Docket: 2011-1019(EI)

BETWEEN:

MARIE-CLAUDE POULIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

KONDITION PLURIEL,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of Kondition Pluriel, 2011-1020(EI), on October 19, 2012, at Montréal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Agent for the appellant:	Michel Poulin
Counsel for the respondent:	Nancy Azzi
Agent for the intervener:	Michel Poulin

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed. The decision rendered by the Minister of National Revenue that the appellant, Marie-Claude Poulin, did not hold insurable employment with Kondition Pluriel during the period of March 7, 2004, to February 28, 2005, is confirmed.

Signed at Ottawa, Canada, this 3rd day of December 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 16th day of January 2013.
Elizabeth Tan, Translator

Docket: 2011-1020(EI)

BETWEEN:

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For the intervener:	The intervener herself

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Citation: 2012 TCC 415
Date: 20121203
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Docket: 2011-1020(EI)

BETWEEN:

KONDITION PLURIEL,

Appellant,

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MARIE-CLAUDE POULIN,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] The appellants are appealing from a decision by the Minister of National Revenue (**Minister**) finding that Marie-Claude Poulin did not hold insurable employment with Kondition Pluriel during the period of March 7, 2004, to February 28, 2005. The Minister found that the employment was excluded from insurable employment pursuant to sections 5(2)(*i*) and 5(3) of the *Employment Insurance Act* (**EIA**). In particular, the Minister feels that the employer and employee had a non-arm's length relationship and under the circumstances, it was not reasonable to find that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[2] The applicable legislative provisions state:

> ***EMPLOYMENT INSURANCE ACT***
>
> **INSURABLE EMPLOYMENT**
>
> **5.(2) Excluded employment** — Insurable employment does not include
>
> ...
>
> *(i)* employment if the employer and employee are not dealing with each other at arm's length.
>
> **5.(3) Arm's length dealing** — For the purposes of paragraph (2)(*i*),
>
> *(a)* the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> *(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.

[3] The arm's length relationship is defined at section 251 of the *Income Tax Act* (**ITA**). The relevant provisions state:

> ***INCOME TAX ACT***
>
> **SECTION 251: Arm's length.**
>
> **(1)** For the purposes of this Act:
>
> *(a)* related persons shall be deemed not to deal with each other at arm's length;
>
> ...

> **(2) Definition of "related persons"** — For the purposes of this Act, "related persons", or persons related to each other are
>
> *(a)* individuals connected by blood relationship, marriage or common-law partnership or adoption;
>
> *(b)* a corporation and
>
> ...
>
> (ii) a person who is a member of a related group that controls the corporation,
>
> ...
>
> **(4) Definitions concerning groups** — In this Act,
>
> "related group" means a group of persons each member of which is related to every other member of the group;
>
> ...
>
> **(6) Blood relationship, etc.** — For the purposes of this Act, persons are connected by
>
> *(a)* blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
>
> *(b)* marriage if one is married to the other or to a person who is so connected by blood relationship to the other;
>
> ...

[4] It is important to note from the start that the decision resulting from the exercise of the Minister's discretionary power can be amended only if the Minister acted in bad faith, failed to take into account all the relevant circumstances, or took into account an irrelevant factor. This court must decide whether the Minister's decision results from an appropriate and lawful exercise of his discretionary power, and if so, it cannot substitute the own decision for that of the Minister. In other words, it is only when the Court concludes that the Minister made an improper use of his discretion that it can decide, taking all the circumstances into account, whether such a contract of employment would have been entered into if the employer and employee had been dealing with each other at arm's length (*Ferme Émile Richard et Fils Inc. v. Canada (Department of National Revenue)*, [1994] F.C.J. No. 1859 (QL); see also *Légaré v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 878 (QL)).

