Docket: 2005-2518(EI)

BETWEEN:

LISE ALLARD O/A FRIGOLUK ENR.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LUC BOUCHARD,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 24, 2006, at Chicoutimi, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant:	Mario Bouchard
Counsel for the Respondent:	Christina Ham
Agents for the Intervener:	Jacques Doucet and Guy Fortin

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue is varied on the basis that the work done by Luc Bouchard for Lise Allard, o/a Frigoluk Enr., during the period from May 20 to November 19, 2004, was under a genuine contract of service within the meaning of paragraph 5(1)(*a*) and came within the exception stated in paragraph 5(3)(*b*) because the employer and the employee would have entered into a substantially similar contract if they had been dealing with each other at arm's length, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of October 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 19th day of July 2007.

Brian McCordick, Translator

Citation: 2006TCC488
Date: 20061005
Docket: 2005-2518(EI)

BETWEEN:

LISE ALLARD O/A FRIGOLUK ENR.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision concerning the insurability of the work that Luc Bouchard did for Lise Allard, o/a Frigoluk Enr., during the period from May 20 to November 19, 2004.

[2] In making the decision under appeal, the Minister of National Revenue ("the Minister") assumed the following facts:

> [TRANSLATION]
>
> (a) From 1995 to 2001, the worker independently operated various businesses specializing in air conditioning and refrigeration.
>
> (b) One of those businesses operated under the name Frigoluk from March 17, 1995 to June 8, 2000.
>
> (c) On May 18, 2000, his business incorporated under the name Frigoluk Inc.

(d) The worker held 60% of the voting shares of the corporation and the Appellant, his spouse, held 40% of the shares.

(e) Frigoluk Inc. was dissolved on March 2, 2004.

(f) On December 17, 2003, the Appellant registered the business name Frigoluk Enr.

(g) The Appellant was now using the business name Frigoluk Enr. and, with the administrative and financial support of the worker, she operated a business specializing in the installation and repair of air conditioning and refrigeration systems for heavy machinery and forestry machinery.

(h) The Appellant's business was seasonal and operated from the spring to the fall.

(i) In 2004, under the terms of an oral agreement, the Appellant hired the worker on a full-time basis (27 weeks) and hired Daniel Simard on an occasional basis.

(j) The worker provided services as an air conditioning system installation and repair technician for heavy machinery and forestry machinery.

(k) He had to cover a vast territory, which included northern Lac St-Jean as well as Dolbeau, Chicoutimi, Girardville and Chibougamau.

(l) The worker generally worked in the woods Mondays to Thursdays from 7 a.m. to 5 p.m., and on the payor's premises, or certain customers' places of business, on Fridays.

(m) He worked 40 hours per week.

(n) He filled out his own work sheets and submitted them to the Appellant.

(o) He received no instructions from the Appellant, and he supervised his own work because he was the one who had the knowledge needed to perform it.

(p) The worker received fixed pay in the amount of $800 per week.

(q) The Appellant had no idea of the value of her business. She had invested $15,000 to start it up.

(r) This $15,000 investment came from a bank account held jointly by the Appellant and the worker and from credit cards belonging to each of them.

(s) The worker also lent the Appellant $6,000 without drafting documents in connection with the loan.

(t) The worker used a truck leased by the Appellant (at a cost of $968.32 per month) in the performance of his work, and he was co-guarantor of the lease with the Appellant.

(u) Along with the Appellant, the worker personally guaranteed all the Appellant's loans and incurred financial risks in the operation of the business.

(v) The worker was the guiding spirit of the Appellant's business, and, given his mastery of the business, the sort of dependent relationship necessary for the creation of a true relationship of subordination between the parties could not have existed.

[3] The Appellant admitted to the vast majority of the assumed facts, including the facts set out in subparagraphs (a) to (f), (h) to (n), (p), (r), (t) and (u). The Appellant denied subparagraphs (o), (s) and (v), claimed to have no knowledge of subparagraph (g), and clarified subparagraph (q).

[4] Ms. Allard explained that she is part of a family of entrepreneurs who know about refrigeration. She first got involved as a businessperson in the field when her spouse operated a corporation, as discussed in subparagraph (d), which it would be helpful to reproduce:

[TRANSLATION]

(d) The worker held 60% of the voting shares of the corporation, and the Appellant, his spouse, held 40% of the shares.

[5] The corporation apparently fell on hard times, notably because it lost a large sum of money and because the worker was not comfortable in the role of entrepreneur. The fact that the couple is now married obviously has no bearing on this matter.

[6] During the period in issue, the worker was Ms. Allard's common-law spouse.

[7] The Appellant, Ms. Allard, said that her spouse did not have the temperament necessary to operate a business; he was more comfortable as a worker than he was as a manager.

[8] She explained that he did not have the skills required to manage a business, and that she noticed that he was more comfortable as an employee.

[9] After the corporation ceased its operations, the Appellant's spouse worked for the Appellant's brother for two seasons, once again as an employee specializing in refrigeration.

[10] The Appellant said that, following a hiatus, she wanted to take up the challenge of entrepreneurship by creating her own business in the field that her relatives — that is to say, her brother and her father — were familiar with. Consequently, she registered her business name and started up a refrigeration business.

