Docket: 2012-2416(EI)

BETWEEN:

MARIA VERTZAGIAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 12, 2013, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Gilbert Nadon
Counsel for the Respondent:	Nancy Azzi

JUDGMENT

The appeal instituted pursuant to subsection 103(1) of the *Employment Insurance Act* (**EI Act**) is dismissed and the decision of the Minister of National Revenue dated March 20, 2012, is confirmed on the basis that the appellant's employment with Leo-Danal (2008) inc. during the period from April 19, 2010 to April 26, 2011 was not insurable employment within the meaning of paragraph 5(1)(*a*) of the EI Act.

Signed at Ottawa, Canada, this 4th day of July 2013.

"Lucie Lamarre"

Lamarre J.

Citation: 2013 TCC 219
Date: 20130704
Docket: 2012-2416(EI)

BETWEEN:

MARIA VERTZAGIAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a decision of the Minister of National Revenue (**Minister**), issued on March 20, 2012, that the appellant did not hold insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (**EI Act**) while working for Leo-Danal (2008) inc. (**the payer**) during the period from April 19, 2010 to April 26, 2011.

[2] The facts relied upon by the Minister are set out in paragraph 5 of the Reply to the Notice of Appeal (**Reply**), which are reproduced hereunder :

> 5) In reaching his determination, the Respondent, the Minister of National Revenue, relied on the following assumptions of fact:
>
> a) The payer operated a women [*sic*] clothing business; **admitted**
>
> b) The payer [*sic*] premises are located at 225, Chabannel street [*sic*] in Montreal; **admitted**
>
> c) The shareholders are Domenico Pagnotta with 50% of the shares and May Haddad and Paul Haddad with 25% of the shares each; **admitted**
>
> d) The Appellant has a degree from LaSalle College; **admitted**
>
> e) The Appellant was head patternmaker/designer of the payer; **admitted**

f) The job of the appellant was to oversee the making of women's garment [*sic*];

g) The Appellant rendered her services at the payer's location and, in part, at her residence;

h) The Appellant a [*sic*] has register [*sic*] business name since 2004; **admitted**

i) Every week, the Appellant submits an invoice to the payer with the number of hours worked; **admitted**

j) The hourly paid [*sic*] rate of the Appellant was 28$ [*sic*]; **admitted**

k) The Appellant has discretion over the number of hours worked;

l) The Appellant supply [*sic*] her own tools such as sewing machines, scissors and rulers;

m) The worker was register [*sic*] for both the GST and the QST.

[3] The appellant testified at the hearing. She explained that she graduated in fashion design from LaSalle College and specializes in patternmaking and design in the making of clothes. She has her own business making evening and wedding dresses, and she has been registered with Quebec's Registraire des entreprises since 2004 as a sole proprietorship ("entreprise individuelle") offering dressmaking services ("service de couturière") under the name of Kopella (Exhibit R-1, Tabs 8 and 18). In October 2009, she started working for the payer two days a week, and worked full-time from December 2009. Apparently, the payer manufactures sportswear for women. On October 10, 2009, the appellant signed a contract with the payer under her personal name (Exhibit R-1, Tab 4). The appellant was to provide her design and pattern-making services at an hourly rate of pay of $28. She did not receive any training from the payer, since she had been working in the industry since 1997.

[4] Her work consisted of designing the product line, picking up fabrics, sketching, giving the fabric to the sample maker for cutting, fitting the product, verifying the grading (the size), and making adjustments to arrive at the final product. She said she was working under the supervision of Ms. May Haddad, whom she referred to as her "boss", who would approve the final product.

[5] The appellant said that part of her job also involved overseeing quality control and production and speaking to the contractors on a daily basis regarding any problems with the fabrics. She said that she also ordered trims, buttons, and linings through the payer's suppliers, with the approval of her "boss".

[6] She testified that she performed her work on the payer's premises and that she was in contact with Ms. Haddad three or four times a day as they were doing fittings daily. She said their offices were next to each other. The appellant also mentioned that on few occasions she took patterns home in order to get work finished on time.

