

[OFFICIAL ENGLISH TRANSLATION]

Files: 2003-744(EI)
2003-745(EI)

BETWEEN:

LÉOPOLD ROY,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on June 1, 2004, at Roberval, Quebec

Before: The Honourable Judge Alain Tardif

Appearances:

For the Appellant:

The appellant himself

Counsel for the Respondent:

Julie David

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* are dismissed in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 25th day of June 2004.

“Alain Tardif”

Tardif J.

[OFFICIAL ENGLISH TRANSLATION]

Reference: 2004TCC416

Date: 20040625

Files: 2003-744(EI)

2003-745(EI)

BETWEEN:

LÉOPOLD ROY,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Tardif J.

[1] These are two appeals from a determination with respect to the insurability of work done by the appellant. First, the work at issue was carried out during the period from April 3 to July 7, 2000, on behalf of and for Mr. Steeve Roy, the appellant's son.

[2] Second, from February 28 to June 29, 2001, the work was carried out for Ms. Élizabeth Awashish Roy, the appellant's wife.

[3] The two determinations had been communicated by letter on November 29, 2002. The legal basis of the two determinations was that the work done by the appellant stemmed from a non-arm's-length relationship between the payer and his father in one case and the payer and her husband in the other.

[4] Alternatively, the respondent also argued that the work done had not been in connection with a true contract of service since the work had not been subject to any power of control.

[5] The parties agreed to proceed on evidence common to both appeals. After the court had explained to the appellant the procedure and certain requirements, including the requirement related to the burden of proof, the appellant told the court that he was prepared to make some admissions regarding the assumed facts in support of the determinations.

[6] The assumed facts taken into consideration in support of the two determinations were as follows:

File 2003-744(EI):

- a) Since November 1999, the payer has been operating a transport business under the corporate name "Transport J.S.S. Sikum Enr."
- b) The payer, the appellant's son, is the sole owner of the transport business.
- c) The payer specializes in transporting wood chips and roundwood.
- d) The payer operates his business year-round.
- e) The payer has monthly sales varying between \$26,000 and \$28,000.
- f) The payer's commercial office is located in Mr. Steeve Roy's personal residence.
- g) The payer owns two trucks; one is used to transport chips, and the other is used to transport logs.
- h) The trucks run 24 hours a day, Monday to Friday.
- i) The payer hires four drivers full time as well as the appellant as a substitute driver.
- j) The payer maintained that the appellant's hours of work varied greatly and depended on the absences of the regular drivers.
- k) The payer could consult the appellant's hours of work by consulting the logbook of the truck used by the appellant.
- l) The appellant replaced drivers who were ill, on vacation, or unavailable.

- m) The appellant had a Class 1 driver's licence, and he was registered as a driver for the payer in most of the unloading locations, whereas the other drivers had to obtain authorization from the payer for certain unloading locations.
- n) The appellant received earnings based on the trips he made; he could receive between \$125 and \$150 for each trip he made.
- o) It was impossible to reconcile the information on the trips made by the appellant and the information contained in the payer's record of wages.
- p) In addition to working as a driver, the appellant took care of the payer's bookkeeping and accounting.
- q) The appellant's wife, Ms. Élizabeth Awashish, also operated a transport business in the same field as the business of the payer (her son).
- r) The commercial office of the business of the appellant's wife was also located in the payer's residence.
- s) The appellant also took care of the bookkeeping and accounting for his wife's business.
- t) The appellant claimed that he devoted two to three hours per week to the accounting for each business; he also devoted a few hours to each business at the end of every month to make payments and complete the documents needed for the various governments.
- u) The appellant did not receive any earnings from the payer or from his wife for the hours spent doing the accounting for their businesses.
- v) During the period at issue, the appellant had been entered in the payer's record of wages for 13 consecutive weeks.
- w) During that period, the appellant had allegedly made four to six trips per week.
- x) The appellant had allegedly not made any other trips for the payer as a driver outside of the period at issue, whereas in fact he had had to replace the other drivers when they were absent.

- y) The appellant had performed a number of services for the payer as a driver and as an accounting bookkeeper outside of the period at issue without being registered in the record of wages.
- z) The period of work claimed by the appellant did not correspond to the business's needs or to the period actually worked by the appellant; it corresponded to the appellant's needs so that he could receive employment insurance benefits.

File 2003-745(EI):

- a) Since July 2000, the payer, Ms. Roy, has operated a transport business under the corporate name "Transport Nipin Enr."
- b) The payer, the appellant's wife, is the sole owner of the transport business.
- c) The payer specializes in transporting wood chips and sawdust.
- d) The payer operates her business year-round.
- e) The payer has monthly sales varying between \$48,000 and \$50,000.
- f) The payer's commercial office is located in the personal residence of Mr. Steeve Roy, her son.
- g) The payer owns two trucks.
- h) The trucks run 24 hours a day, Monday to Friday.
- i) The payer hires four drivers full time as well as the appellant as a substitute driver.
- j) The payer maintained that the appellant's hours of work varied greatly and depended on the absences of the regular drivers.
- k) The payer could consult the appellant's hours of work by consulting the logbook of the truck used by the appellant.
- l) The appellant had to replace drivers who were ill, on vacation, or unavailable.

