

Docket: 2010-524(EI)

BETWEEN:

RACHÈLE G. BERNARD,

Appellant,

and

MINISTER OF NATIONAL REVENUE

Respondent,

and

ALPHONSE BERNARD C.A. INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on July 13, 2010, at New Carlisle, Quebec

Before: The Honourable Justice Paul Bédard

Appearances

For the appellant:	The appellant herself
Counsel for the respondent:	Simon-Olivier de Launière
Agent for the intervenor:	Alphonse Bernard

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**JUDGMENT**

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed on the ground that, from January 5, 2007, to May 1, 2009, Rachèle G. Bernard held an insurable employment within the meaning of paragraph 5(1)(a) of the Act while she was working for Alphonse Bernard C.A. Inc., in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 8th day of January 2010.

"Paul Bédard"

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Bédard J.

Translation certified true  
on this 17th day of December 2010  
Sarah Burns, Translator

Citation: 2010 TCC 577

Date: 20101108

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**REASONS FOR JUDGMENT**

Bédard J.

[1] The Appellant is appealing a decision by the Minister of National Revenue (the Minister) under the *Employment Insurance Act* (the Act). The Minister decided that the appellant did not hold an insurable employment when she worked for Alphonse Bernard C.A. Inc. (the Payor) during the period at issue, that is, from January 5, 2007, to May 1, 2009, finding that her employment was excluded because she and the Payor would not have entered into a similar employment contract if they had been dealing with each other at arm's length.

[2] To make his decision, the Minister relied on the following presumptions of fact found at paragraphs 5 and 6 of the Reply to the Notice of Appeal, which were admitted or denied, depending on the case:

[TRANSLATION]

5. The Appellant is a person related to the Payor with the meaning of the *Income Tax Act* for the following reasons:

- a. the Payor's majority shareholder was Alphonse Bernard with 70 percent of the voting shares, while Claude Bernard had 25 percent of the voting shares and H el ene Lagac e had 5 percent; **(admitted)**
  - b. the appellant is Alphonse Bernard's spouse and Claude Bernard's mother; and **(admitted)**
  - c. the appellant is related by marriage to a person who controls the Payor. **(admitted)**
6. The Minister determined that the Appellant and the Payor were not dealing with each other at arm's length in the context of this employment. In fact, the Minister was satisfied that it was not reasonable to conclude that the appellant and the Payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, in light of the following facts:
- (a) The Payor was incorporated on January 1, 2004; **(admitted)**
  - (b) The Payor's business has existed since 1996, when Alphonse Bernard operated his business on his own; **(admitted)**
  - (c) The Payor's business is an accounting firm; **(admitted)**
  - (d) Alphonse and Claude Bernard have their accounting designations, while H el ene Lagac e has a great deal of accounting experience; **(admitted)**
  - (e) Alphonse and Claude Bernard are the Payor's only directors, and their sole duty is to approve the financial statements at the end of the year; **(denied as written)**
  - (f) Each shareholder manages his or her own client base; however, when it comes to purchasing, reorganization or hiring, all shareholders are consulted; **(denied)**
  - (g) The busiest time for the Payor is between February and the end of May, the income tax return filing period; **(denied)**
  - (h) The Payor's revenues have been rising steadily for a few years and reached \$476,000 in December 2008; **(admitted)**
  - (i) The Payor employs between seven and eight persons, shareholders included; **(admitted)**

