

Docket: 2007-2258(EI)

BETWEEN:

HÉLÈNE LACROIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on January 18, 2008, at Sherbrooke, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jean Beaudry

Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* concerning the Appellant's employment with Can-Am Immigration Service 2000 Inc. from April 30, 2001, to July 25, 2003, is dismissed and the decision made by the Minister of National Revenue on February 1, 2007 is confirmed in accordance with the attached Reasons for Judgment.

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

"Alain Tardif"

Tardif J.

Translation certified true
on this 19th day of March 2008.

Brian McCordick, Translator

Citation: 2008TCC54
Date: 20080207
Docket: 2007-2258(EI)

BETWEEN:

HÉLÈNE LACROIX,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This appeal pertains to the insurability of the work done by the Appellant from April 30, 2001, to July 25, 2003, for the benefit of Can-Am Immigration Service 2000 Inc.

[2] In making his decision, the Respondent relied on the following assumptions of fact:

[TRANSLATION]

- (a) The Payor was incorporated on May 19, 1999 following the bankruptcy of Can-Am Immigration Services Inc., and then went bankrupt itself on August 1, 2003. **(admitted)**
- (b) The Payor's activities were resumed by another business of the same type. **(admitted)**
- (c) The Payor took over the services of the predecessor company, which consisted in selling work permits to Canadian construction workers who wished to work in the United States. **(admitted)**

- (d) The Payor also sold the services of these workers to U.S. businesses. **(admitted)**
- (e) The Appellant rendered services to the Payor and to businesses owned by the Parenteau family for several years. **(admitted)**
- (f) The Appellant was the wife of Richard Parenteau, Sr. The couple divorced on December 4, 2000. **(admitted)**
- (g) Richard Parenteau, Sr. was the person who first hired the Appellant to work for the family business. **(admitted)**
- (h) Although he was officially no longer a shareholder of the Payor, Richard Parenteau, Sr. was the person who managed the Payor's day-to-day activities. **(admitted)**
- (i) Richard Parenteau, Sr., was the person who gave us the information concerning the employment held by the Appellant, who refused to cooperate with the coverage officer ~~or the appeals officer~~. **(denied)**
- (j) During the period in issue, the Appellant worked for the Payor as a customer service clerk. **(admitted)**
- (k) The Appellant's main task was to communicate with the Payor's clients to ensure that they were satisfied. **(admitted)**
- (l) The Appellant worked from home and could contact 10-15 clients a day. **(denied)**
- (m) In addition, the Appellant occasionally picked up clients at the Magog airport and brought them back there after they met with the Payor's management. **(denied)**
- (n) The Payor has no documents substantiating the number of times that the Appellant drove clients. **(denied)**
- (o) The Appellant noted that when she did not have enough work, Richard Parenteau, Sr., gave her some accounting work in the form of a few additions to do. **(denied)**
- (p) The Appellant claims that the calculations that she did could take her four to five hours a day to complete. **(denied)**

- (q) The Appellant claims that she worked 40 hours a week but her hours were not tabulated by the Payor and the few tasks assigned to her were not quantifiable. **(denied)**
- (r) The Appellant initially declared that she used her personal automobile to travel, but the Payor provided her with a vehicle for her travel. **(denied)**
- (s) The Appellant received fixed gross remuneration of \$726 per week regardless of the hours actually worked. **(denied)**
- (t) Based on the Appellant's account that she worked 40 hours per week, her hourly rate was \$18.15, which is patently unjustified having regard to the duties assigned to her. **(denied)**
- (u) According to the Emploi-Québec occupational wage guide, the average hourly wage for a person who works full-time in this field is \$14.78. **(denied)**
- (v) In addition to her remuneration, the Appellant had use of a car supplied by the Payor, and the Payor paid for insurance on the Appellant's life. **(denied)**
- (w) The few tasks entrusted to the Appellant cannot justify the remuneration that she received from the Payor. **(denied)**
- (x) It is not reasonable to believe that the Payor would have paid such a salary to a customer service clerk who did work similar to that done by the Appellant. **(denied)**

[3] The Respondent determined that the Appellant's employment was not insurable because the Appellant, and the company that paid her salary, were not dealing with each other at arm's length.