[5] The Minister based his decision on the facts at paragraphs 5 and 6 of the Reply to the Notice of Appeal (for Marie-Claude Poulin), which state:

[TRANSLATION]

(5) The appellant and the payer are related persons within the meaning of the *Income Tax Act* because:

(a) the payer is a non-profit organization; [**admitted**]

(b) during the period in question, the payer's Board of Directors was composed of three individuals, Martin Kusch, Michel Poulin and Marie-Claude Poulin; [**admitted**]

(c) Marie-Claude Poulin is Michel Poulin's daughter and Martin Kusch's spouse; [**admitted**]

(d) the appellant, Marie-Claude Poulin, is connected by blood relationship and marriage to each of the other members of the payer's Board of Directors; [**admitted for the period in question**]

(6) The Minister found that the appellant and the payer were not dealing with each other at arm's length in the context of this employment. The Minister was convinced that it was unreasonable to find that the appellant and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, considering the following circumstances:

(a) the payer was incorporated in 2003 as a non-profit organization, following a change of name;

(b) the payer is funded by grants and donations;

(c) the payer operates a specialized artistic performance business in three disciplines: dance, media shows and multidisciplinary shows. It also stages its creations in Europe;

(d) the payer's initial founders are the appellant and Martin Kusch who created Compagnie de Fortune Inc. in 2000;

(e) the payer's Board of Directors meets twice a year for regular meetings and once for a general meeting. All major decisions requiring the Board's approval are made by phone or during meetings; [**admitted**]

(f) all decisions regarding daily activities are made by Martin Kusch and the appellant;

(g) from the time Compagnie de Fortune was created until 2003, the appellant worked as a self-employed worker;

(h) when the non-profit organization was created in 2003, the appellant's status changed to employed person following the recommendation of an external firm that helps young entrepreneurs manage their businesses. The appellant could then potentially collect maternity benefits;

(i) this firm, Diagramme gestion culturelle, provides its clients, including the payer, with resource services and administrative and communications

management consulting, and facilitates access to various professional, material and financial resources;

(j) the appellant held the position of artistic co-director;

(k) the appellant's duties included administration for the payer, getting grants, managing money, organizing tours, preparing and developing projects, giving conferences, hiring employees such as dancers, producers and choreographers;

(l) the appellant's duties were determined by the payer and Diagramme gestion culturelle, under a task-sharing agreement defined at Schedule A of the contract between the payer and Diagramme gestion culturelle;

(m) the appellant had to report to the payer's Board of Directors and seek their approval for all issues other than those related to daily operations; [**admitted]**

(n) the appellant's pay was set by the Board of Directors and Diagramme gestion culturelle at $600 every two weeks, without consideration for the hours actually worked;

(o) the appellant's pay was based on the payer's ability to pay considering the fee the appellant previously received;

(p) on October 22, 2004, the appellant's salary went from $600 every two weeks to $1,160 every two weeks, an increase of $560;

(q) in a first version, the appellant explained that the salary increase was the result of a budget presentation to the Council for the Arts based on the project to be completed and the approval of the payer's Board of Directors, and in a second version, the appellant and the payer explained that the salary increase was subsequent to the departure of her assistant, Marilou Aubin;

(r) a review of the payer's books shows that Marilou Aubin has not worked for the payer since November 21, 2003;

(s) during the appellant's maternity leave absences, the payer did not replace the appellant, but distributed her workload between Martin Kusch and Catherine Tardif for dances and choreographies.

[6] In her reply, the appellant admitted only the paragraphs with "admitted" indicated above. She denied or commented on the other paragraphs.

[7] The appellant claims that, despite her non-arm's length relationship with the employer, she was treated the same way any other person acting as choreographer, dancer and artistic co-director would be treated. She explained that Kondition Pluriel is a very small company that operates in a low profitability field that must work with the grants from the councils for the arts of Montreal, Quebec and the

federal government to pay any employee it may have, and with whatever other small income it receives. She notes that the fact it receives grants from the three levels of government shows how serious their business is. And to ensure the credibility of the organization, the company's goal is to include external members on its Board of Directors (BoD), which it did for the first time in April 2005. It appears that in 2011 the BoD had six directors, half of whom were not related persons. During the period in question, there were three people on the BoD: the appellant herself, her father Michel Poulin, and her husband Martin Kusch.

