Docket: 2002-4204(EI)

BETWEEN:

DENIS VOYER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 27, 2003 at Trois-Rivières, Quebec

Before: The Honourable J. F. Somers

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Sébastien Gagné

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 23rd day of September 2003.

"J. F. Somers"

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

Translation certified true
on this 23nd day of March 2004.

Sharon Moren, Translator

Citation: 2003TCC666
Date: 20030923
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REASONS FOR JUDGMENT

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

[1] This appeal was heard at Trois-Rivières, Quebec, on August 27, 2003.

[2] The Appellant is instituting an appeal from the decision of the Minister of National Revenue (the "Minister") that the work performed during the period at issue, from January 1 to December 31, 2000 for Luc Roberge, doing business under the trade name "Mon Gym", the Payor, was insurable because this employment met the requirements of a contract of service by virtue of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the "Act"); there was an employer-employee relationship between the Appellant and the Payor.

[3] Subsection 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;

. . .

[4] The burden of proof is on the Appellant, who must establish by the preponderance of evidence that the Minister's decision is unfounded in fact and in law. Each case must be examined on its own merit.

[5] In making his ruling, the Minister drew upon the following assumptions of fact that were either admitted or denied by the Appellant:

[TRANSLATION]

(a) the Payor registered the name "Mon Gym" on July 21, 1999; (admitted)

(b) the Payor was the sole proprietor of the company; (admitted)

(c) the Payor operated a physical training centre "Mon Gym" and two chiropractic clinics; (admitted)

(d) the Appellant has a Bachelor of Physical Education; (admitted)

(e) the Appellant had been hired as a physical educator by the Payor; (denied)

(f) the Appellant's duties were to create specialized programs and assist clients; (admitted)

(g) the clients were the Payor’s clients; (denied)

(h) the Appellant had a work schedule that had been set by the Payor after he had obtained the Appellant's availability; (denied)

(i) the Appellant could not be absent without notifying the Payor; (denied)

(j) the Appellant filled out a time card and had to note all hours worked on a daily basis; (admitted)

(k) there was a relationship of subordination between the Appellant and the Payor; (denied)

(l) the Appellant rendered services from 30 to 50 hours per week to the Payor, depending on the season and the client traffic; (admitted)

(m) the Appellant was remunerated on the basis of the number of hours worked; (admitted)

(n) the Appellant received a remuneration of $10 per hour from the Payor; (admitted)

(o) the Appellant did not bill the Payor's clients; (admitted)

(p) the Appellant incurred no expense related to his duties other than providing his athletic clothing and shoes; (admitted)

(q) the Appellant had no opportunity for profit or risks of loss except the salary paid by the Payor; (denied)

(r) the Payor provided the Appellant with the premises and all the training equipment used by the Payor's clients; (admitted)

(s) the Appellant's work was an integral part of the Payor's activities. (denied)

[6] Only the Appellant and Louise Dessureault, Appeal Officer for the Canada Customs and Revenue Agency testified at the hearing of this appeal.

[7] The Payor, the sole proprietor of the business, registered the trade name "Mon Gym" on July 21, 1999. He has operated a physical training centre and two chiropractic clinics.

[8] The Appellant has a Bachelor of Physical Education. According to him, his duties were to create specialized programs and to assist the Payor’s clients.

[9] The Appellant declared that he worked from 5 to 7 days per week during irregular hours that he set himself. He has denied that he could not be absent without notifying the Payor and added that the latter was rarely at the gym.

[10] The Appellant worked from 30 to 50 hours per week, depending on the season and client traffic. He filled out a time card, noted on it the hours worked each day and billed the Payor, who paid him $10.00 per hour. For the year 2000, the Appellant received the amount of $19,655 from the Payor as remuneration.

[11] In addition to the remuneration that the Payor paid him, the Appellant received the amount of $500.00 that he earned in the field of music. During the

period at issue, the Appellant had as other occupations, among others, university courses and did volunteer work as a trainer.

[12] The Appellant incurred no expense related to his employment other than his athletic clothing and shoes. The Payor provided the Appellant with the premises and all the training equipment used by the Payor's clients.

[13] On cross-examination, the Appellant stated that the gym's hours of operation were from 6:00 a.m. to 10:00 p.m.

[14] With the Payor being rarely on the premises, a certain Michel Couturier looked after the gym. The Appellant totalled his hours worked, turned them in to the Payor and received his remuneration depending on this number of hours. The clients bought memberships to the gym; these were the Payor's clients and not those of the Appellant and the latter received only his salary according to the number of hours worked.

[15] The Appellant stated that he had no employees and that the Payor is the one who had liability insurance.

[16] The Appeal Officer, Louise Dessureault, related the facts on which the Minister based his decision, including:

- the worker consulted the Payor with regard to the state of health of the gym's clients;

- the worker could not enter a partnership with third parties without the Payor's consent.

