

Docket: 2002-3804(EI)

BETWEEN:

CAROLINE ÉMOND,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JONATHAN FOSTER,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 18, 2003, at Jonquière, Quebec

Before: Honourable Deputy Judge J. F. Somers

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Marie-Claude Landry

For the Intervener: The Intervener himself

JUDGMENT

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

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers"

D.J.T.C.C.

Translation certified true
on this 17th day of March 2004.

Shulamit Day-Savage, Translator

Citation: 2003TCC548
Date: 20030911
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REASONS FOR JUDGMENT

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

[1] This appeal was heard at Jonquière, Quebec, on June 18, 2003.

[2] The Appellant appeals from the decision of the Minister of National Revenue (the "Minister") that the employment with the Payor, Jonathan Foster, during the period at issue, from March 5, 2001, to March 8, 2002, is excluded from insurable employment within the meaning of the *Employment Insurance Act* because there was not an arm's-length relationship between the Payor and the Appellant.

[3] Subsection 5(1) of the *Employment Insurance Act* (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 *Unemployment Insurance Act* read in part as follows:

5. (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*; and
 - (b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

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

Section 251: Arm's length relationship

- (1) For the purposes of this Act,
 - (a) related persons shall be deemed not to deal with each other at arm's length;

...

(2) Definition of "related persons". For the purpose of this Act, "related persons", or persons related to each other, are

- (a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

...

[6] The burden of proof is on the Appellant. The Appellant must show, on a balance of evidence, 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 outlined in paragraph 7 of the Reply to the Notice of Appeal, which were admitted or denied:

[TRANSLATION]

- (a) the Payor registered a business on January 16, 1997, as a sole proprietor; (admitted)
- (b) the Payor was an electrician; (admitted)
- (c) the Payor conducted business under the corporate name "Entreprise Jonathan Foster Enr."; (admitted)
- (d) the Appellant is the spouse of Jonathan Foster; (admitted)
- (e) the Appellant had been hired as an accounting secretary by the Payor; (admitted)

- (f) the Appellant had worked for the Payor since the beginning of the business; (denied)
- (g) the Appellant's duties included answering the phone, taking care of bank reconciliations and payroll, preparing invoices, typing bids and filling out reports for government organizations; (denied)
- (h) the Appellant was recorded in the Payor's payroll register with remuneration of \$16 per hour in 2001 and \$20 per hour in 2002; (admitted)
- (i) on May 8, 2002, the Appellant told a representative of the Respondent that her salary had been established to meet the family's needs; (denied)
- (j) on July 18, 2002, the Payor stated to a representative of the Respondent that he was looking for a replacement to perform the Appellant's duties with a salary of \$10 or \$12 per hour subsidized by HRDC; (admitted)
- (k) the Appellant's salary was unreasonable in light of her duties; (denied)
- (l) the Appellant's salary was not fully paid; (denied)
- (m) in 2001, of the 41 weeks worked, the Appellant and the Payor have proof of pay for only 19 weeks; (denied)
- (n) in 2002, of the 10 weeks worked, the Appellant and the Payor have no proof of pay; (denied)
- (o) on March 14, 2002, the Payor gave the Appellant a record of employment for the period beginning March 5, 2001 and ending on March 8, 2002, that indicated 1,080 insurable hours and total insurable earnings of \$19,040.00; (admitted)
- (p) after she was laid off, the Appellant continued to provide services to the Payor without pay; (denied)

[8] The Payor registered a business on January 16, 1997, as a sole proprietor. The Payor was an electrician doing business under the corporate name of "Entreprise Jonathan Foster Enr."

[9] The Appellant is the Payor's spouse. She had been hired as an accounting secretary by the Payor.

[10] The Appellant told the Court that she had worked as an office clerk for the school board until 1999, and that she has not worked anywhere else since then.

[11] She stated that she worked for the Payor between 2000 and 2002. Her duties included answering the phone, taking care of the bank reconciliations and payroll, preparing invoices, typing bids and filling out reports for government organizations. In addition, she allocated tasks to the Payor's employees and spread salt on icy surfaces in the winter.

[12] The Appellant was entered in the payroll register with remuneration of \$16 per hour in 2001 and \$20/hour in 2002.