[11] Since the bankers knew little about her, she had to ask her spouse to help her borrow and invest money and lease the truck in order to ensure that the business would run smoothly.

[12] She described the circumstances that led her to create the business, as well as her management style.

[13] She also described the nature of the business: most of its contracts involved working in the forest, often very far away.

[14] Her spouse generally did the work alone. He completed a work order setting out the duration and nature of the work and the parts needed to carry it out. This was submitted to his spouse, who looked after the invoicing.

[15] The Minister, for his part, did not call the person or persons responsible for the Appellant's file as witnesses. Essentially, he argued that the matter had been evaluated carefully and unassailably by gathering and then analysing all the relevant facts.

[16] His main argument was that the contract in issue was not a contract of employment because the worker did not perform the work as part of a relationship of subordination.

[17] In the Respondent's submission, the main reason that there was no relationship of subordination was that the Appellant did not generally go to the work sites, and had very little technical knowledge about the way in which the work should be done.

[18] However, the Minister identified certain facts that are much more relevant in determining whether his findings were meritorious. These facts include the husband's financial involvement in the activities of the business as a lender and guarantor, and the fact that, at the beginning of his period of unemployment, he agreed to wait before getting paid, which is something that a third party would clearly never have agreed to, according to the Respondent.

[19] These were very relevant findings of fact. Were they sufficient to justify the Minister's conclusions?

[20] If the decision depended solely on these considerations, then I would clearly have to dismiss the appeal. However, the evidence also disclosed that the Appellant's spouse essentially did the same work, at roughly the same rate of pay, for his brother-in-law during the two previous seasons.

[21] The Respondent submits that the Records of Employment requested by the Court are not relevant because they pertain to a period other than the one in issue. However, it appears that the Respondent's analysis fails to consider a very important factor: whether the contract was similar to one that would have been made in an entirely different context.

[22] In addition, I believe that the analysis of this matter was skewed by the Respondent's position that no relationship of subordination could have existed. Indeed, it is completely inappropriate to conclude that there is no relationship of subordination on the basis that the payor does not go to the work sites, or that the work is specialized and that the payor is somewhat or wholly unfamiliar with it.

[23] Such elements are clearly present in several cases where the existence of a relationship of subordination is not in doubt.

[24] It is quite possible for a payor to know practically nothing about the way in which to perform the work for which he or she is paying, and this is not a sufficient reason to conclude that no relationship of subordination exists.

[25] Such a theory would lead to numerous outlandish situations. One need only imagine a small or medium-sized employer in a very specialized field that requires employees from dozens of different specialties. If the employer did not have all the knowledge associated with each of these specialties, would this prevent the work done by all those salaried experts from being insurable? The mere mention of this hypothesis is enough to establish that the argument cannot succeed.

[26] In the case at bar, the Appellant could well claim that she had the power to control her spouse's activities thanks to the detailed reports that he prepared at the work sites.

[27] The financial contributions and support are a more serious, and, most importantly, a more relevant aspect of this case, as is the work that was completed but remained unpaid for days.

[28] Both of these facts are attributable to the same cause: without her spouse's financial involvement, the Appellant, being unknown to the banking community, would not have been able to launch her business as she did. The delay in remuneration coincides with the start-up period.

[29] However, I cannot disregard the fact that this work was seasonal by nature, and that its beginning and end dates depended on the weather.

[30] The Appellant's spouse had the knowledge, expertise and experience needed to perform the work.

[31] His remuneration was comparable to what he was paid during the two previous seasons when he worked for his brother-in-law.

[32] The case at bar is not one in which all the factors point to a single conclusion. Certain facts deserved greater attention during the analysis that led to the determination under appeal.

[33] In my view, these facts include, *inter alia*, the fact that an outsider worked much longer than the Appellant's spouse even though the Appellant's spouse was the person who provided the skill that gave the business its credentials. This raises the question whether the length of the period of employment was based on the number of hours needed to qualify for employment insurance benefits.

[34] Were the facts and explanations consistent with the financial statements? Did the Appellant's spouse perform work outside the periods set out in the Records of Employment? The answers to all of these questions could have led to a very different determination from mine, so I am astonished that the person or persons responsible for the investigation on which the decision was based did not testify.

[35] Since I must dispose of the appeal on a balance of probabilities, I find that the evidence supports the Appellant's position — not categorically, but, rather, on a balance of probabilities.

[36] Consequently, I allow the appeal and find that the work that Luc Bouchard did for Lise Allard, o/a Frigoluk Enr., during the period from May 20 to November 19, 2004, was under a genuine contract of service within the meaning of paragraph 5(1)(*a*) and came within the exception stated in paragraph 5(3)(*b*) because the employer and the employee would have entered into a substantially similar contract if they had been dealing with each other at arm's length.

Signed at Ottawa, Canada, this 5th day of October 2006.

"Alain Tardif"

Tardif J.

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STYLE OF CAUSE:	Lise Allard o/s Frigoluk Enr. and Luc Bouchard and Her Majesty the Queen
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REASONS FOR JUDGMENT BY:	The Honourable Justice Alain Tardif
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APPEARANCES:

Counsel for the Appellant:	Mario Bouchard
Counsel for the Respondent:	Christina Ham

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