schedule as such; sometimes she arrived at 8 a.m. or lots of other times much later, but I know she took care of the bar.
>
> . . . Brigitte did what she wanted, she was there, she wasn't there, and she really didn't know much about the restaurant business.

[11] The Appellant responded to the Minister's assumption that her working hours were not recorded, saying that she reported them on her tips declaration. It should be noted, however, that these declarations were not produced and that this statement is not supported by the rest of the evidence. It should also be emphasized that in her testimony she affirmed that she did not remember whether she declared her tips.

[12] The Minister emphasized that the records of employment do not reflect reality. The Payors admitted this to the investigators. They did not testify at the hearing, did not attend, and were not called as witnesses. The Appellant denied this assumption of the Minister but did not prove that it was false.

[13] The Payors also admitted to the investigators that the Appellant provided services to them before and after the periods indicated on the records of employment. Once again, the Appellant did not succeed in proving this assumption false. In fact the documentation produced as evidence established that the Appellant had provided services in May 2000 whereas her period of employment began on June 11, according to her record of employment.

[14] The documentary evidence demonstrated that in 1999, the Appellant endorsed her pay cheques and returned them to the Payor. Confronted with this fact, she had to admit it. None of the Appellant's pay cheques for 1999, beginning from August 22, were cashed until November 15, 1999, with the exception of the pay cheque for August 31, which was cashed on October 15, 1999. It was established that in order to be paid, the Appellant had to wait until the Payor received his bottle credit from Molson.

[15] The evidence revealed that when the Payor did not have any money, the Appellant waited to be paid. She did not cash her pay cheques. When the Payor received the money, she gave him her cheque in exchange for cash. The Appellant revealed that the Payor's business was not good in 1999 and 2000, but because she wanted to keep her job, she waited.

[16] It was established that the Appellant provided services, did errands for the Payors, without pay. She admitted this.

[17] The Appellant claimed she did not work outside the periods at issue, but she admitted that she spent time at the Payor's business in her free time, either to eat or have a drink, and that, if the servers were busy, she helped out without being paid.

[18] The Appellant's evidence does not take into account the services rendered to the Payors. For 1999, this evidence does not take into consideration the $30 she received from the Payor for each shift she worked while she was being trained. For 2000, this evidence does not take into account the services rendered in May and the numerous receipts she signed for the Payor when she was unemployed.

[19] The documentary evidence revealed that the Appellant's periods of work do not correspond to the economic activity of the Payors. Also, the table produced in evidence as Exhibit I-5, the Payor had the means in 1999 to pay the Appellant in August, so why wait until November?

[20] The same table showed economic activity in November and December 1999, justifying the Appellant's services, but she was unemployed.

[21] All these considerations led the Minister to conclude that the Appellant and the Payors had made an arrangement for the purpose of enabling the Appellant to qualify to receive employment insurance benefits.

[22] A case similar to this one was presented at this Court before Tardif J. in *Thibeault v. Canada (Minister of National Revenue – M.N.R.)*, [1998] T.C.J. No. 690.

[23] The issue led Tardif J. to state that:

> Genuine employment is employment remunerated according to market conditions, which contributes in a real and positive way to the advancement and development of the business paying the salary in consideration of work performed. These are basically economic factors that leave little, if any, room for generosity or compassion.
>
> . . .
>
> Where the size of the salary bears no relation to the economic value of the services rendered, where the beginning and end of work periods coincide with the end and the beginning of the payment period and where the length of the work period also coincides with the number of weeks required to requalify, very serious doubts arise as to the legitimacy of the employment contract. Where the coincidences are numerous and improbable, there is a risk of giving rise to an inference that the parties agreed to an artificial arrangement to enable them to profit from the benefits.

[24] The Appellant asked this Court to overturn Minister's decision. It is appropriate to recall the circumstances that may justify this Court's intervention and, in particular, the recognized limits of this power to review and intervene.

[25] In this respect, the words of Marceau J. of the Federal Court of Appeal are useful. They are reproduced below as they appear at paragraph 4 of *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878:

> 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.

[26] The Federal Court of Appeal took up this same idea in *Gray v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 158. Desjardins J. wrote the following:

> The applicant submits with the assumptions on which the Minister relied on in his reply to the notice of appeal were largely irrelevant . . . The applicant also submits that the fact that the applicant worked for the payor outside of his remuneration period did not amount, in the circumstances of the case at bar, to an important factor to be relied on.
>
> . . .
>
> With regard to the applicant's second argument, the weight to be given to relevant factors is for the Tax Court judge to assess and not a matter for this Court to reassess.

[27] After reviewing the Appellant's file, the Minister concluded that there was no real contract of service between the Appellant and the Payors. He concluded, among other things, that there was an arrangement between the Payors and the Appellant for the sole purpose of enabling the Appellant to draw employment insurance benefits.

[28] Tardif J., of this Court, in *Thibeault*, *supra*, described the circumstances which invalidate a contract of service. He explained as follows, at paragraphs 22 and 29:

> Genuine employment is employment remunerated according to market conditions, which contributes in a real and positive way to the advancement and development of the business paying the salary in consideration of work performed. These are basically economic factors that leave little, if any, room for generosity or compassion.
>
> Of course, it is neither illegal nor reprehensible to organize one's affairs so as to profit from the social program that is the unemployment insurance scheme, subject to the express condition that nothing be misrepresented, disguised or contrived and that the payment of benefits occur as a result of events over which the beneficiary has no control. Where the size of the salary bears no relation to the economic value of the services rendered, where the beginning and end of work periods coincide with the end and the beginning of the payment period and where the length of the work period also coincides with the number of weeks required to requalify, very serious doubts arise as to the legitimacy of the employment contract. Where the coincidences are numerous and improbable, there is a risk of giving rise to an inference that the parties agreed to an artificial arrangement to enable them to profit from the benefits.

[29] It is appropriate to add that this decision was upheld by the Federal Court of Appeal on June 15, 2000, when it dismissed the application for judicial review with costs.

[30] Parties that agree upon payment established according to criteria other than the time or period during which the work was conducted, thereby desiring to take advantage of the provisions of the Act, introduce factors that are foreign to a true contract of service, effectively call its validity into question.

[31] I therefore conclude that the Appellant's employment was not insurable because there was not an arm's-length relationship between the Payors and the Appellant.

[32] In addition, the Appellant's employment was not insurable, within the meaning of the Act, during the periods at issue, since during these periods the Payors and the Appellant did not have a true contract of service within the meaning of paragraph 5(1)(*a*) of the Act.

[33] Finally, in light of the evidence presented at the hearing, it must be concluded that there was an arrangement between the Payors and the Appellant for the sole purpose of enabling the Appellant to qualify for employment insurance benefits.

[34] For these reasons, the appeals are dismissed and the decisions of the Minister are upheld.

Signed at Grand-Barachois, New Brunswick, this 11th day of August 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 18th day of March 2004.

Shulamit Day-Savage, Translator