[17] This witness contacted the Counsel for the Payor, Marc-Antoine Deschamps, by telephone on September 12 and 18, 2002. She knew about the Payor's Notice of Appeal (Exhibit I-2) with regard to the insurability of the Appellant's employment during the period at issue. It should be noted that the Payor had instituted an appeal from the Minister's decision and that he consequently withdrew it (see the Notice of Discontinuance filed as Exhibit I-5).

[18] This officer communicated with the Appellant and gathered and noted the following facts in her appeal report filed as Exhibit I-4:

> [TRANSLATION]
>
> - In 2000, he worked at the Payor's physical conditioning centre. He was a trainer.
> - He looked after the gym's clientele and not his personal clientele.
> - He did not set his hours of work himself. It is the centre that sets his schedule according to the clients. His work schedule depended on the gym's clientele.
> - He had to ask and notify if he expected to take leave and if he wanted a week's leave, he had to take it in the summer since that is when it is quietest at the centre.
> - He worked from 40 to 50 hours per week during the winter and 30 hours during the summer.
> - He had to turn in a time card to the Payor at the end of every week, reporting his hours worked.
> - He confirms his hourly rate, the equipment provided by the Payor, and the payment of his hours by the Payor's cheque every week.
> - He does not believe that he could have hired a stranger to replace him. If he was away, he was replaced by someone who worked at the gym.
> - He did not rent the premises from the gym.
> - He provided his athletic clothing and shoes.

[19] These statements made to the Appeal Officer were not denied by the Appellant at his appeal hearing.

[20] According to the Appeal Officer, the Appellant worked under the supervision of Michel Couturier whom the Appellant notified his availability on the basis of which the Appellant's hours of work were set. Moreover, the clients were the Payor's and not the Appellant's and it was the Payor who had liability

insurance and not the Appellant. The equipment and the premises were provided by the Payor; the Appellant provided only his athletic clothing and shoes.

[21] The Payor has not demonstrated any interest in determining the status of the Appellant, Denis Voyer.

[22] In order to distinguish the contract of service from the contract for services (self-employed person), it is necessary to examine the entirety of the various components of the relationship between the parties. The parties' intention is not necessarily the deciding factor if this distinction.

[23] It is clear that the degree of control exercised by the employer over the employee's work remains the essential criterion for demonstrating the relationship of subordination and this degree varies depending on the circumstances.

[24] It is well established that there are four basic elements for distinguishing a contract of service from a contract for services: a) the degree or absence of control exercised by the employer; b) ownership of the tools; c) the opportunity for profit and risks of loss; and d) the degree of integration of the employee's work in the employer's business (see *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553).

a) Control

[25] The Appellant had a Bachelor of Physical Education. He was, therefore, a specialist in this field and had a certain freedom to apply his knowledge in creating programs and assisting clients.

[26] The Payor was the sole proprietor of the business and had liability insurance to protect his clients. He had an interest in keeping a certain control over his business's activities.

[27] The evidence showed that the clients were those of the Payor and that they had to be members to get a training program; the Appellant was a trainer of the Payor's clients.

[28] The gym's business hours were from 6:00 a.m. to 10:00 p.m. The Appellant had to notify the supervisor, Michel Couturier, of his availability and the latter set the Appellant's work hours. If it was necessary for the Appellant to be away from work, he had to notify Michel Couturier, who undertook finding a replacement.

The Appellant filled in a time card noting all of the hours worked and the Payor remunerated him at an hourly rate of $10.00.

[29] From these facts, it is clear that a sufficient relationship of subordination existed between the Payor and the Appellant to conclude that the Appellant was an employee.

b) Ownership of Tools

[30] The Payor provided the premises and all the necessary training equipment used by the Appellant in the context of his work. The Appellant incurred no expense for using the Payor's equipment.

[31] According to this criteria, there was a contract of service between the parties.

c) Chance for Profit and Risks of Loss

[32] The Appellant received a salary from the Payor based on the hours worked; the hourly rate was $10.00. The Appellant was assured an income coming solely from the Payor; therefore, he assumed no loss in performing his work. From this criterion, it can be concluded that the Appellant was an employee.

d) Degree of Integration

[33] The Payor owns the business, not the Appellant. The Appellant's work was performed for the benefit of the Payor and the Payor's clients. The Appellant was well-integrated into the Payor's business operations.

[34] According to this criterion, the Appellant was the Payor’s employee.

[35] Taking into account all of the evidence and the above-mentioned criteria, the Appellant's work during the period at issue was insurable since it met the requirements of a contract of service under paragraph 5(1)(*a*) of the Act; there was an employer-employee relationship.

[36] The appeal is dismissed and the Minister's decision is upheld.

Signed at Ottawa, this 23rd day of September 2003.

"J. F. Somers"

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

Translation certified true
on this 23nd day of March 2004.

Sharon Moren, Translator