Docket: 2011-1538(EI)

BETWEEN:

NICOLE MARCIL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

LES ENTREPRISES GHISLAIN MATHIEU INC.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 23, 2011, at Chicoutimi, Quebec.
Before: The Honourable Justice Johanne d'Auray
Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Marie-France Dompierre
Agent for the intervener:	Ghislain Mathieu

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is dismissed and the decision of the Minister dated February 21, 2011, determining that the appellant did not hold insurable employment, within the meaning of paragraph 5(2)(*i*) and subsection 5(3) of the Act, during the period from August 2, 2009, to August 6, 2010, when working for Les Entreprises Ghislain Mathieu Inc., is confirmed.

Signed at Ottawa, Canada, on this 3rd day of October 2011.

"Johanne D'Auray"

D'Auray J.

Translation certified true
On this 26th day of October 2011
Monica F. Chamberlain, Translator

Citation: 2011 TCC 463
Date: 20111003
Docket: 2011-1538(EI)

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NICOLE MARCIL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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LES ENTREPRISES GHISLAIN MATHIEU INC.,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

D'Auray J.

[1] At issue in this appeal is whether the appellant's employment is excluded employment within the meaning of paragraph 5(2)(*i*) of the *Employment Insurance Act* (Act).

Facts

[2] In her testimony, the appellant indicated that she worked as a secretary for her spouse's company, Les Entreprises Ghislain Mathieu Inc. (intervener), for 30 years.

[3] The intervener operated a lumber transportation and loading business. The intervener was a sub-contractor for the forester Robec Inc.

[4] The intervener employed fourteen drivers and two mechanics. Under the arrangement with Robec Inc., Robec paid the drivers except for overtime, which was paid by the intervener. Robec Inc. was the intervener's sole client.

[5] The intervener was the owner of seven trucks and a front-end loader.

[6] The intervener's gross income at the end of its fiscal year ending April 30 was:

2004	**2005**	**2006**	**2007**	**2008**	**2009**
2,212,199	2,458,463	2,424,836	2,208,959	1,759,630	1,585,949

[7] The appellant's duties were to pay accounts, answer the telephone, make deposits, fill out Records of Employment, make federal and provincial remittances, complete GST and QST reports, complete reports regarding excise tax on diesel, reconcile the truckers' hours, order parts for the trucks as needed, do monthly and yearly reconciliations and, when necessary, prepare correspondence.

[8] The intervener's office was located in the personal residence of the appellant and her spouse, Ghislain Mathieu. The office was fitted out with a computer, a photocopier and a printer. The Appellant used the intervener's tools to do her work.

[9] Regarding the hours worked, the appellant testified [TRANSLATION] "when we work, we work 24/7". I understood by this that the appellant generally worked from 8 a.m. to 12 p.m. and 1 p.m. to 5 p.m. However, when the telephone rang outside of business hours, she answered it. It was unavoidable, as the appellant explained, [TRANSLATION] "when you have a company, you want to succeed".

[10] Under cross-examination, the appellant indicated that the intervener's slow period was from March to May, sometimes until August.

[11] The appellant also stated that she had the authority to sign all the cheques; she had no monetary limit.

[12] During the period when the intervener's activities slowed down, the appellant worked six to seven hours a week.

[13] The appellant would sometimes work from the cottage, but her spouse, Mr. Mathieu, indicated that they went there mainly on weekends and very rarely during the week. Moreover, the appellant brought work with her to the cottage. The intervener did not see any problem with that.

[14] To the question whether another person would agree to be on call 24/7, the appellant answered [TRANSLATION] “we are owners, I am his spouse, we have to work”.

[15] Mr. Mathieu also indicated during his testimony, that before working for Robec Inc., the intervener was a sub-contractor to Abitibi Bowater Inc. When Abitibi Bowater inc. closed, the intervener became a subcontractor for Robec Inc.

[16] Robec Inc. gave the intervener so much work that Mr. Mathieu had to call the appellant in the evening to ask that she order parts for the following day.

[17] Mr. Mathieu stated that no secretary would have done her job.

[18] Moreover, he would not have given anyone but the appellant authority to sign cheques for the intervener without any monetary limits.

[19] As for the appellant's salary increase, he stated that the increase had been given before the forestry industry and the business' activities slowed down. The appellant’s salary increased from $520 gross per week, including the 4% vacation pay deduction, to $728 gross per week as of February 7, 2010, a 40% increase.

[20] When counsel for the respondent asked him why he had dismissed the appellant in August, given that in August 2010 the intervener's activities were increasing, he replied that it was a decision they made together.

Analysis

[21] The respondent does not dispute the fact that the appellant had worked for the intervener, but she asserted that the appellant's employment is excluded under paragraph 5(2)(*i*) of the EIA.

Paragraph 5(2)(*i*) indicates:

(2) Insurable employment does not include:

> …
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.

[22] There is no dispute over the issue of arm's length relationship. The appellant is the spouse of the sole shareholder of the intervener.

[23] The appellant and the intervener challenge the respondents decision with respect to the application of paragraph 5(3)(*b*) of the EIA, which reads as follows:

> 5(3) For the purposes of paragraph (2)(*i*),
>
> > (*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[24] Chief Justice Richard of the Federal Court of Appeal explained in *Francine Denis v. Minister of National Revenue*, 2004 FCA 26, the role of the Tax Court of Canada judge in an appeal from a determination by the Minister under the exclusionary provisions of subsections 5(2) and 5(3) of the Act:

> [5] The function of the Tax Court of Canada judge in an appeal from a determination by the Minister under the exclusionary provisions of subsections 5(2) and 3 of the Act is to inquire into all the facts with the parties and witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the known facts were misunderstood (*Pérusse v. Canada (Minister of National Revenue - M.N.R.*), [2000] F.C.J. No. 310, March 10, 2000).

[25] According to the respondent, the non-arm's length relationship between the intervener and the appellant governed the appellant's employment conditions. As indicated in *Denis*, I cannot substitute my own opinion for that of the Minister when there are no new facts. In addition, there is no basis for thinking that the known facts were misunderstood by the respondent.

[26] In light of the testimony at the hearing regarding the remuneration paid, the terms and conditions, the duration and the nature of the appellant's work:

- the 40% salary increase, particularly when activities in the forestry industry were slowing down;
- the hours worked by the appellant, the availability of the appellant 24 hours a day/7 days a week;
- the appellant's lay-off for no real reason in August, a period in which the intervener's activities were picking up again;

I cannot find that the facts were misunderstood by the respondent. I cannot conclude that the respondent was unreasonable in applying his discretionary power as he did in this case, that is, in being satisfied that the appellant and the intervener would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[27] The appeal is dismissed.

Signed at Ottawa, Canada, on this 3rd day of October 2011.

"Johanne D'Auray"

D'Auray J.

Translation certified true
On this 27th day of October 2011
Monica F. Chamberlain, Translator

CITATION:	2011 TCC 463
COURT FILE NO.:	2011-1538(EI)
STYLE OF CAUSE :	NICOLE MARCIL AND M.N.R. AND LES ENTREPRISES GHISLAIN MATHIEU INC.
PLACE OF HEARING:	Chicoutimi, Quebec
DATE OF HEARING:	September 23, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	October 3, 2011

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Marie-France Dompierre
Agent for the intervener:	Ghislain Mathieu

COUNSEL OF RECORD:

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