[13] She admitted have spoken to a representative of Human Resources Development Canada (HRDC) on July 18, 2002, saying that she was working for good of the family.

[14] On July 15, 2002, the Payor told a representative of the Minister that he was looking for a replacement to perform the Appellant's duties at a salary of \$10 or \$12 per hour, subsidized by HRDC.

[15] The Appellant testified that her salary of \$16 per hour was always paid weekly, either by cheque or in cash, for a total of \$461.66 per week. In January 2002, she received \$20 per hour for approximately \$580.

[16] The Appellant stated that she worked for 41 weeks in 2001 and received 32 paycheques.

[17] She admitted that in 2002 she worked for the Payor for 10 weeks and she was paid in cash since the Payor had enough liquidity to do so. According to her, she did not work for the Payor after March 2002.

[18] On March 14, 2002, the Payor issued a record of employment, Exhibit I-4, to the Appellant, for the period beginning on March 5, 2001, and ending on March 8, 2002, indicating 1,080 insurable hours and total insurable earnings of \$19,040.00.

[19] The Appellant told the Court that she did not work for the Payor after March 2002.

[20] In cross-examination, she stated that at the very start of business operations in 1997, when the business office was in the family home, she helped her spouse prepare invoices and set up an accounting system.

[21] Between 1999 and 2000, she went to the business office to perform certain duties without pay; at that time, the business office was located in a building owned by her spouse, located approximately 3 to 4 km from her home.

[22] She admitted having spoken to Lynne Laberge, insurance agent for HRDC, and thinks she told her that she was working for the Payor to meet the family's needs.

[23] She admitted there is no payroll register for her salary for 2002 and that her spouse asked her to delay payment of her salary, to which she replied, "You pay me when you can." However, she stated that she received her full salary for 2002 in cash.

[24] She admitted having signed a statutory declaration on April 17, 2002, (Exhibit I-1), which reads in part as follows:

[TRANSLATION]

. . .My spouse Jonathan Foster has been the sole proprietor of a business "Entrepreneur Électrique" since 1997. I have worked with him since that date, but I never worked for pay before March 2001. At the beginning, we had set up the offices in our home and we paid ourselves a salary by making withdrawals from the company profits. We thought that we had no right to a salary because we were "owners". The first year, the profits were around \$30,000 and increased from year to year. Last year, it was up to \$808,000. In April 2000, my spouse bought a building in Forestville, since the business was expanding and it had become too cramped at home (materials, traffic, etc.) . . .

[25] Upon reading her statutory declaration, she admitted that she had not been paid during this period although she performed the same duties for which she had been paid previously. Only since 2000 had she been on the payroll register.

[26] The Appellant recognized the paycheques she received in 2000 and 2001.

[27] She admitted having received a letter from the Canada Customs and Revenue Agency dated July 22, 2002, (Exhibit I-3), asking for documents such as the payroll register and proof of wages paid.

[28] The Appellant submitted as evidence photocopies of her paycheques (Exhibit A-1) for 2001 and recognized that approximately 11 were missing.

[29] She stated that she signed her own paycheques and deposited them in the joint account she held with her spouse, the Payor.

[30] According to the Appellant, the secretary who replaced her was paid \$10 per hour during 2002. The latter worked from July 2002 until January 2003 and this job was subsidized by HRDC.

[31] She admitted that her hourly rate was increased to \$20 per hour in 2002, since the Payor had a large contract. She stated that her salary was not paid regularly and that she went to the office outside the period at issue to show her spouse the tasks that needed to be done.

[32] She stated that the following passage in her statutory declaration was false:

[TRANSLATION]

. . . When the paperwork accumulated, I went to the office for a few hours to do it and I took care to declare my hours and the pay I received.

[33] Jonathan Foster, the Payor, testified that he had employed an average of eight to 10 people in 2001 and four to five in 2002.

[34] His business office was set up in his home from 1997 to 1998. Since his business had grown, he bought a building in 2000, where his office is now located.

[35] He admitted that the Appellant had worked for him for several weeks in 2000 and she only received a salary in 2001. He also admitted that she did not receive her salary regularly because his business did not have enough liquidity.