[7] The appellant said that she provided her own rulers and scissors. She used the payer's paper rolls and tables. She herself did not work with sewing machines. Accordingly, she offered to sell her two old sewing machines to Ms. Haddad. Apparently, Ms. Haddad agreed to pick them up, but as the sample maker (the person doing the samples) did not like them, Ms. Haddad never purchased them and they were not of any use to the payer. The appellant never took back those two sewing machines, which were stored on the payer's premises and left behind when the payer eventually moved (Exhibit R-1, Tab 20).

[8] As for her work schedule, the appellant testified that starting in December 2009 she worked Monday to Friday from 9:00 a.m. to 5:00 p.m. She said that there were rules of conduct; lunch was at 12:00 p.m. and the break at 3:00 p.m. Occasionally, she would work on Saturdays from 9:00 a.m. to 1:00 p.m. This schedule lasted for 2 or 3 months, after which she was told by Ms. Haddad to work two or three days a week. She worked full-time again during the summer of 2010, but things slowed down once more in the fall of 2010.

[9] The appellant was paid weekly according to the hours she invoiced (the invoices for the period from November 2009 to February 2011 were filed as Exhibit A-1). She was paid by cheque without any deductions at source (one sample was provided as Exhibit A-2). At one point, Ms. Haddad told the appellant that she had to register for GST as her total income had reached $30,000. The appellant applied for GST registration and obtained her business number for GST purposes on September 20, 2010 (Exhibit R-1, Tab 17).

[10] According to the appellant, when she started working full-time for the payer in December 2009, Ms. Haddad made it clear that she had to work exclusively for her. The appellant explained that, in any event, with the heavy workload she would not have been able to work elsewhere. The payer had apparently purchased another line of clothes. This explains the high volume of work at the time. The appellant herself did not require outside help but Ms. Haddad hired another pattern designer in those busy days. The appellant even once asked her sister to serve as a model on a photo shoot for one full day to help out the payer. Unfortunately neither the appellant nor her sister was compensated by the payer for the sister's services (see Appeal Letter

dated November 1, 2011 from the appellant to the Chief of Appeals, Exhibit R-1, Tab 1, page 3).

[11] The payer provided the appellant with a parking spot. The appellant was not reimbursed for anything and did not receive any holiday or statutory holiday pay, nor was she ever paid overtime. She almost never took sick days and when she stayed at home, it was at Ms. Haddad's request because there was not enough work. One example of this, apparently, appears on the invoice dated September 17 (presumably 2010), which shows that she worked four full days but was "off" on Friday (Exhibit R-1, Tab 5, page 2); on other invoices, she only billed for a few days per week. In cross-examination, she stated that she estimated that she worked an average of 30-32 hours per week.

[12] She acknowledged that she was paid as if she was a self-employed, but said that money was a sensitive issue with the payer and nothing was done to change that arrangement. She did not receive T4 slips. However, she later filed a complaint against the payer with the Commission des normes du travail, claiming her statutory holiday pay, her 4% vacation pay, overtime, and pay in lieu of two weeks' notice after she stopped working for the payer (Exhibit R-1, Tab 3). A settlement was eventually reached between the parties in September 2012 "sans aucune admission de responsabilité de part et d'autre, dans le seul but d'éviter les frais d'un procès" ([TRANSLATION] »with no admission of liability by either party, for the sole purpose of avoiding the costs of a trial ») (Exhibit A-3).

[13] The appellant acknowledged that before working for the payer she was self-employed and said that in 2007 she also received employment income.

[14] She never collected or remitted GST to the government before working for the payer (as she said she never reached the $30,000 threshold), nor did she file her tax returns for the years 2009 through 2012. She did not remit the GST collected from the payer. Her GST registration number was revoked in April 2011 (Exhibit R-1, Tab 14), which was when she stopped working for the payer.

