Docket: 2003-1104(EI)

BETWEEN:

DANIEL FORTIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 31, 2003 at Québec City, Quebec

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal is dismissed and the Minister's decision is upheld according to the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 18th day of November 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 26th day of April 2004.

Sharon Moren, Translator

Citation: 2003TCC763
Date: 20031118
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DANIEL FORTIER,

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REASONS FOR JUDGMENT

Savoie, D.J.

[1] This appeal was heard at Québec City, Quebec, on July 31, 2003.

[2] This is an appeal regarding the insurability of the work of the Appellant, Daniel Fortier while working for Service Ménager Victor Inc., the Payor, from October 5, 1998 to April 25, 2001, the period at issue, as understood in the *Employment Insurance Act* (the "Act").

[3] On December 17, 2002, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that this work for the period at issue was not insurable because it did not meet the requirements of a contract of service and that there was not an employer-employee relationship between himself and the Payor.

[4] In making his decision, the Minister relied on the following assumptions of fact that were admitted or denied by the Appellant or of which the Appellant had no knowledge:

[TRANSLATION]

(a) the Payor was incorporated on April 11, 1995; (admitted)

(b) the Payor operated a maintenance company that cleaned government buildings; (admitted)

(c) the Payor's only shareholder was Dyane Maltais; (admitted)

(d) on October 22, 2002, Yves de Varennes, husband of Dyane Maltais, stated to an Agent for the Respondent that he alone made all of the Payor's decisions, and that he controlled and managed the business's operations; (no knowledge)

(e) the Payor hired from 20 to 40 employees; (admitted with explanations)

(f) the Appellant had training as an administrative specialist; (admitted)

(g) the Appellant had been hired as a controller by the Payor; (admitted)

(h) the Appellant's duties were to take care of the accounting, keep the computerized accounting books, the banking reconciliations, government reports and the payroll; (admitted)

(i) the Appellant always worked at the Payor's office; (admitted)

(j) the Appellant set his own work schedule; (admitted)

(k) the Appellant was not required to work a specific number of hours per week for the Payor; (denied as written)

(l) the Appellant's hours of work were not recorded by the Payor; (admitted)

(m) the Appellant did not have the benefit of the group insurance of the Payor's employees; (admitted)

(n) in 1998, the Appellant stopped working following an injury and received no remuneration from the Payor for three weeks; (denied)

(o) the Appellant worked from 10 to 15 hours per week for the Payor; (denied as written)

(p) the Appellant could leave when he had finished his work; (admitted)

(q) during the entire period at issue, the Appellant's wage was $12 per hour; (denied as written)

(r) on October 22, 2002, Yves de Varennes stated to the Agent for the Respondent that the Appellant worked two to three days per week and did not work full days; (no knowledge)

(s) on October 22, 2002, Yves de Varennes stated to an Agent for the Respondent that he did not know the hours actually worked by the Appellant; (no knowledge)

(t) on April 26, 2001, the Payor declared bankruptcy; (admitted)

(u) on April 23, 2001, the Payor issued a record of employment to the Appellant that indicated his first day of work as October 5, 1998 and his last day of work as April 25, 2001, 1,320 insurable hours and $13,440.00 insurable remuneration; (admitted)

(v) on May 4, 2001, the Appellant stated in his application for employment insurance benefits at Human Resources and Development Canada that he worked 40 hours per week and received remuneration of $960 every two weeks when he was working only 10 to 15 hours per week at $12 per hour; (denied as written)

(w) the Payor and the Appellant were unable to provide evidence of payment of the Appellant's remuneration to the Agent for the Respondent; (denied)

(x) the Appellant's record of employment does not match the hours worked and the Appellant's remuneration; (denied)

(y) the Payor and the Appellant made an arrangement in order to qualify the Appellant to receive higher employment insurance benefits. (denied)

[5] In his testimony, the Appellant maintained that when he stopped working in 1998 following an injury, he was remunerated in the same fashion by the Payor, who had received an employment support grant.

[6] He added that he worked 40 hours per week during the first six months of his employment and then 12 to 15 hours per week for a year or a year and a half and, then for the last seven or eight months, he worked more hours, full time, 40 hours per week.

[7] Evidence brought by the Appellant did not successfully show the falsity of the Minister's assumption stated in paragraph (w) above.

[8] At the hearing, the Appellant testified that he had remitted the records establishing the remuneration received from the Payor to the union and that the union had lost them. This statement was contrary to his statement made to the Appeals Officer, namely that he had lost these records in moving.

[9] In his testimony, the Appellant maintained that his work was supervised, but that he worked alone most of the time. Yves de Varennes occasionally came to the premises, but gave the Appellant no directives; what he cared about was the results. Moreover, it was shown that the Appellant decided his own timetable, organization of time and his work. No one gave him his schedule in writing. The evidence revealed that the Appellant had no set timetable; he decided his work days himself; he came to the workplace occasionally five days, occasionally four days and occasionally three days per week, as he pleased. When he was hired, the Appellant received no training and, in performing his duties, received no instruction on the procedures to be used.