[8] The appellant and her husband are the artistic co-directors and they make everyday decisions. They meet with the BoD two or three times a year to discuss the more important issues. During the period in question, the only addition at the BoD meetings was her father. They hired an organization, Diagramme gestion culturelle (**Diagramme**), that specializes in financial and administrative management and offers its services at a low cost to organizations working in the field of dance. It was Diagramme that recommended that the appellant become an employee starting August 22, 2003. Prior to this, she was paid a performance fee and no source deductions were made. The appellant explained that it was too much work for their little company to keep a record of wages. Apparently, in 2003 they were expecting ongoing grant funding as opposed to funding per project, which would have provided some security to allow the company to pay a salary instead of fees.

[9] The appellant received a salary from August 22, 2003, until February 28, 2005, when she stopped working for her first maternity leave. She explained that the company's fiscal year was from July 1 to June 30, and during the 2003-2004 fiscal year, she received $14,280 in salary. During this same fiscal year, they paid a salary of $3,278.65 to Marie-Lou Aubin, who was hired to do promotions and market development . The company also allegedly received a grant for $3,000 to hire Marie-Lou, who received the entire amount. She therefore received a total of $6,278.65 during that year.

[10] During the 2004-2005 fiscal year, the appellant received $16,515.99. Before October 22, 2004, she earned $600 every two weeks and after, she started earning $1,160 every two weeks. As she combined her own work with that of Marie-Lou after she left on November 21, 2003, she thought it was entirely justified for her salary to increase by so much in October 2004, since she had been significantly underpaid from November 2003 to October 2004. She was on maternity leave from May 2005 to May 2006. On her return, they agreed that she would no longer be paid by salary. She returned to receiving performance fees, with no source

deductions. The Québec Parental Insurance Plan was modified to allow non-employees to benefit from this insurance so the appellant did not become an employee again for her second pregnancy.

[11] The appellant said she always worked at least 55 hours per week. When she was an employee, she worked for a set salary for 40 hours per week. The declaration provided to the Employment Insurance office (Exhibit I-3) shows work weeks of 35 hours and five days for an employer with which the appellant had a non-arm's length relationship. The appellant said she was not the one who completed this declaration, but acknowledged that she signed it without verifying its content. It was Diagramme's representative, Nathalie Prémont, who allegedly completed the declaration. She testified that she and the appellant agreed to write 35 hours of work per week. She justified this saying the figure could be explained because of weeks the appellant worked less. She recommended that the appellant become an employee so she would have stability, considering the financial viability of the company. But the final decision to pay the appellant a salary instead of fees was made by the BoD of Kondition Pluriel.

[12] Moreover, the respondent submitted to evidence the contractual agreement between Diagramme and Kondition Pluriel under which Kondition Pluriel recognizes that it is completely responsible for all administrative decisions made, regardless of the services rendered by Diagramme (Exhibit I-5, paragraph 3).

[13] The appellant also had Danielle Demers testify; she was Diagramme's Director General from 2007 to 2011. In a letter submitted as Exhibit A-1, she stated that Diagramme offers professional services in financial and administrative management to the dance community for a low fee because of the support of the councils for the arts. She noted that the companies that work in the field of dance depend for the most part on government grants, as is the case for Kondition Pluriel. She notes that they are all subject to income fluctuations and that employee remuneration depends on it. She also noted that the workload of the artistic directors includes a large portion of the administrative duties, such that the directors accumulate a significant number of hours of work and, therefore, they accept pay that is close to minimum wage. She added that a non-arm's length relationship between the artists and members of the BoD of a company generally do not influence the decisions made. She noted that all the companies are subject to the standards and rules of the councils of the arts that award the grants and to whom the companies must report annually. She feels that Kondition Pluriel is no different.

[14] After investigation and analysis, Sonnie McGrath, the appeals officer for the Canada Revenue Agency (**CRA**) in this case, came to the conclusion that it was unreasonable to find that the employer would have hired a person with whom it was dealing at arm's length under a substantially similar contract of employment to the one it had with the appellant. In court she explained the factors she relied on to come to this conclusion (the analysis can be found in her report, filed as Exhibit I-6).