[15] Ms. May Haddad was called to testify by the respondent. She is an associate designer with the payer. She became a partner in 2008. She also entered into a written contract with the payer under her registered business name of Vêtements Maggio. The contract provided that she would receive a fixed annual amount to be divided into monthly payments (Exhibit R-1, Tab 15). According to Ms. Haddad, she and the appellant agreed that the appellant would be hired on a contract basis to do

pattern work on her own time. Ms. Haddad knew the appellant was working from home as she was advertising on the web.

[16] Ms. Haddad said that the payer had employees on the payroll at that time and that the appellant preferred to be paid as a self-employed contractor, which gave her more freedom and more flexibility. She said that the appellant could either work at the office or from home, while the other employees had to be on-site full-time. Ms. Haddad testified that it happened that the appellant took samples home to sew and asked someone else (whom she believed was the appellant's mother) to do the sewing. On such occasions, she invoiced the payer for the finished product and not by the hour (examples of this are found in the invoices filed in Exhibit R-1, Tab 5, at page 3).

[17] Ms. Haddad said that the appellant was remunerated $28 per hour for her work as a patternmaker and that this covered her expenses (as she had more expenses as a contractor). By way of comparison, the payer hired another patternmaker as a part-time employee, and she was paid $21 per hour (Exhibit R-1, Tab 16).

[18] When the appellant reached the $30,000 income threshold, Ms. Haddad told her that she needed a GST registration number. She apparently offered the appellant the possibility of becoming an employee if she preferred, which offer was declined by the appellant, who wanted to keep a flexible schedule and did not want source deductions to be withheld from her paycheque.

[19] Ms. Haddad said that she did not supervise the appellant's work. What mattered to her was that the projects be completed on time and in accordance with the payer's specifications. She would give the sketch to the appellant, who would then make the pattern according to her own schedule. Ms. Haddad testified that the appellant showed up whenever she wanted. She could stay late in the evening if Ms. Haddad stayed, Ms. Haddad being the only one having a key to the premises. Ms. Haddad fixed deadlines taking into account industry requirements. She knew the amount of time that needed to be allotted for cutting and for adjustments to be made after the patterns were completed. She therefore gave deadlines to the appellant. She did not really check the number of hours invoiced by the appellant as it seemed reasonable.

[20] As for the tools, Ms. Haddad said that the appellant provided her own scissors, rulers, pens and tape dispensers. The appellant used the payer's paper rolls and tables. At times, she even used them for her own purposes. Ms. Haddad recognized

that the payer let the appellant use an office and a parking spot, but said that they did the same for other contractors. They kept three offices for those contractors.

[21] Ms. Haddad also acknowledged that she received government subsidies both for the work done by the employees and for that done by her and the appellant as self-employed persons (Exhibit R-1, Tab 19).

[22] The respondent called Mr. Serge Benoit, a field officer with the CRA, who spoke to the appellant in May 2013 regarding her non-filed tax returns for the years 2009 through 2011.The appellant told him that she was self-employed from October 2009 through September 2011 and was paid at the rate of $28 per hour for 35 hours per week (Exhibit R-1, Tab 21, 2nd page). He was not aware at the time, and she did not tell him, that she was contesting her work status. He noted that no T4A slip for a self-employed worker or T4 slip for an employee was filed by the payer for the appellant.

[23] Mr. Elio Palladini, an appeals officer with the CRA, also testified to explain why he decided to treat the appellant as self-employed. In summary, he believed Ms. Haddad's version of the facts, which version was apparently confirmed by another employee, who had worked for the payer at the same time as the appellant. That employee was not called to testify. Mr. Palladini also confirmed with the Ministère du Développement économique, de l'Innovation et de l'Exportation that subsidies were granted both for employees and for self-employed people working in the fashion industry (as can be seen from the certificates issued and filed as Exhibit R-1, Tab 19). Finally, Mr. Palladini determined that the payer had 22 employees in 2010 and 17 in 2011 for whom T4 slips were issued, and that the appellant was not one of them. He also confirmed that no T4A slip was issued by the payer for the appellant.