[4] After analysing the file, the Respondent determined that the employment relationship was shaped or influenced by the non-arm's-length dealings. In other words, the Appellant's employment was not insurable employment under paragraph 5(2)(i) and subsection 5(3) of the *Employment Insurance Act* ("the Act") because the Minister of National Revenue ("the Minister") decided, after analysing all the relevant facts, that it was reasonable to believe, having regard to all the circumstances, that the Appellant and the Payor would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[5] In support of her case, which the burden was on her to prove, the Appellant testified personally, and called Richard Parenteau, Sr., the company's majority shareholder, as a witness.

[6] The evidence, which consisted primarily of Richard Parenteau's testimony, can be summarized as follows. He began by stating that he was the president and CEO of the business. He described the business as a major one in its field. Mr. Parenteau, the directing mind, described it as an expanding business, and referred to the number of employees, the places of business and the possibility of a franchise network in the future. He said that the immigration consultancy business that he managed obtained all kinds of visas for individuals, or, for its corporate clients, groups of workers. The business made more than a million dollars in consulting fees.

[7] Claiming to be very busy due to the scope of his business's activities, he alleged, several times, that his heavy responsibilities prevented him from answering precisely fundamental questions about the Appellant's job description, the terms and conditions governing the performance of her work, and various facts related to the manner in which job-related instructions were given to her.

[8] It is important to note that the Appellant never went to the employer's place of business, and that most of the work was done from her private residence.

[9] Demonstrating great concern about marketing issues, Mr. Parenteau stated that there were three components to the Appellant's duties. The first was customer service. Starting in 1999, the Appellant had to call the clients whose contact information she was given; she phoned them, identified herself as a member of Mr. Parenteau's family, and asked them if they were satisfied with the services rendered. The results of her inquiry were not recorded, and were essentially repeated orally to Mr. Parenteau himself. Mr. Parenteau said that only a few questions were asked, not the dozen or more questions that some agencies specialized in this field ask. He was unable to quantify the number of calls or their content. Apparently, no record was kept of the outcome of these calls. The evidence on this subject was general, and might even be described as somewhat confusing.

[10] The second component was to drive certain clients to or from the airport, such as Dorval or Burlington. The Appellant received instructions from her spouse about this as well.

[11] The evidence regarding the frequency of those trips was not clear. This duty was described as sporadic; the only specific information provided about this aspect of the job description was the duration of the trips, which was estimated to be four hours for Montréal and two and a half hours for Burlington. In this regard, the Appellant asserted that she made as many as three trips on the same day.

[12] The third component that was discussed was the filing of invoices. According to the witness, the various invoices were delivered to the Appellant's house by Mr. Parenteau. He emphasized that he needed someone he could trust; hence his reliance on the Appellant. Every time that an attempt was made to obtain clarifications from the witness, the same answer, namely that everything depended on the needs of the business, was given. When asked to acknowledge that the company paid the premiums for an insurance policy on the Appellant's life, Mr. Parenteau admitted to the fact, hastening to add that the same benefit was granted to another employee whose services were essential.

[13] According to Mr. Parenteau, this was neither accounting nor management work, but essentially filing work, without further specification. The Appellant added that she verified whether the goods received matched the goods invoiced. The Court was left to wonder what goods she was talking about.

[14] The Appellant also stated that her job was the subject of an audit and analysis that led to the determination that it constituted insurable employment. Following this determination, the employer paid the premiums based on the belief that it had to. Mr. Parenteau said, and repeated, that this was the same type of work, performed in the same manner, and that he was stunned that he had to testify in a matter similar to one in which it was determined that the employment was insurable.

[15] Lastly, Mr. Parenteau submitted that the salary was reasonable having regard to the experience and expertise of the Appellant, who had worked for many years as an executive secretary in the hospital sector.

[16] The Respondent, for his part, called an RCMP officer as a witness. The officer had been assigned to an investigation into the Appellant's employer. His testimony was not very helpful because the Respondent wanted to adduce information through the witness from third parties who were not present, and the Court did not admit that evidence.

