

Docket: 2003-718(EI)

BETWEEN:

CATHY BOUCHARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on July 29, 2003, at Québec City, Quebec

Before: The Honourable Deputy Judge S. J. Savoie

Appearances:

Counsel for the Appellant: Christine Gagnon

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal is dismissed and the Minister's decision is upheld in accordance with 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 3rd day of May 2004.

Sharon Moren, Translator

Citation: 2003TCC765

Date: 20031118

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] This appeal was heard at Québec City, Quebec, on July 29, 2003.

[2] This appeal involves the insurability of the Appellant's employment while working for 9076-2956 Québec Inc., the Payor, during the period at issue, April 8 to 19, 2002, as understood in the *Employment Insurance Act* (the "Act").

[3] On November 26, 2002, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that this employment was not insurable as it did not meet the requirements of a contract of service and there was not an employer-employee relationship between the Appellant and the Payor.

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

[TRANSLATION]

- (a) The Payor, incorporated on April 13, 1999, operated a trucking company; (admitted)
- (b) François Gagnon was the Payor's sole shareholder; (admitted)

- (c) The Payor specializes in transporting wood chips in Quebec; (admitted)
- (d) The Payor had only one truck; (admitted)
- (e) The Payor's business place was located at 69, rang St-Antoine in Notre-Dame-des-Monts, that is, at Mr. Gagnon's parents' family home where Mr. Gagnon occupied a bedroom; (admitted)
- (f) The Payor had no office there; the papers were piled on a table in the living room of the residence; (denied as written)
- (g) During the first two weeks of April 2002, Mr. Gagnon was ill and allegedly hired the Appellant, an acquaintance, to give assist him; (admitted)
- (h) The Appellant alleges to have helped Mr. Gagnon with the following tasks:
 - She helped him do an oil change and change the tires on the truck;
 - She organized the Payor's papers (on the table);
 - She washed Mr. Gagnon's bedroom floor;
 - She cleaned the Payor's truck inside and out; (admitted)
- (i) The Appellant claims to have done two 35-hour weeks to complete her tasks; (admitted)
- (j) The Appellant received two cheques for \$294.35 for her alleged work for the Payor; (admitted).
- (k) The Appellant's two cheques cleared the Payor's account on May 3, 2002; (admitted)
- (l) The Appellant needed 910 hours of work to allow her to qualify, for the first time, to receive employment insurance benefits; (admitted)
- (m) Before her alleged work for the Payor, the Appellant had accumulated 883.75 hours of work with two different employers; (admitted)

- (n) The Payor was unwilling to cooperate with the Canada Customs and Revenue Agency officer to determine the facts of this file; (denied/no knowledge)

[5] It is important to stress that the Minister's assumption stated at paragraph (n) was proved at the hearing as well as the assumption at paragraph (f) of the Reply to the Notice of Appeal.

[6] It was established that the Appellant met the Payor's sole shareholder, François Gagnon, at a dance hall approximately ten years ago. They saw each other again in 2000 when the Appellant was looking for a job. She needed additional hours to qualify for employment insurance benefits. François Gagnon said he was willing to help her out and told her he would call her. In 2002, François Gagnon fell ill and called the Appellant to come and assist him.

[7] In his testimony, François Gagnon indicated that he needed someone to help him with the maintenance of his truck: wash it, change the tires and oil, clean his office and organize his papers. He agreed to pay her \$10 an hour. The tasks had to be performed by the Appellant at the Payor's place of business, the home of François Gagnon's parents. Said tasks were to be performed between 8:00 a.m. and 4:00 p.m. During her testimony, the Appellant specified that François Gagnon told her what to do and that she used his tools in performing her tasks. According to her, she carried out his orders. The Appellant explained that François Gagnon checked her hours and provided her with a timetable. She was paid by cheque and during the period at issue, she received two cheques from the Payor.

[8] In cross-examination, however, the Appellant admitted that she had no experience in truck maintenance, that is, changing the tires, etc.