Analysis

[24] As the Federal Court of Appeal said in *NCJ Educational Services Limited v. Minister of National Revenue*, 2009 FCA 131, at paragraph 49, under the principle of complementarity reflected in section 8.1 of the *Interpretation Act*, the criteria set out in the *Civil Code of Québec* (**CCQ**) must be applied to determine whether a specific set of facts gives rise to a contract of employment.

[25] Reference must therefore be made to articles 2085, 2098 and 2099 of the CCQ. Under article 2085, there are three characteristic elements to a contract of

employment, namely: 1) the performance of work; 2) remuneration; 3) the direction or control of another person, the employer. On the other hand, article 2099 makes it clear that in a contract for services "no relationship of subordination exists between . . . the provider of services and the client" (*NCJ Educational Services*, *supra*, paragraphs 50-52).

[26] In *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592, at paragraph 31, the Federal Court of Appeal, relying on dictionaries, stated that the "subordination of a person involves his or her dependence on another person or his or her submission to that person's control. Therefore, a contract for services is characterized by a lack of control over the performance of the work. This control must not be confused with the control over quality and result. The Quebec legislator also added as part of the definition the free choice by the contractor of the means of performing the contract".

[27] It is noteworthy that the Federal Court of Appeal had previously warned in that same case, at paragraph 27, that "it would be wrong to believe that there is antinomy between the principles of Quebec civil law [regarding the legal nature of a work relationship] and what has been referred to as common law criteria, that is to say, control, ownership of the tools, chance of profit, risk of loss, and integration of the worker into the business". Létourneau J.A., summarized his analysis as follows at paragraph 43:

> [43] In short, in my opinion there is no antinomy between the principles of Quebec civil law and the so-called common law criteria used to characterize the legal nature of a work relationship between two parties. In determining legal subordination, that is to say, the control over work that is required under Quebec civil law for a contract of employment to exist, a court does not err in taking into consideration as indicators of supervision the other criteria used under the common law, that is to say, the ownership of the tools, the chance of profit, the risk of loss, and integration into the business.

[28] Moreover, the Federal Court of Appeal also referred, in paragraph 32 of its decision in *Grimard*, to articles 1425 and 1426 of the CCQ, which "require that the mutual intention of the parties be determined and that a certain number of factors be considered, such as the circumstances in which it was formed". However, the Court stressed the fact that "the behaviour of the parties in performing the contract must concretely reflect this mutual intention or else the contract will be characterized on the basis of actual facts and not on what the parties claim" (paragraph 33).

[29] In the very recent decision of the Federal Court of Appeal in *1392644 Ontario Inc. o/a Connor Homes v. Minister of National Revenue*, 2013 FCA 85 (***Connor***

Homes), at paragraph 23, the Court confirmed that the ultimate question in determining if a given individual is working as an employee or as an independent contractor is whether or not the individual is performing the services as a person in business on his own account. This concept was first adopted by MacGuigan J.A. in *Wiebe Door Services Ltd. v. M.N.R.* [1986] 3 F.C. 553, in the search for the total relationship between the parties, and was approved by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 at paragraph 47.

[30] As stated by Desjardins J.A in *NCJ Educational Services, supra,* at paragraph 70, this concept related to the integration test is drawn from the common law analytical approach referred to earlier in the *Grimard* decision, which confirmed the use that may be made of common law decisions in ascertaining the nature of a contract of employment under the civil law.

[31] Therefore, in making that determination, the level of control held by the employer over the worker's activities and whether or not the worker provides his own equipment, hires his helpers, manages and assumes financial risks, and has an opportunity for profit in the performance of his tasks will be relevant factors to consider (*Connor Homes*, at paragraph 29).

[32] There is a two-step process of inquiry that is used to assist in addressing the central question, i.e whether or not the individual is performing the services as a person in business on his own account (*Connor Homes*, paragraph 38).