[17] Marcelle Gagné and Lyne Courcy also testified for the Respondent. Their testimony shed light on the numerous denied facts and on the differences regarding the circumstances surrounding the Appellant's refusal to go to the investigators' office.

[18] The facts that were relied upon are taken, *inter alia*, from an interview in which counsel for the Appellant was involved. Quite clearly, the explanations that the Court was given were not entirely consistent with the explanations obtained in the course of the investigation. The following facts were denied:

[TRANSLATION]

- (i) Richard Parenteau, Sr., was the person who gave us the information concerning the employment held by the Appellant, who refused to cooperate with the coverage officer ~~or the appeals officer~~. **(denied)**
- (l) The Appellant worked from home and could contact 10-15 clients a day. **(denied)**
- (m) In addition, the Appellant occasionally picked up clients at the Magog airport and brought them back there after they met with the Payor's management. **(denied)**
- (n) The Payor has no document substantiating the number of times that the Appellant drove clients. **(denied)**
- (o) The Appellant noted that when she did not have enough work, Richard Parenteau, Sr., gave her some accounting work in the form of a few additions to do. **(denied)**
- (p) The Appellant claims that the calculations that she did could take her four to five hours a day to complete. **(denied)**
- (q) The Appellant claims that she worked 40 hours a week but her hours were not tabulated by the Payor and the few tasks assigned to her were not quantifiable. **(denied)**
- (r) The Appellant had initially declared that she used her personal automobile to travel, but the Payor provided her with a vehicle for her travel. **(denied)**
- (s) The Appellant received fixed gross remuneration of \$726 per week regardless of the hours actually worked. **(denied)**

- (t) Based on the Appellant's account that she worked 40 hours per week, her hourly rate was \$18.15, which is patently unjustified having regard to the duties assigned to her. **(denied)**
- (u) According to the Emploi Québec occupational wage guide, the average hourly wage for a person who works full-time in this field is \$14.78. **(denied)**
- (v) In addition to her remuneration, the Appellant had use of a car supplied by the Payor, and the Payor paid for insurance on the Appellant's life. **(denied)**
- (w) The few tasks entrusted to the Appellant cannot justify the remuneration that she received from the Payor. **(denied)**
- (x) It is not reasonable to believe that the Payor would have paid such a salary to a customer service clerk who did work similar to that done by the Appellant. **(denied)**

[19] Ms. Courcy's testimony disclosed that the facts set out in the Reply to the Notice of Appeal were correctly stated; the testimony of Mr. Parenteau and the Appellant was more evasive, less precise and more confusing than the testimony provided during the investigation.

[20] Among other things, the Respondent's evidence validated the following allegations:

[TRANSLATION]

- (i) Richard Parenteau, Sr., was the person who gave us the information concerning the employment held by the Appellant, who refused to cooperate with the coverage officer ~~or the appeals officer~~. **(denied)**
- (m) In addition, the Appellant occasionally picked up clients at the Magog airport and brought them back there after they met with the Payor's management. **(denied)**
- (n) The Payor has no document substantiating the number of times that the Appellant drove clients. **(denied)**
- (o) The Appellant noted that when she did not have enough work, Richard Parenteau, Sr., gave her some accounting work in the form of a few additions to do. **(denied)**

- (q) The Appellant claims that she worked 40 hours a week but her hours were not tabulated by the Payor and the few tasks assigned to her were not quantifiable. **(denied)**
- (v) In addition to her remuneration, the Appellant had use of a car supplied by the Payor, and the Payor paid for insurance on the Appellant's life. **(denied)**

Analysis

[21] The Appellant perfectly understood all the reasons for the decision from the outset. The decision followed an investigation that was unusual to say the least, in that several players were involved.

[22] In addition, this is a case in which the burden of proof is on the Appellant.

[23] Despite these two facts, the Appellant did not consider it important to call an employee of the business, preferably a third party, as a witness in order to validate or corroborate certain very important if not determinative elements.