- m) The appellant had a Class 1 driver's licence, and he was registered as a driver for the payer in most of the unloading locations, whereas the other drivers had to obtain authorization from the payer for certain unloading locations.
- n) In addition to working as a driver, the appellant took care of the payer's bookkeeping and accounting.
- o) Mr. Steeve Roy, the son of the appellant and the payer, also operated a transport business in the same field as the payer's business.
- p) The commercial office of the appellant's son's business was also located in Steeve Roy's residence.
- q) The appellant also took care of the bookkeeping and accounting for his wife's business.
- r) The appellant claimed that he devoted two to three hours per week to the accounting for each business; he also devoted a few hours to each business at the end of every month to make payments and complete the documents needed for the various governments.
- s) The appellant did not receive any earnings from the payer or his wife for the hours spent doing the accounting for their businesses.
- t) During the period at issue, the appellant had been entered in the payer's record of wages for 17 consecutive weeks.
- u) The appellant had allegedly not made any other trips for the payer outside of the period at issue, whereas in fact he had had to replace the other drivers when they were absent.
- v) During that same period, the appellant had received fixed earnings of \$640 per week.
- w) The appellant allegedly received earnings of \$16 per hour, whereas the other drivers received a fixed amount per trip.
- x) During the period at issue, the appellant had allegedly worked 40 hours each week, whereas he was supposed to replace drivers based on the payer's needs.
- y) The appellant managed the business and looked after its daily tasks.

- z) The appellant performed a number of services for the payer outside of the period at issue without being registered in the record of wages.
- aa) The period of work claimed by the appellant did not correspond to the business's needs or to the period actually worked by the appellant; it corresponded to the appellant's needs so that he could receive employment insurance benefits.

[7] With regard to file 2003-744(EI), the appellant admitted all of the subparagraphs except subparagraphs m), o), x), and z).

[8] With regard to file 2003-745(EI), the appellant admitted all of the subparagraphs except subparagraphs m), x), and aa).

[9] Although the two payers testified very succinctly, the evidence consisted essentially of the appellant's testimony. Gifted with a strong personality and articulateness, the appellant showed that he had expertise and experience in the economic sector in which his son and his wife worked; he also had good managerial qualities.

[10] However, the payers, the appellant's son and wife, showed some discomfort and, in the wife's case, a total lack of experience; therefore, during the periods at issue, the appellant had been an indispensable person.

[11] The Minister of National Revenue had conducted a very exhaustive analysis, taking into consideration all of the relevant facts. Also, the number of facts that were assumed and repeated in both responses to the notices of appeal were more than sufficient to support and justify the determinations being appealed. After the appellant had acknowledged the majority of these facts, a number of which were deciding factors, to be accurate and true, the appeals could be dismissed on this one basis alone; however, I will add some comments and observations.

[12] Mr. Léopold Roy explained that he had been very deeply affected by a tragedy that had occurred in his immediate family. He explained that one of the methods he had used to forget had been to completely immerse himself in work to take his mind off of things.

[13] He acknowledged that he had worked outside of the periods at issue for both businesses. He also affirmed that the wages he had received had been less than he

had deserved, since he had often received earnings based on 40 hours of work when in reality he had worked more than 70 hours per week.

[14] He said that, on a few occasions, he had slowed down somewhat because of his state of health. He also maintained that he had voluntarily left work at the end of each of the periods at issue but had continued at a pace that was less intense.

[15] He also said that his son had been doing him a favour by allowing him to accompany him because no one else would have given him that type of opportunity.

[16] He said that he had been raised in a large family where everyone helped each other out; this is how he justified the magnitude of the free services he provided to his son and his wife.

[17] The evidence also revealed that he had acted as a resource person when his son's business had been created by training him and giving him all of the instructions needed to start his business properly.

[18] For his wife's business, the appellant had not only acted as a resource person; he had actually done everything, since his wife was clearly not qualified for those types of activities or interested in them since she was the owner/operator of another business, a drop-in centre for seniors.

[19] The assumed facts that were mentioned in the notice of appeal and admitted and the explanations presented during the hearing were coherent; they fully justify the reasonableness of the two determinations that were behind the appeals.

[20] There is no doubt that the work performed by the appellant was useful, necessary, and even essential for the two businesses. However, it seemed just as apparent that a third party would never have accepted or been offered substantially similar or comparable employment conditions. A third party would have been much more demanding regarding salary; on the other hand, a third party would never have been so generous with his employer. Only the non-arm's-length relationship could explain and justify such disinterestedness and lack of concern about his time.