[33] The Federal Court of Appeal stated the following regarding that two-step process at paragraphs 39 and 40 of *Connor Homes*:

> [39] Under the first step, the subjective intent of each party to the relationship must be ascertained. This can be determined either by the written contractual relationship the parties have entered into or by the actual behaviour of each party, such as invoices for services rendered, registration for GST purposes and income tax filings as an independent contractor.
>
> [40] The second step is to ascertain whether an objective reality sustains the subjective intent of the parties. As noted by Sharlow J.A. in *TBT Personnel Services Inc. v. Canada*, 2011 FCA 256, 422 N.R. 366 at para. 9, "it is also necessary to consider the *Wiebe Door* factors to determine whether the facts are consistent with the parties' expressed intention." In other words, the subjective intent of the parties cannot trump the reality of the relationship as ascertained through objective facts. In this second step, the parties [*sic*] intent as well as the terms of the contract may also be taken into account since they colors [*sic*] the

> relationship. As noted in *Royal Winnipeg Ballet* at para. 64, the relevant factors must be considered "in the light of" the parties' intent. However, that being stated, the second step is an analysis of the pertinent facts for the purpose of determining whether the test set out in *Wiebe Door* and *Sagaz* has been in fact met, *i.e* whether the legal effect of the relationship the parties have established is one of independent contractor or of employer-employee.

[34] Therefore, the first step in the analysis is to determine the intent of the parties, and the second is to then determine whether the parties' relationship, as reflected in objective reality, is one of employer-employee or of client-independent contractor (*Connor Homes*, *supra*, paragraph 42).

[35] Here, it may be inferred from the evidence that the intent of both parties was that the appellant would be an independent contractor when they first contracted with each other. Indeed, the appellant's understanding was that she was hired as such. I draw this conclusion from the contract that she signed in October 2009 whereby she offered her design services to the payer in consideration of remuneration at a specified hourly rate (Exhibit R-1, Tab 4), combined with the fact that she was advertising her own business, that she was always paid by cheque without any deductions at source, that she registered for the GST, and lastly that she mentioned to Mr. Benoit, a field officer with the CRA, that she was self-employed during the period at issue (Exhibit R-1, Tab 21, 2nd page).

[36] As for the payer, it obviously did not consider the appellant as an employee and did not issue her T4 slips as it did to its 20 or so employees.

[37] The issue before this Court is therefore whether this contractual intent was reflected in reality, i.e whether the contract's legal effect was in fact to create a client-independent contractor relationship or rather an employer-employee relationship (*Connor Homes*, *supra*, paragraph 43).

[38] With respect to the degree of direction or control of the payer over the appellant, I have been presented with two different versions. Ms. Haddad testified that the appellant was free to work according to her own schedule. She said that the appellant could work on her patterns at home and that she sometimes took samples home with her to be sewed by someone else (the appellant's mother, Ms. Haddad believed), and the appellant invoiced the payer for the final product. Ms. Haddad testified that the appellant did the fittings for the proposed patterns at the office. Ms. Haddad said that she did not supervise the appellant's work. What mattered was that the project be completed on time, to the payer's specifications and in accordance

with industry requirements. She said that the appellant also worked for her own clients, sometimes from the payer's premises.

[39] The appellant, on the other hand, said that she worked from 9 a.m. to 5 p.m., Monday to Friday, for a period of two or three months when she started working full-time in December 2009, and again in the summer of 2010. She said that there were rules of conduct; lunch was at 12 p.m. and the break at 3 p.m. She said that she was supervised when she completed a pattern and that she was told by Ms. Haddad how to cut. Ms. Haddad would approve the sample. In the appellant's words, she was constantly monitored by Ms. Haddad, their offices being side by side.

[40] In view of the two contradictory versions, I looked closely at the invoices presented by the appellant to the payer from November 2009 onward (Exhibit A-1). It appears from those invoices that the appellant did not work regular hours even in December 2009, which was when she said she started working full-time according to a strict schedule imposed by the payer. For example, for the week November 24-27, 2009, invoiced on December 3, 2009, she billed for four days of seven hours per day for a total of 28 hours. For the following week (November 30 – December 4, 2009) invoiced on December 9, 2009, she billed for four days at seven hours a day and for one five-hour day, for a total of 33 hours. The first full week of December 2009, she again billed for four days at seven hours a day, but also invoiced for three hours on Friday and three hours on Saturday, for a total of 34 hours. The second full week of December 2009, she billed for five days at seven hours a day for a total of 35 hours. In January 2010, she billed for between 41 hours per week and 51½ hours a week. It appears that she worked longer hours than those of the regular schedule of 9 a.m. to 5 p.m. to which she referred in her testimony. Thereafter, her schedule varied constantly and very rarely, it would appear, did she work five days a week from 9 a.m. to 5 p.m. as she claimed she did in her testimony and in her Notice of Appeal. In July and for the first two weeks of August 2010, she filed two invoices for each week: one for regular weeks of 35 hours and the second for extra hours.

