Docket: 2007-1290(EI)

BETWEEN:

DANIEL DESROSIERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on November 7, 2007, at Rimouski, Quebec
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Denis Tremblay

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* ("the Act") is dismissed on the ground that Mr. Desrosiers, during the periods from April 28 to August 31, 2002, May 4 to August 30, 2003, May 2 to September 4, 2004, May 1 to September 3, 2005, and April 27 to September 9, 2006, was not employed in insurable employment with 9100-8359 Québec Inc., and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of January 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 21st day of February 2008.

Brian McCordick, Translator

Citation: 2008TCC10
Date: 20080107
Docket: 2007-1290(EI)

BETWEEN:

DANIEL DESROSIERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] Daniel Desrosiers ("the Appellant" or "the Worker") is appealing from a decision made by Minister of National Revenue (the "Minister") under the *Employment Insurance Act* ("the "Act"). The Minister determined that Mr. Desrosiers was not employed in insurable employment with 9100-8359 Québec Inc. ("the Payor") during the periods from April 28 to August 31, 2002, May 4 to August 30, 2003, May 2 to September 4, 2004, May 1 to September 3, 2005, and April 27 to September 9, 2006 ("the relevant periods"). Specifically, the Minister determined that his employment constituted excluded employment because a substantially similar contract of employment would not have been entered into if Mr. Desrosiers and the Payor had been dealing with each other at arm's length.

[2] I should immediately note that Mr. Desrosiers admitted that he was not at arm's length from the Payor.

[3] The Respondent based his decision on the factual allegations set out in paragraph 7 of the Reply to the Notice of Appeal ("the Reply"). The allegations read as follows:

(a) The Payor was incorporated on February 5, 2001. **(admitted)**

(b) The Payor operated a stationary canteen in the town of Matane. **(admitted)**

(c) The business was open on a seasonal basis. **(admitted)**

(d) The Payor carried on business as "Cantine des Iles". **(admitted)**

(e) The business operated seven days a week from 9:30 a.m. to 9 or 10 p.m. depending on how busy it was. **(admitted)**

(f) The Payor's profit and loss statements contained the following numbers: **(denied as worded)**

FY	Gross Revenues	Wages	Net Income
2002	$36,190	$24,516	($17,608)
2003	$39,264	$21,565	($11,164)
2004	$35,359	$19,831	($12,131)
2005	$42,916	$19,518	($5,095)

(g) The Payor had three employees in 2002 and 2003 and two employees in 2004 and 2005. **(admitted)**

(h) The Appellant had a work accident while employed by the Société des traversiers [the Quebec government ferry corporation] in July 1995. **(admitted)**

(i) Following this accident, the Appellant's physical abilities were limited. **(admitted)**

(j) The Payor was incorporated in order to create a job for the Appellant. **(denied)**

(k) The Appellant was the Payor's manager. **(admitted)**

(l) The Appellant's duties were to manage staff, place orders, keep inventory, run errands, open the business in the morning, prepare the food, serve the customers and maintain the premises. **(admitted)**

(m) The Appellant had no fixed work schedule. **(denied)**

(n) The Appellant might start his work day at 7 a.m. and finish and the end of the evening. **(denied as worded)**

(o) The Appellant was always recorded to have worked 55 hours a week, regardless of the number of hours that he actually worked. **(denied as worded)**

(p) In reality, the Appellant worked 70-80 hours per week. **(denied as worded)**

(q) The Appellant was only paid for 55 hours per week. **(admitted)**

(r) The Appellant's overtime was not remunerated by the Payor. **(denied as worded)**

(s) An unrelated employee would not have agreed to work hours without pay. **(denied)**

(t) On April 27, 2006, Chantal Marceau told a representative of the Respondent that the Appellant was not paid for any hours that he worked over and above the 55 hours because the Payor could not afford to pay more. **(denied)**

(u) The Appellant used his personal vehicle to run errands for the Payor and was not reimbursed for his expenses. **(denied as worded)**

(v) The terms and conditions of the Appellant's employment were not reasonable. **(denied)**

(w) The Appellant was paid $1,320 for 110 hours of work over 15 days, which corresponds to an hourly rate of approximately $12. **(admitted)**

(x) On September 10, 2002, the Payor gave the Appellant a Record of Employment which stated that the first day of work was April 28, 2002, the last day of work was August 31, 2002, the number of insurable hours was 999.6 and insurable earnings totalled $12,355.20. **(admitted)**

(y) On September 3, 2003, the Payor gave the Appellant a Record of Employment which stated that the first day of work was May 4, 2003, the last day of work was August 30, 2003, the number of insurable hours was 935, and the insurable earnings totalled $11,220. **(admitted)**

(z) On September 7, 2004, the Payor gave the Appellant a Record of Employment which stated that the first day of work was May 10, 2004, the last day of work was September 4, 2004, the number of insurable hours was 1045 and the insurable earnings totalled $12,355.20. **(admitted)**