- Why did the people whom the Appellant drove not testify?
- Why did no employee of the business come to confirm that the Appellant did invoice verification as part of her job?
- Why did this invoice verification duty not yield any evidence substantiating the number of invoices checked, the precise nature of the work done, and the useful purposes it served?
- Why were no telephone bills adduced, indicating the number of long-distance calls, the places called and the dates of those calls?
- Why did the company supply a car for this kind of work?
- Why did the company pay the premiums for a life insurance policy in her name?

These are rather unusual benefits for work of this nature.

[24] All of these questions undoubtedly lead to the same answer: it was not possible to adduce such evidence. The explanations given by Mr. Parenteau are quite simply implausible.

[25] Mr. Parenteau described himself as a major executive and sought, from the very outset, to show how uncomfortable he was having to stoop to providing details regarding the Appellant's matter.

[26] It is quite possible that Mr. Parenteau was uncomfortable for the reasons invoked, but if his responsibilities were so important and burdensome that he was unable to testify in a way that shed light on the various relevant aspects, it was up to the Appellant to call upon one or more people who could provide explanations that supported her claims.

[27] The witness Parenteau stated, on a few occasions, that the Appellant's relationship with the business was based on trust and family ties and that there cannot be one without the other.

[28] The Appellant and Richard Parenteau were completely familiar with all the facts underlying the decision that they were contesting. They should have made a special effort to mount a reasonable rebuttal of the relevant elements relied upon by the Minister.

[29] They chose not to do so, and provided vague and general explanations while citing a past decision declaring that a job apparently identical to the one in the instant case was insurable.

[30] Based on vague, often confusing and very imprecise explanations, I do not see how a professional business can offer such flexible working conditions to an employee without exercising any control over her work.

[31] The only plausible explanation is that this was clearly an employment of convenience, and that it was in Mr. Parenteau's interest to provide such employment because it enabled him to pay what was likely a support obligation in the form of a salary. All the facts of the instant matter point to such a conclusion.

[32] I do not doubt that the Appellant was called upon to contribute certain services such as transportation; however, the explanations regarding the calls that were made in order to ensure that clients were satisfied, and regarding the invoice filing or verification work, struck me essentially as a description of phony

employment aimed at proving that there was work justifying the salary paid. In fact, the use of a vehicle during part of the work period is very significant for someone who gets paid an amount much closer to the minimum wage than the Appellant's salary.

[33] Certainly the fundamental question that I must answer is whether a person at arm's length could have obtained the salary and conditions described by Richard Parenteau and generally confirmed by the Appellant.

[34] As for the previous court decision, which was adduced in support of the Appellant's position that the work was insurable, it is obviously not binding on this Court. Moreover, it was based on a very cursory analysis that led to findings which are open to debate for the same reasons as those applying to the case at bar.

[35] I would add, though, that I have unfortunately seen several cases where the consequences of a decision weighed more heavily in the balance than the relevant elements; indeed, it is sometimes decided that employment is insurable when this would result in the collection of premiums, and that it is not insurable when the dispute is over whether benefits are to be paid. Conflicting decisions in the same file cause those concerned, in this case the Appellant, to be confused and highly sceptical.

[36] In the case at bar, the work was clearly not done as part of a genuine contract of service because the working relationship was very much influenced by the fact that the parties were not dealing with each other at arm's length. Consequently, the appeal must be dismissed.

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

"Alain Tardif"

Tardif J.

on this 19th day of March 2008.

Brian McCordick, Translator

CITATION: 2008TCC54

COURT FILE NO.: 2007-2258(EI)

STYLE OF CAUSE: HÉLÈNE LACROIX and M.N.R.

PLACE OF HEARING: Sherbrooke, Quebec

DATE OF HEARING: January 16, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: February 7, 2008

APPEARANCES:

 Counsel for the Appellant: Jean Beaudry

 Counsel for the Respondent: Christina Ham

COUNSEL OF RECORD:

 For the Appellant: Jean Beaudry
 Jean Beaudry & Associé

 For the Respondent: John H. Sims, Q.C.
 Deputy Attorney General of Canada
 Ottawa, Ontario