[9] In her application for employment insurance benefits, the Appellant explained that she had worked for the Payor for two 35-hour weeks for a total of 70 hours. She explained in her testimony at the hearing of this appeal, that it had taken her half a day to wash the truck; it had taken an hour to wash the Payor's bedroom floor; and, it took a day for two people, that is the Appellant with François Gagnon's help, to do the truck maintenance. It took her a week to organize the Payor's papers.

[10] The Appellant admitted that the Payor knew that she needed the hours to qualify for employment insurance benefits.

[11] The evidence established that the Payor's office was located in the living room of François Gagnon's parents' home, where he occupied a bedroom and used a table in the living room of this home to keep his office items.

[12] In his testimony, François Gagnon indicated that the Appellant helped him fairly often in his absence because he was not always there. With regard to the time that it took the Appellant to perform each of her tasks, he did not know. He indicated that he had some control over the Appellant's hours but only when he was at the premises. He explained that when the Appellant had finished her work, she would call so he could give her other tasks to perform. In addition, he indicated that the Appellant had no set timetable and admitted that occasionally she could not come to work but that she made up the time on weekends.

[13] In cross-examination, François Gagnon indicated that before the Appellant had come, he had done all these tasks himself. As for his papers, particularly with regard to his taxes, this task was performed by a certain Ms. Côté. He claimed that washing his bedroom floor [TRANSLATION] "was related" since he certainly had to go to bed. He admitted that his parents needed the room (living room) that he used as his little makeshift office, that he ought to move elsewhere and added that his parents were retired and had limited mobility.

[14] It was established at the hearing of this appeal that before the period at issue, the Appellant had applied for employment insurance benefits, but that she did not have enough hours to qualify and that after said period, she appeared with a new application that contained a total of 70 additional hours. The evidence brought by the Appellant has not established the number of hours contained in her application for benefits.

[15] Control of the Appellant's work, according to the evidence, was almost nonexistent. Moreover, testimony of the Appellant and the Payor's sole shareholder, François Gagnon, was not very convincing.

[16] The process by which it is determined whether employment meets the requirements of a contract of service places a great deal of importance on the criterion of control. The relationship of subordination is determined by this factor and is crucial since the question of insurability will be settled on this basis. Jurisprudence has so held.

[17] A number of facts in the evidence submitted by the Appellant contributed to discrediting her; for example, the Appellant's meeting with the Payor's proprietor

and the arrangement made to enable the Appellant to qualify for employment insurance benefits. Moreover, the offer of employment to the Appellant of work for which she had no experience or aptitude and for a limited number of hours for the purpose of establishing the necessary number to collect employment insurance benefits, also contribute to discrediting the Appellant's evidence. Furthermore, some tasks that the Appellant had to perform, like washing François Gagnon's bedroom floor, really had nothing to do with the Payor's business and contribute to casting doubt on the parties' sincerity in this entire undertaking. This situation caused the Minister's lawyer to say that the Appellant's appeal was not at all serious.

[18] A scenario similar to that under consideration caused Tardif J. of this Court to say in *Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124:

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.

And in continuing his analysis, Tardif wrote as follows at paragraph 51:

The Act insures only genuine contracts of service; a contract of employment under which remuneration is not based on the period during which work is performed cannot be defined as a genuine contract of service. It is an agreement or arrangement that is inconsistent with the existence of a genuine contract of service since it includes elements foreign to the contractual reality required by the Act.

[19] In my opinion, there was an arrangement between the parties involved, the sole purpose of which was to enable the Appellant to qualify for employment insurance benefits.

[20] Consequently, this employment was not insurable because it did not meet the requirements of a contract of service; there was no employer-employee relationship between the Appellant and the Payor.

[21] In view of the foregoing, the appeal is dismissed and the Minister's decision is upheld.

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

"S. J. Savoie"

Savoie, D.J.

Translation certified true
on this 3rd day of May 2004.

Sharon Moren, Translator