[15] As for the remuneration paid, she noted that the appellant received a fixed salary every two weeks, including two weeks' vacation; at the beginning of the period, this was the equivalent to less than minimum wage, if the actual hours of work were considered. Then, her salary nearly doubled. The appellant claimed this was justified because Marie-Lou Aubin left and she carried out extra administrative duties. Ms. McGrath felt this was unreasonable since Diagramme had already been hired to take care of the administrative duties and the communication work previously carried out by Marie-Lou did not justify such an increase. During Ms. McGrath's investigation, the chair of the BoD sent a letter allegedly explaining that the appellant's salary was due to the employer's improved cash flow. Ms. McGrath felt that an employee's salary does not usually fluctuate based on the company's revenue. She concluded that a person with an arm's length relationship would not have carried out similar work for similar compensation.

[16] As for the terms and conditions of employment, Ms. McGrath noted that the appellant did not keep track of her hours of work, and had considerable professional freedom because of her experience and training. Ms. McGrath also considered it highly unlikely that an employer would make a non-related worker an employee solely so she could collect maternity benefits, considering all the resulting expenses for the employer. She therefore found it unreasonable to find that a person with an arm's length relationship would have been hired under similar terms and conditions of employment.

[17] As for the duration, Ms. McGrath felt the appellant did exactly the same work before, when paid a fee as a self-employed worker and regained this status after her maternity leave. She therefore concluded that the appellant only became an employee to be eligible for maternity benefits under the employment insurance system.

[18] The appellant explained that in 2005-2006, they had hoped to obtain ongoing funding, but this did not happen until 2008. Kondition Pluriel had to adapt to the employment-related costs of the employee status. The appellant explained

that her administrative work was complementary to that of Diagramme. They worked together. As for the duties carried out by Marie-Lou, the appellant had to take these on after her departure. Marie-Lou was hired through a 4 to 6 month employment program with Emploi Québec.

[19] Lastly, the appellant acknowledged that during the period in question, she was paid by cheques she herself could have signed on behalf of Kondition Pluriel, and she sometimes waited many days before cashing her paycheques.

Respondent's arguments

[20] The respondent claims that Ms. McGrath's decision is not unreasonable. He feels the non-arm's length relationship affected the employer-employee relationship since even a devoted employee would not have agreed to work long hours, up to 60 hours a week, for compensation for 40 hours a week. As for the argument that the dance world is a unique environment where workers are ready to make concessions and often agree to be underpaid, the respondent states that there is no exception in the EIA for dancers. Moreover, the respondent feels that the evidence indicating that dancers generally agree to be underpaid should have been presented by experts. The appellant called two people who had worked for Diagramme to testify, but these two people were not specifically called to testify as experts on the subject. They could only testify to their factual involvement with Kondition Pluriel.

[21] The respondent also notes that the appellant had a variety of duties. She did more administrative work than dancing. Therefore, she could not be considered part of a group of dancers with mediocre pay.

[22] The respondent notes that the appellant's salary doubled 11 months after Marie-Lou's departure. The salary increase therefore did not correspond to the increased work load, but rather was dependent on the company's revenue. It more like the compensation a business owner gives himself when income allows. Additionally, a review of the cheques issued to the appellant, copies of which were submitted as Exhibit I-7, indicate that some cheques were only cashed after a 10 to 20 day delay. She also had five weeks of fully paid vacation. The respondent feels that this would not have been granted to an employee with an arm's length relationship.

[23] As for the employment conditions, the respondent feels that becoming an employee solely to qualify for maternity benefits again shows special treatment for a non-arm's length employee. It is not unreasonable to think that such treatment would not have been granted to a person with an arm's length relationship. He also notes that the appellant herself deliberately created confusion by not mentioning in her declaration that there was a relationship with the employer, and by falsely claiming she was paid for 35 hours a week when in fact she worked much more, without keeping track of her hours. The respondent relies on the decision of this court, *Serres de la Pointe Inc. v. Canada (Minister of National Revenue)*, [2005] T.C.J. No. 656 (QL), at paragraphs 51 to 53, to claim that such a presentation shapes the working relationship in a way that skews reality to benefit the employee and then be able to control the benefits. The same situation existed in *Ferme Émile Richard et Fils Inc.*, *supra*, and the Federal Court of Appeal accepted the trial judge's finding that such an arrangement was influenced by the non-arm's length relationship.