- (j) The Payor's business hours, that is, those adhered to by the shareholders, are from 8 a.m. to 4:30 p.m. from Monday to Friday, whereas the employees' schedule is from 8:30 a.m. to 4:30 p.m. for 35 hours a week; **(denied as written)**
- (k) The appellant was hired by the Payor for the first time during the period at issue; **(admitted)**
- (l) The appellant has been retired since October 31, 2008, after 30 years of employment at the Centre de Santé et services sociaux de Baie-des-Chaleurs; **(denied as written)**
- (m) When she was hired, the appellant had a specific mandate to carry out, that is, to reorganize and standardize the professional staff filing system, update the boilerplate letters and act as a resource person for the secretary/receptionist, who was relatively inexperienced; **(admitted)**
- (n) The appellant's work schedule was determined by Alphonse Bernard's because they travelled together; she therefore worked 40 hours a week even though she was paid for 35 hours; **(admitted)**
- (o) The hours worked by the appellant were not compiled because she was paid a fixed weekly salary and her duties were related to the administration of the business and not directly to operations; **(denied as written)**
- (p) The appellant's salary was determined at a consultation with shareholders, after a discussion with the appellant on the salary she earned at her former employer and her expectations; **(admitted)**
- (q) In determining the appellant's salary, the shareholders took into consideration the fact that the work mandate was very specific and limited in time and that once it was completed, the appellant's employment would be terminated and she would not be replaced; they also considered the appellant's experience in the field; **(admitted)**
- (r) The appellant received an annual salary of \$60,000, which is higher than the three shareholders' base salary without taking into account the bonuses they are paid; **(denied as written)**
- (s) The appellant earned \$2,307.69 in gross wages every two weeks; **(admitted)**

- (t) According to Emploi-Québec, the hourly wage in Quebec in 2006–2008 for an executive secretary ranged from \$16 to \$25.99; **(denied)**
- (u) For 17 weeks of work, the appellant received \$20,399, which corresponds to the annual salary (\$20,255) received by an arm's length secretary for a full year of work; **(admitted)**
- (v) The appellant was hired primarily to reorganize the filing system during the Payor's busiest period; **(denied as written)**
- (w) According to the Payor, the appellant's employment was terminated once her mandate was fully completed, whereas the appellant asserts that the termination of her employment corresponds to the fact that the "rush" was over and that she wanted to return to her retirement, despite the fact that the work was not finished because there were still improvements to be made, such as to the archiving policy; **(denied as written)**.

[3] The Appellant testified. Alphonse Bernard (the appellant's spouse and majority shareholder of the Payor) testified in support of the appellant's position. Only Appeals Officer Nathalie Belleau testified in support of the respondent's position.

[4] On numerous occasions, the Federal Court of Appeal has defined the role conferred on Tax Court of Canada judges by the Act. This role does not allow a judge to substitute his or her discretionary decision for that of the Minister, but it includes the obligation 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' was still objectively reasonable." (see *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878 (Q.L.), at paragraph 4).

[5] Mr. Bernard, whose credibility has not been put in doubt, testified, in particular, as follows:

- i. The appellant was hired to carry out a specific mandate consisting essentially of the following tasks:
  - (a) reorganize and standardize the Payor's filing system;

- (b) weed out the inactive files, since the Payor no longer had space to store its active files;
- (c) reword all of the boilerplate letters to comply with the standards of the Ordre des comptables agréés [Quebec order of chartered accountants]; and
- (d) act as resource person for the relatively inexperienced secretary/receptionist the Payor had just hired.

Mr. Bernard also explained that, although he did not have a very clear idea of the time required to carry out the mandate, the Payor had communicated to the appellant that the mandate was temporary in nature and would take much less than a year to complete.

- ii. Before the Payor hired the appellant to carry out the mandate, it had been looking for over two years for a person to carry out the mandate. In that respect, Mr. Bernard explained that the position had been posted at the Emploi-Québec office, but that there had been no takers;
- iii. In early 2007, the Payor absolutely had to find someone to carry out the mandate because, in particular, the Payor had almost no space left to store the active files, and its boilerplate letters no longer complied with the standards of the Ordre des comptables agréés. All in all, Mr. Bernard went on at length to explain the urgency there had been to find an experienced person to carry out this mandate;
- iv. The Payor terminated the appellant's employment on May 1, 2009, because she had successfully carried out the bulk of her mandate;
- v. The appellant's pay had been negotiated by the Payor and the appellant, and the Payor had taken the following factors into account: the specific, one-off and temporary nature of the mandate, the urgency to find a person to carry it out, the Payor's repeated and unsuccessful efforts to find a qualified person to carry out the mandate, and the appellant's qualifications;
- vi. Only the Payor's employees whose time is billed to clients had to complete a time sheet; and

- vii. The fact that he paid for the appellant's lunch and that the appellant travelled with him for free compensated, in a way, for the unpaid hour the appellant worked for the Payor each day.