[21] The appellant himself gave a very good example of the distinctive nature of his work. He explained that he had to work as a driver to replace a driver who did not like the spring thaw. Does this fact not show that a third party with an arm's

length relationship with the payer could have stipulations that a family member of the employer would not dare express or show?

[22] The appellant also pointed out that his salary should have been approximately \$1,000 per week instead of the \$640 he had received.

[23] The balance of evidence showed that the work carried out by the appellant on behalf of and for his son and wife was not similar to the work a third party would have done in a comparable context.

[24] In fact, the appellant worked with the same energy, determination, and concerns he would have had if he himself were the owner of the businesses at issue, which in itself is not a flaw or something to be criticized; on the contrary, this enthusiasm and his immense generosity with his time do him credit. Nevertheless, this type of working relationship does not correspond to the standards or habits of an employment contract between third parties, where the content and context of the employment contract are essentially based on economic concerns. The employee performs specific work in return for compensation that corresponds to the quality and quantity of work done.

[25] This is also related to the analysis of the alternative argument raised by the respondent, namely that the appellant did not have insurable employment within the meaning of the *Employment Insurance Act* during the period at issue because, during that period, the appellant and the payer had not been bound by a true contract of service within the meaning of paragraph 5(1)(a) of the Act.

[26] This argument is fully justified in the case where the payer is the appellant's wife. In that case, the appellant himself described himself as a resource person; in addition, where all of the stakeholders were concerned, he was the only person qualified to answer all of the questions related to the affairs of the transport business.

[27] The testimony of the appellant's wife also confirmed that she did not have the experience, competency, or authority needed to claim that she had power of control over the appellant's activities and actions.

[28] The appellant had acted as though he were the actual owner of the business. This issue was barely touched on in this case, but the evidence did not enable me to conclude that Ms. Élizabeth Awashish had acted simply as a nominee.

[29] Yet there is no doubt that the appellant had never been in a position of subordination; on the contrary, he had been in a position of authority at all times during the periods at issue.

[30] As he was more qualified than his son and wife for the work required for income-generating activities, the appellant had had such an influence on his son and wife that they had clearly been unable to have any power of control.

[31] A true contract of service, the only contract that can be determined to be insurable, must be the result of an agreement according to which specific work will be carried out in return for adequate compensation, that is, in accordance with the standards applicable to the economic sector at issue.

[32] That type of employment contract must be justified by economic concerns in a context where quality, productivity, and efficiency are omnipresent objectives. The beginning and end of the work must stem only from the business's needs.

[33] The quality of working relationships may vary from one business to the next. In some cases, there may be greater flexibility, more co-operation, better communication, more generous behaviour, etc., all within a true insurable contract of service.

[34] However, in some cases there is a very fine line that cannot be crossed without losing the insurable quality of an employment. This line is obviously easier to cross when the worker and the payer are not at arm's length.

[35] This line may be crossed without bad faith or fraud; this may stem from simple feelings that are more widespread or omnipresent in the family environment than in an environment where the person is concerned about and guided by only economic interests and where balance is generally found somewhere between the position of the payer, who wants to get as much as possible for the salary he is paying, and the position of the worker, who wants the best salary possible for the least amount of work possible within the simple context of the capitalist system.

[36] In this case, the appellant provided very good, useful, indeed essential services in consideration for inadequate earnings in that his earnings did not correspond to what should have been paid to a third party for the same quality and quantity of work. On the other hand, the appellant had a strong desire to see his son's business be successful, which is to his credit and is explained by his status as a father for whom his son's well-being has priority over anything else.

[37] Regarding the transport business operated by the appellant's wife, it is not obvious from the evidence that it was actually the wife's business. It is certainly not exaggerated to conclude that the business was in fact controlled and directed by the appellant himself.

[38] In this context, there could not be a true contract of service because there was no relationship of subordination; indeed, the balance of evidence never showed that, during the periods at issue, the employers had been in positions of authority or had made use of any power of control. The appellant was fully responsible for all of the activities and actions done within the framework of the work carried out.

[39] For all of these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 25th day of June 2004.

“Alain Tardif”

Tardif J.

Certified true translation
Colette Beaulne

REFERENCE: 2004TCC416

COURT FILE NOS.: 2003-744(EI); 2003-745(EI)

STYLE OF CAUSE: Léopold Roy and the
Minister of National Revenue

PLACE OF HEARING: Roberval, Quebec

DATE OF HEARING: June 1, 2004

REASONS FOR JUDGMENT BY: The Honourable Judge Alain Tardif

DATE OF JUDGMENT: June 25, 2004

APPEARANCES:

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