(aa) On September 12, 2005, the Payor gave the Appellant a Record of Employment which stated that the first day of work was May 1, 2005, the last day of work was September 3, 2005, the number of insurable hours was 990 and the insurable earnings totalled $12,355.20. **(admitted)**

(bb) On September 12, 2006, the Payor gave the Appellant a Record of Employment which stated that the first day of work was April 27, 2006, the last day of work was September 9, 2006, the number of insurable hours was 1057 and the insurable earnings totalled $13,191.36. **(admitted)**

(cc) The Appellant's Records of Employment do not reflect the true number of hours worked. **(denied)**

(dd) The Payor's low revenues and significant annual losses would not have justified hiring the worker at arm's length under the same terms and conditions. **(denied)**

[4] Mr. Desrosiers and his spouse Chantal Marceau testified in support of the Appellant's position. Louise Dessureault, the appeals officer in the instant case, testified in support of the Minister's position. Ms. Dessureault's appeal reports were tendered as Exhibit I-3. It should be noted that she testified that she was not able to meet with Ms. Marceau and Mr. Desrosiers or to contact them, and that she therefore essentially relied on the insurability reports prepared by Jimmy Desgagnés, the coverage officer at the Québec district office who had contacted Ms. Marceau and Mr. Desrosiers by telephone, and on the statutory declarations of Ms. Marceau and Mr. Desrosiers (Exhibits I-1 and I-2). I would immediately note that counsel for Mr. Desrosiers emphasized that Ms. Dessureault's testimony regarding the facts obtained by Mr. Desgagnés were of little probative value because it was, in a sense, hearsay.

[5] I should immediately note that the evidence presented by the parties during the hearing discloses that the facts set out in subparagraph 7(f) of the Reply are proven facts.

Chantal Marceau's testimony

[6] Ms. Marceau's testimony essentially discloses the following:

(a) She bought the canteen not only to provide a job for her spouse, but also to employ other people.

(b) At the time that the Payor (of which she was the sole shareholder) acquired the canteen, it had been operating for roughly 20 years. She explained that her spouse simply replaced the person who had been the manager prior to the acquisition of the canteen, and that the canteen's *modus operandi* did not change significantly following its acquisition.

(c) During the relevant periods, the Worker generally worked from 8:30 a.m. to 5 p.m., seven days a week. He generally arrived at the canteen a half hour before opening time, which was usually at 9 a.m. Occasionally, that is to say four or five times a year, the Worker worked a 70-80 hour week. It should be noted that Ms. Marceau's statutory declaration (Exhibit I-1) concerning the hours worked by her spouse says substantially the same thing. In addition, Ms. Marceau stated that the Worker's remuneration seemed reasonable to her (though she did not investigate or check with third parties what managers under similar circumstances were generally paid) having regard to the duties assigned to the Worker, the hours worked, and the seasonal nature of the job.

The Worker's testimony

[7] The Worker's testimony concerning his hours of work can be summarized as follows. He generally worked from 8:30 a.m. to 4:30 p.m., or sometimes 5 p.m., seven days a week during the relevant periods. He occasionally started at 7 a.m. when there was broken equipment. He sometimes worked past 4:30 p.m. when he had to replace an employee who was sick or did not show up. The Worker's statutory declaration (Exhibit I-2) concerning his hours of work is also worth quoting from:

> [TRANSLATION]
>
> I am paid for 55 hours and have no fixed hours. I can start at 7 a.m. and end in the evening, depending on the weather. I am in charge seven days a week except when it rains. I take advantage of that to do my inventory at home, because that is where the goods are delivered. I am paid $12 per hour. . . I have a fixed rate and fixed number of hours. . . I open early in the morning and the place is open for business at approximately 9:30 and I am there until 5:30.

[8] The Federal Court of Appeal has had several occasions to rule on the role that the Act confers upon Tax Court of Canada judges. This role does not permit judges to substitute their decision for the Minister's decision, but it does require them to "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 . . . decide whether the conclusion with which the Minister was "satisfied" still seems reasonable."[1]

[9] In other words, before deciding whether the conclusion with which the Minister was satisfied still seems reasonable to me, I must verify, in light of the evidence before me, whether the Minister's assumptions of fact are well-founded in whole or in part, having regard to the factors set out in paragraph 5(3)(*b*) of the Act.

[10] It must therefore be asked whether the Appellant and the Payor would have entered into a substantially similar contract if they had been dealing with each other at arm's length.

[11] The Appellant bore the burden of proving that the Minister did not exercise his discretion in accordance with the applicable principles, or, in other words, of showing that the Minister did not examine all the relevant factors, or that he disregarded relevant elements.

