Docket: 2002-181(EI)

BETWEEN:

MADELEINE LAFLAMME,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GABRIEL GÉHU AND JEAN-MARC GÉHU,

Interveners.

Appeal heard on October 29, 2002, at Matane, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances

Counsel for the Appellant: Me Gilles Thériault

Counsel for the Respondent: Me Marie-Claude Landry

Representative for the Interveners: Gabriel Géhu

[OFFICIAL ENGLISH TRANSLATION]

JUDGMENT

The appeal is dismissed and the Minister's decision is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 28th day of March 2003.

"S.J. Savoie"

D.J.T.C.C.

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator

Citation: 2003TCC126
Date: 20030328
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[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Deputy Judge Savoie, T.C.C.

[1] This appeal was heard at Matane, Quebec, on October 29, 2002.

[2] The appellant appealed the decision of the Minister of National Revenue (the "Minister") that the employment she held with Gabriel Géhu and Jean-Marc Géhu (the "payer") during the period from July 1 to August 4, 2001, was not insurable because, *inter alia*, the appellant and the payer would not have entered into a similar contract of employment if they had been dealing at arm's length. The Minister further explained that this employment did not meet the requirements of a contract of service.

[3] In making his decision, the Minister relied on the following assumptions of fact set out in paragraph 5 of the Reply to the Notice of Appeal:

[Translation]

(a) Gabriel Géhu and Jean-Marc Géhu were co-owners of a 42-foot fishing vessel, the “Linda Daniel”;

(b) Gabriel Géhu and Jean-Marc Géhu were equal partners in a crab and turbot fishing enterprise;

(c) the appellant is the spouse of Gabriel Géhu and the mother of Jean-Marc Géhu;

(d) the crab fishing period was the month of May and the turbot fishing season was from July to September;

(e) the payer sold the crab to Pêcherie B.S.R. Inc. and the turbot to Poissonnerie Blanchette;

(f) the appellant was hired as a fisherman’s helper for both fishing periods;

(g) the appellant did not work in the week of July 22 to 28, 2001;

(h) during the period at issue, the appellant’s duties consisted of preparing sandwiches for the crew and gutting fish;

(i) Poissonnerie Blanchette issued pay statements based on the information provided by the payer;

(j) according to the pay statements of Poissonnerie Blanchette, the appellant received a fixed salary of $450 a week;

(k) on October 17, 2001, in his statement to a representative of the respondent, the appellant said that, during the period at issue, that is, during the turbot fishing period, there were three people on the vessel: the appellant, her husband, Gabriel Géhu, and her son, Jean-Marc Géhu, while according to Poissonnerie Blanchette’s pay statements, during the weeks ending on July 7, 14, and 21, 2001, there was a fourth crew member, namely, Jean-Claude Géhu;

(l) according to Poissonnerie Blanchette’s pay statements, Jean-Claude Géhu’s salary varied between $157 and $450 a week while the appellant’s salary was fixed;

(m) during part of the period at issue, the appellant worked as an assistant cook for another employer, namely, Relais Chic-Choc St-Octave Inc.;

(n) on July 9, 2001, Relais Chic-Choc St-Octave Inc. issued a record of employment to the appellant for the period from June 29, 2001, to July 7, 2001, which showed the total insurable hours as 53.25 and the total remuneration as $387.66;

(o) the appellant could not work for two employers at the same time;

(p) on August 28, 2001, the payer issued a record of employment to the appellant for the period from July 1, 2001, to August 4, 2001, which showed the total insurable hours as 230 and the total remuneration as $1,800 over four weeks;

(q) the appellant's record of employment does not reflect reality with regard to the period actually worked or the number of insurable hours;

(r) on September 25, 2001, in her statement to a representative of the respondent, the appellant said that she had worked for two weeks on the vessel without being paid because the catches were insufficient;

(s) on October 18, 2001, in her statement to a representative of the respondent, the appellant said that she helped out without being paid in the winter of 2000-2001 by assisting the payer in painting the vessel;

(t) on October 18, 2001, in his statement to a representative of the respondent, Gabriel Géhu said that the appellant gave him some help in maintaining the vessel during the winter;

(u) on October 18, 2001, in his statement to a representative of the respondent, Gabriel Géhu stated that the appellant also handled the correspondence and filing the payer's papers;

(v) the appellant provided services to the payer before and after the period at issue without reported remuneration;

(w) the period allegedly worked by the appellant did not correspond to the period actually worked.