[10] The Minister acknowledged that in performing his work, the Appellant used the Payor's tools and equipment. The Minister admitted in addition that the Appellant incurred no risk of loss and had no opportunity to profit as he received a set wage. Furthermore, it was established that the Appellant's work was integrated into the Payor's business, but the Appellant did not have the benefit of any group insurance or pension fund, unlike the other employees. It must be added that the Appellant was not covered by the Commission de la santé et de la sécurité du travail (CSST).

[11] The Minister's investigation gathered contradictory evidence with regard to the Appellant's pay; the source of this information is the Appellant's record of employment dated April 23, 2001 (Exhibit I-1), his application for employment insurance benefits dated May 4, 2001 (Exhibit I-2) and the information given by the Appellant and by Yves de Varennes, who are named in the appeal report (Exhibit I-3).

[12] Moreover, the Minister was unable to obtain the Payor's payroll journal or evidence of payment to the Appellant who, complaining about not receiving his last weeks of pay, made no complaint to the union when the Payor went bankrupt.

[13] The evidence provided by the Minister revealed that the Appellant had attributed a large increase in his wages to a National Defence contract transferred from one company to another at the right time, but the investigation revealed a flaw in this explanation when it was confirmed that the dates did not support the Appellant's explanations; this demonstrated the falsity of the Appellant's allegations and led the Minister to doubt all of the Appellant's claims. Therefore, the Minister found that there had been an arrangement between the Payor and the Appellant, two individuals who had known each other well for a long time, in order to enable the Appellant to receive higher employment insurance benefits.

[14] It was shown that the information provided to the Minister's investigators was often contradictory. Thus, according to the Appellant's record of employment dated April 23, 2001, he allegedly received $960 salary every two weeks for 49 hours of work. On the other hand, in his May 4, 2001 application for benefits, he declared a wage of $960, but for 80 hours of work.

[15] Furthermore, it was revealed that in a conversation with the Agent for the Payor that Yves de Varennes declared that the Appellant received a salary of $400 or $500 per week, regardless of the number of hours worked. Neither version was accepted by the Minister due to the impossibility of determining with certainty if either were true, as the Minister had been unable to obtain the Payor's payroll journals.

[16] The Minister concluded that, due to the contradictions in the statements and the documentary evidence, it was impossible to find the parties' statements credible and that their only purpose was to favour the Appellant.

[17] In *Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124, this court looked into a similar situation to the one currently being studied. In rendering his judgment, Tardif J. wrote:

> I nonetheless believe that the work done by Mr. Laverdière during the said period in 1992 was not performed under a genuine contract of service, *inter alia* for the following reasons. First of all, only a genuine contract of employment can meet the requirements

> for being characterized as a contract of service; a genuine contract of service must have certain essential components, including the performance of work; that performance must come under the authority of the person paying the remuneration, which remuneration must be based on the quantity and quality of the work done.
>
> Any agreement or arrangement setting out terms for the payment of remuneration based not on the time or the period during which the paid work is performed but on other objectives, such as taking advantage of the Act's provisions, is not in the nature of a contract of service.

[18] In a similar file, Tardif, J. recapitulated nearly the same comments in *Duplin v. Canada (Minister of National Revenue – M.N.R.)*, [2001] T.C.J. No. 136 when he wrote:

> . . . A genuine contract of service exists where a person performs work that is defined in time and generally described in a payroll journal, in return for which that person receives fair and reasonable remuneration from the payer, which must at all times have the power to control the actions of the person it is paying. The remuneration must correspond to the work performed for a defined period of time.
>
> . . .
>
> Only the real facts are to be taken into account in determining whether or not a genuine contract of service existed. Often, the facts have been falsified, disguised or even hidden, which is why the Court must rely on the whole of the available tendered evidence. The only relevant facts and information are those relating to the performance of work, to the remuneration paid and to the existence or non-existence of a relationship of subordination.
>
> . . .
>
> The fundamental components of a contract of service are essentially economic in nature. The records kept, such as payroll journals and records concerning the mode of remuneration, must be genuine and must also correspond to reality. For example, the payroll journal must record hours worked corresponding with the wages paid. Where a payroll journal records hours that were not worked or fails to record hours that were worked during the period shown, that is a serious indication of falsification. Such is the case where pay does not correspond with the hours worked. Both situations create a very strong presumption that the parties have agreed on a false scenario in

> order to derive various benefits therefrom, including benefits with respect to taxes and employment insurance.
>
> It is possible for an arrangement to be more profitable for one party than the other, but this is a secondary effect that is not relevant in characterizing a contract of service, since as soon as a contract of employment is shaped by false or inaccurate information, it no longer meets the essential conditions for being characterized as a contract of service. Thus, when the evidence shows that the records containing the information essential to the existence of a genuine contract of employment are false and incomplete, it becomes essential to prove conclusively that the real facts support the existence of a genuine contract of service....

[19] The facts in the present case were analysed according to the criteria established in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, that is, the control of the work and the worker, ownership of tools, chance for profit or risk of loss and the worker's integration into the Payor's business.

[20] After this analysis, this Court must conclude that the Appellant's employment during the period at issue was not insurable because it did not meet the requirements of a contract of service in accordance with paragraph 5(1) of the Act.

[21] This Court furthermore finds that there was an arrangement between the Payor and the Appellant so that the Appellant would qualify for higher employment insurance benefits.

[22] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 18th day of November 2003.

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 26th day of April 2004.

Sharon Moren, Translator