[6] The appellant, whose credibility has not been put in doubt, referred for the most part to her spouse's testimony. However, she made the following additions:

- i. For over 30 years, she held a position as executive secretary at the Centre de santé et des services sociaux de la Baie-des-Chaleurs;
- ii. The remuneration required and obtained from the Payor was the remuneration she received from her employer before she retired;
- iii. Her employment was terminated when her mandate was almost fully completed; and
- iv. She did not recall having told Nathalie Belleau that she had been hired by the Payor to fill a position as executive secretary.

[7] Let us now consider the Minister's allegations in light of the facts in the record. First, I am of the opinion that the Minister erred in relying too heavily on the fact that, according to the statistics published by Emploi-Québec, the wages of an executive secretary in Quebec range from \$16 to \$25.99. In my view, the Minister erred in failing to consider the particularities of the situation. First, he failed to consider the urgency for the Payor to find a qualified, experienced person to carry out the mandate and the fact that the Payor had been unable to find such a person, despite having made numerous attempts. The Minister also erred in failing to consider the lack of employment security and the specificity of the tasks related to this employment. It should be borne in mind that the Payor was looking for an experienced person to carry out a specific, short-term mandate. The Payor was not, by any means, looking to hire a full-time executive secretary. In any event, I am not even satisfied that all of the tasks given to the appellant corresponded to those normally performed by an executive secretary, such as those described in the document from Emploi-Québec entered in the record as Exhibit I-1, at tab 5. Furthermore, was the statistic submitted by the Minister the same for 2009? Did the hourly rate submitted by the Minister (in this case, \$16 to \$25.99) include employee benefits? All of those questions remain unanswered. I would add that it would be



very interesting to know the statistics published by Emploi-Québec for the Gaspésie region. That being said, considering that the appellant worked 40 hours a week, not 35 hours, and that the appellant's real hourly wage during the relevant period was \$28.83 ( $\$2,307 \div 80$  hours), it seems to me that the appellant's real hourly wage is not far off the maximum hourly wage earned by an executive secretary in 2008 in Quebec, according to Emploi-Québec. I would add that the fact that the appellant's remuneration was higher than that of the Payor's secretary and shareholders seems utterly irrelevant to me. This, in my opinion, is conclusive in terms of subparagraphs 6(*r*), (*s*), (*t*) and (*v*). None of those subparagraphs provide a basis for me to reasonably find that there was a non-arm's length relationship.

[8] The Minister also alleged that the appellant's employment should be excluded because she was doing an hour's unpaid work each day for the Payor during the relevant period. As such, performing unpaid work does not necessarily mean exclusion under paragraph 5(2)(*i*) of the Act. Everything is a question of circumstance and degree. The fact that the appellant helped out for free (in this case, for an hour a day) at the family business while waiting for her spouse, with whom she commuted, to finish his work does not seem to me a sufficiently important factor to exclude this employment. In any event, was that hour truly unpaid? In consideration, the appellant's travel to her workplace cost her nothing, and she was offered lunch for free.

[9] Last, I would add that regarding the Minister's allegations concerning the duration of the work, the testimonies of the appellant and her spouse have satisfied me that the work performed by the appellant was not only useful, but necessary. They have also satisfied me that the appellant's employment was terminated because the mandate had been almost fully carried out.

[10] For these reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 8th day of November 2010.

"Paul Bédard"

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Bédard J.

CITATION: 2010 TCC 577  
COURT FILE NO.: 2010-524(EI)  
STYLE OF CAUSE: RACHÈLE G. BERNARD v. M.N.R. and  
ALPHONSE BERNARD C.A. INC.

PLACE OF HEARING: New Carlisle, Quebec

DATE OF HEARING: July 13, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: November 8, 2010

APPEARANCES:

For the appellant: The appellant herself  
Counsel for the respondent: Simon-Olivier de Launière  
Agent for the intervenor: Alphonse Bernard

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: Myles J. Kirvan  
Deputy Attorney General of Canada  
Ottawa, Canada.