[36] In the fall of 2001, he decided to give the Appellant a raise to \$20 per hour, starting in 2002.

[37] He stated that he did not have any employees between March and June 2002. He also admitted that his business had a loss of \$54,143 in 2001 and a profit of approximately \$63,000 in 2002.

[38] Anny DeBlois, Client Service Officer and Appeals Officer at HRDC during the period at issue, stated that she had telephone conversations with the Payor and the Appellant: with the Payor on July 18, 2002, and with the Appellant on July 18, August 5 and August 12, 2002.

[39] The information obtained from the Payor and the Appellant confirms that the Appellant worked for the Payor without pay from 1997 to 1999 and that her salary was not paid on a regular basis in 2000.

[40] This witness submitted a table, labelled Exhibit I-7, that shows the names of the Payor's employees as well as their working hours.

[41] According to her report on a call (Exhibit I-6), the Appellant was entered on the payroll register for 2000 and 2001 whereas according to the payroll register and the proof of pay provided by the Payor, several paycheques had not been cashed by the worker in 2000, 2001 and 2002:

YEARS	Weeks Worked	Entry in payroll register	PROOF OF PAY
2000	52	10*	3*
2001	52	41	19
2002	10	8	0

*in 2000, the salary was paid every two weeks.

[42] However, the Appellant presented evidence that there were 31 salary payments made in 2001, whereas she worked 42 weeks; however, no proof of pay was presented for 2002.

[43] The Appellant did not receive vacation pay or 4% pay in lieu of vacation.

[44] The Appellant received a salary increase of \$4 per hour, bringing her hourly rate to \$20, whereas the Payor did not have the ability to pay.

[45] After March 2002, the Appellant went to the office four or five times per week without being paid.

[46] The Federal Court of Appeal, in *Ferme Émile Richard et Fils Inc. v. Canada (Department of National Revenue)*, [1994] F.C.J. No. 1859, indicated that when applying subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act*, now paragraph 5(3)(b) of the *Employment Insurance Act*, the Court must ask whether the Minister's decision "resulted from the proper exercise of his discretionary authority." The Court must first require that the Appellant "present evidence of wilful or arbitrary conduct by the Minister."

[47] In *Bérard v. Canada (Minister of National Revenue – M.N.R.)*, [1997] F.C.J. No. 88, Hugessen J. of the Federal Court of Appeal said the following at paragraph 3:

. . . The clear purpose of the legislation is to except contracts of employment between related persons that are not similar in nature to a normal contract between persons dealing with each other at arm's length. It is in our view clear that this abnormality can just as well take the form of conditions unfavourable to the employee as of favourable conditions. In either case, the employer-employee relationship is abnormal and can be suspected of having been influenced by factors other than economic forces in the labour market.

[48] In *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878, Marceau J. of the Federal Court of Appeal said the following at paragraph 4:

. . .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.

[49] The Court verified the facts relied on by the Minister and concluded that they were correctly assessed having regard to the context in which they occurred.

[50] The Appellant provided services to the Payor from 1997 to 1999 without pay. During 2000, 2001 and 2002, the Appellant was not paid regularly.

[51] The Appellant did not receive paid vacation during the period at issue, nor did she receive 4% of her salary in lieu.

[52] The Appellant worked at the Payor's office after the period on question without being paid.

[53] According to the Appellant, she was paid by cheque or in cash; but no evidence was presented to this effect.

[54] The Appellant received a salary increase, whereas the Payor's financial ability had decreased. This increase was not reasonable.

[55] Given the remuneration paid, the terms and conditions, the duration, nature and importance of the work performed it is reasonable to conclude that the Payor and the Appellant would not have entered into a substantially similar contract if they had been dealing with one another at arm's length.

[56] The Appellant has failed to establish, on a balance of evidence, that the Minister acted wilfully or arbitrarily.

[57] As a result, the Court concludes that the Appellant's employment during the period at issue is excluded from insurable employment under paragraph 5(2)(i) and subsection 5(3) of the *Employment Insurance Act*.

[58] The appeal is dismissed.

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers"

Deputy Judge Somers

Translation certified true
on this 17th day of March 2004.

Shulamit Day-Savage, Translator