[41] Furthermore, Ms. Haddad testified that she had hired another patternmaker in the peak period and that this person was on the payer's payroll and was paid $21 an hour. Ms. Haddad explained that this employee was paid $7 less an hour than the appellant because Ms. Haddad recognized that the appellant had more expenses since she was working as a contractor. Ms. Haddad said that she offered the appellant the possibility of becoming an employee when her income reached the threshold of $30,000 that obliged her to apply for a GST registration number. According to Ms. Haddad, the appellant declined the proposition because she wished to keep the flexibility she enjoyed and did not want the payer to withhold deductions at source.

[42] The appellant did not really challenge this in Court. She acknowledged that she did apply for a GST number and admitted that she did not remit any tax to the government. She did not file income tax returns for the years 2009 through 2011 and informed Mr. Benoit, the CRA field officer, that she was self-employed during those years.

[43] Taking into account the contradiction between the hours indicated on the invoices and the work schedule alleged to have existed by the appellant in Court and in her Notice of Appeal, together with the fact that the appellant deliberately indicated to the CRA field officer that she was self-employed during the time she worked for the payer and, incidentally, that she was not very diligent when it came to discharging her tax responsibilities, I am inclined to give more weight to Ms. Haddad's version of the facts. The appellant moreover did not receive any training from the payer as she already specialized in patternmaking and design in the making of clothes, and advertised herself accordingly. She also provided her own rulers, scissors, pens, and tape dispensers but used the payer's tables and paper rolls. She occasionally worked for her own personal business on the payer's premises.

[44] She was paid a fixed hourly rate but according to a varying schedule. That rate was $7 per hour more than that of the other patternmaker, who was hired as an employee. She occasionally had someone else sew the samples, for which work she invoiced the payer not by the hour but for the final product. She asked her sister to help in a photo shoot, for which the payer paid nothing.

[45] The appellant was provided with a parking spot and office space when she was on the payer's premises, but so were the other contractors. The appellant did not have any employee benefits nor was she paid for any statutory holidays.

[46] It is true that the appellant filed a complaint with the Commission des normes du travail after the period at issue, in March 2012 (Exhibit R-1, Tab 3), but that complaint was settled [TRANSLATION] "with no admission of liability by either party" (Exhibit A-3). Ms. Haddad explained that it was less costly to settle than to pursue the matter further.

[47] Considering it as a whole, I find that the evidence tends to confirm the subjective intent of the parties when they first contracted with each other. The appellant may have wanted to change her status during the period at issue, but she did not act in such a way as to make it possible to conclude that such a change may have occurred. Rather, one gets the impression that as long as she was working she

preferred self-employed status (not having tax deducted at source and being paid more) but, when she claimed employment insurance, she realized that she would have been better off as an employee.

[48] The appellant has not convinced me that she was not hired by the payer as an individual working on her own account and that the legal relationship between her and the payer was not consistent with her having independent contractor status. She failed to satisfy me that, irrespective of the terms agreed upon with the payer, she was working as an employee in the payer's business and for the payer's business.

[49] I therefore conclude that, when working for the payer during the period at issue, the appellant did not hold insurable employment within the meaning of paragraph 5(1)(*a*) of the EI Act.

[50] The appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of July 2013.

"Lucie Lamarre"

Lamarre J.

CITATION:	2013 TCC 219
COURT FILE NO.:	2012-2416(EI)
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DATE OF JUDGMENT:	July 4, 2013

APPEARANCES:

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