Appellant's arguments

[24] The appellant notes that, in many companies, hours of work are not recorded. When a person enjoys their job, formalities are set aside. She admits that becoming an employee was advantageous for her, but she claims that she had always considered herself an employee, even when she was paid by fees. The company started to grow and the same would have happened with an arm's length employee to provide some stability to the employees. The dance world must be considered in a special context. Employees know they must work a lot to have some recognition and that remuneration is not always adjusted for the hours worked.

[25] In regard to the confusion raised by the respondent in the declaration the appellant made, the appellant notes the company's true intention of expanding its BoD with arm's length members. She claims that, with this in mind, the BoD always supervised her work even if it was composed only of three members of the same family. The appellant is first and foremost a graphic artist and not an administrator, even if, in the context of a small business, she had no other choice but to handle the administration.

Analysis

[26] As I mentioned at the beginning of these reasons, this court must first limit its analysis to a review of the lawfulness of the Minister's decision. It is only if I find that one of the grounds to intervene has been established—namely, that the Minister neglected to consider all the circumstances, considered irrelevant factors or violated a principle of law—that I can review the validity of the Minister's decision. If there is sufficient material to support the Minister's conclusion, the Court is not at liberty to overrule it merely because it would have come to a different conclusion (*Canada (Attorney General) v. Jencan*, [1998] 1 F.C. 187, at para. 31).

[27] In my opinion, the appellant did not prove that the Minister inappropriately used his discretionary power. The remuneration factor alone would sufficiently justify the Minister's decision. The appellant admits she worked considerably more hours that the number of hours indicated in her declaration at the Employment Insurance office. She admitted she was underpaid for a certain period and that the decision was made to double her salary when the company could afford to do so. This behaviour alone reflects decisions made by a person who controls her own company. Moreover, from comments made by Tardif J. in *Serres de la Pointe Inc.*, *supra*, at paragraph 51, fluctuations in pay for similar work during a single period distorts the data regarding the contract of employment and is an important element to demonstrate the extent to which the non-arm's length relationship shaped the contract of employment. In the present case, indicating a weekly salary for 35 hours of work when the actual number of hours was much higher, leads to an artificial increase in the hourly rate.

[28] Moreover, the decision was made to grant the appellant employee status so she could collect maternity leave benefits. I agree with the appellant that this, in itself, is not illegal, if the working conditions truly reflect a contract of employment. But here, it is important to remember that the appellant decides whether she will have an employment relationship or not, at her convenience, which would not necessarily be the case with an arm's length employee. Once she returned from her maternity leave, she went back to being paid by fees, with no source deductions. Although not a determining factor in itself, these actions could very well be considered by the Minister as one element among others that indicate a decision was made by a person with control of his or her company, one that would not necessarily have been made by another person with an arm's length relationship.

[29] Additionally, although representatives of Diagramme stated that dance artists could be underpaid and must constantly adapt to financial instability, there

was no concrete evidence that such an artist with an arm's length relationship would have been treated the same way as the appellant at Kondition Pluriel. On the contrary, it was established that the appellant not only saw her salary double during the period in question, but also had five weeks' vacation, fully paid; in my opinion, this is completely contrary to the statements made by Ms. Demers.

[30] I feel there is sufficient evidence to support the Minister's finding. It is therefore difficult for me to find that the Minister improperly exercised his discretion and that his decision was unreasonable. The appellant did not pass this first step, therefore it is impossible for me to intervene in her favour.

[31] The appeal is dismissed and the Minister's decision confirmed.

Signed at Ottawa, Canada, this 3rd day of December 2012.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 16th day of January 2013.
Elizabeth Tan, Translator

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PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	December 3, 2012

APPEARANCES:

Agent for the appellants:	Michel Poulin
Counsel for the respondent:	Nancy Azzi
Agent for the interveners:	Michel Poulin (2011-1019(EI)) The intervener herself (2010-1020(EI))

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