[12] I should immediately note that the Minister erred in placing too much emphasis on the facts alleged in subparagraphs 7(f), 7(h), 7(i) and 7(j) of the Reply to the Notice of Appeal. The evidence certainly did disclose that Ms. Marceau indirectly acquired a canteen that had been operating for roughly 20 years. The evidence also disclosed that, after acquiring the canteen, she replaced the person who had been managing it with her spouse, who had enough restaurant experience to take over the position of manager adequately. Ms. Marceau never denied that the main objective of purchasing the canteen was to secure a job for her spouse. However, I do not see how these facts, and the fact that the Payor incurred operating losses during the relevant periods, are relevant in determining whether a third party who was dealing with the Payor at arm's length would have entered into an employment contract with the Payor that was substantially similar to the contract between the Worker and the Payor, having regard to the workload, the pay, and the responsibilities associated with this position of manager.

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[1] *Légaré v. Canada* (*Minister of National Revenue – M.N.R.*), [1999] F.C.J. No. 878 (QL), at paragraph 4.

[13] Upon reading the allegations set out in subparagraphs 7(b), 7(c), 7(e), 7(k), 7(l), 7(m), 7(n), 7(o), 7(p), 7(q), 7(r), 7(s), 7(u), 7(w), 7(cc) and 7(dd) of the Reply to the Notice of Appeal, the substance of which is that the Payor would not and could not have retained the services of the Worker if they had been dealing with each other at arm's length, one must infer that it was implicit in the Minister's perspective that the terms and conditions of employment, which, along with other things, are discussed in these subparagraphs, were markedly favourable to the Payor, and thus, that the Payor enjoyed special treatment in this regard. Essentially, the Minister alleges that the Worker worked 70 to 80 hours per week during the relevant periods, but was paid for only 55 hours of work per week, and thus, an employee at arm's length from the Payor would not have agreed to do 15 to 25 hours of unpaid work per week during the relevant periods. In other words, the Minister alleges that an employee unrelated to the Payor would never have agreed to work 70 to 80 hours per week for an hourly rate that works out to between $8.25 and $9.42 per hour considering the responsibilities of the employment and the other terms and conditions. In this regard, I note that the Worker worked seven days a week for 18 to 20 consecutive weeks.

[14] In my opinion, the evidence has not shown that the Minister's allegations concerning the hours of work are inaccurate. The Worker's evidence in this regard, which essentially consisted of his testimony and that of his spouse, was of little probative value in my view. The Worker tried to suggest that he generally worked 55 hours per week, from 8:30 a.m. to 4:30 p.m., seven days a week during the relevant periods, and that he occasionally worked more than 56 hours a week. However, based on the Worker's statutory declaration (Exhibit I-2), it appears that he generally left work at 5:30, not 4:30. Thus, in light of the Worker's statutory declaration, it is permissible to conclude that the Worker generally worked 63 hours per week, not 55. And I should repeat that Ms. Marceau testified that the Worker worked 70 to 80 hours per week four or five times a year. Considering that the canteen operated an average of 19 weeks a year, it is permissible to conclude, strictly from the testimony and declarations of the Worker and his spouse, that the Worker worked at least 222 hours a year without remuneration, which is an average of 8 hours over 14 weeks and 20 hours over 5 weeks. Thus, I find it reasonable to conclude that an employee unrelated to the Payor would not have agreed to work so many unpaid hours. Even if some of the Minister's allegations in the case at bar are not relevant, or not completely accurate, there are sufficient elements to warrant the Minister's determination.

[15] Counsel for the Worker submitted that I should make the same decision that Garon J. made in *Bernier*[2] because the facts of that case bear a strange resemblance to those of the instant case in that, from 1993 to 1995, Ms. Bernier, like the Worker, was the manager of the same canteen, which was owned by her husband at the time. First of all, I should note that judges must decide each case in light of the evidence before them and that I am in no way bound by the decision of Garon J. In addition, I should note that the Minister's allegations in *Bernier* are substantially different from the Minister's allegations in the case at bar. Indeed, upon reading the allegation contained in subparagraph 5(i) of the Reply to the Notice of Appeal in *Bernier*, which states that the terms and conditions of employment were substantially different from those of the other two employees, in conjunction with allegations (m) and (n), which state, in substance, that the Payor would not have retained Ms. Bernier's services if the relationship had been at arm's length, one must infer that it was implicit, from the Minister's perspective, that this difference in the terms and conditions of employment referred to in subparagraph (i) was markedly favourable to Ms. Bernier and that she enjoyed special treatment in this regard. Here, I should note that the Minister's allegations make no reference to the terms and conditions of the jobs that were held by the Payor's other employees. Moreover, I should point out that here, unlike *Bernier*, the Minister is alleging that the Worker was not paid enough having regard to the number of hours of unpaid work that he did.

[16] In light of the evidence before me, and after considering the factors referred to in subparagraph 5(3)(*b*) of the Act and verifying the merits of the Minister's allegations, the Minister's conclusion seems reasonable to me.

[17] For all these reasons, the appeal is dismissed.

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[2] *Bernier v. Canada (Minister of National Revenue – M.N.R.)*, [1997] T.C.J. No. 1266.

Signed at Ottawa, Canada, this 7th day of January 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 21st day of February 2008.

Brian McCordick, Translator

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Appearances:

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Counsel for the Respondent:	Marie-Claude Landry

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