[4] The appellant admitted the assumptions of the Minister that were set out in subparagraphs (a) to (c), (e) to (g), (i), (j), (m) to (p) and (r) to (v); she denied those set out in subparagraphs (q) and (w) and denied those set out in subparagraphs (d), (h), (k) and (l) as written.

[5] It must be explained at the outset that the evidence as a whole did not confirm the appellant's allegations concerning the Minister's assumptions except as regards her duties described in subparagraph (h), which, in addition to those the subparagraph describes, include her help in lifting nets with the winch, putting the catches in the hold and removing crab from the nets. The other assumptions of the Minister that were doubted by the appellant were established by the oral evidence that was gathered and the documentation submitted at the hearing, including pay statements, statutory declarations, fish plant reports, and so on.

[6] The issue in the case at bar arose when Human Resources Development Canada (HDRC) became aware that two records of employment, one from Relais Chic-Choc and the other from the payer, had been issued in the appellant's name for the same period, including the period at issue.

[7] The appellant and the payer admitted the ambiguity; they argued that a mistake had been made either by Relais Chic-Choc or by the payer. However, they were unable to tender any documents or other evidence to corroborate their version and support their claim. The statements gathered attest that the appellant worked from June 29 to July 7, 2001, at Relais Chic-Choc St-Octave Inc. According to the appeal report (Exhibit I-3), prepared by March Tremblay, an appeals officer with the Canada Customs and Revenue Agency, Caroline Tremblay, in telephone conversations, was definite about the worker's period of employment. She even specified the appellant's shifts and her hours of work each day, as well as her remuneration.

[8] The investigation by the appeals officer disclosed that, during the period from June 29 to July 7, 2001, when the appellant was employed with Relais Chic-Choc St-Octave Inc., she was supervised by Micheline Sergerie Lavoie. The appellant's pay stub for this period of employment at Relais Chic-Choc shows that she was paid on July 12.

[9] In making her claim for employment insurance benefits to HRDC, the appellant provided a record of employment issued by the payer for services provided to the payer between July 1 and August 4, 2001, (Exhibit A-1).

[10] The evidence disclosed that the pay statements for the fishers on board the "Linda Daniel" were prepared for the period at issue by Poissonnerie Blanchette based on the information provided to it by Gabriel Géhu, but fish plant personnel did not verify who was on board the vessel.

[11] The Minister's suspicions were further aroused by noting the contradictions in the appellant's statements relating, for example, to the location where she prepared the meals for the crew members, the complete silence about the employment of a fourth fisher on board, during the period at issue, who performed the same tasks as the appellant did for less pay. The appellant also said that she had no memory for dates.

[12] The Minister proved that the appellant's record of employment did not reflect reality as to the period actually worked and the number of insurable hours. Moreover, the period allegedly worked by the appellant does not correspond to the period actually worked.

[13] The "fishers' pay report" of Poissonnerie Blanchette (Exhibit A-3) for the period at issue was prepared on the basis of the information provided by Gabriel Géhu, the appellant's husband, and Jean-Marc Géhu, the appellant's son.

[14] The Court finds itself facing an unlikely scenario, one that tends to establish that the appellant was employed by two businesses at the same time, namely, by Relais Chic-Choc as an assistant cook and as a fisherman's helper on the vessel "Linda Daniel" during the period from July 1 to August 4, 2001.

[15] The information pertaining to the appellant's employment at Relais Chic-Choc and with the payer comes from their respective employees. When the source of that information is considered, the question that has to be asked concerns the appellant's place of work. It is true that this Court does not have to decide the question, but it must be remembered that the appellant and the payer could not explain this implausible situation except to allege, without further details, that one of the employers had made a mistake.

[16] It should be noted that the evidence presented by Relais Chic-Choc St-Octave Inc. was clear, objective, transparent and unambiguous. Unfortunately, this Court cannot say as much of the overall case presented by the appellant. In weighing the appellant's evidence, this Court considered the following factors, *inter alia*:

1. The appellant admitted to the investigators that she did not remember the dates;

2. no evidence was adduced by the appellant or the payer to corroborate their claim that a mistake had been made by Relais Chic-Choc or the payer;

3. the appellant and the payer made a false statement about the number of crew members on the vessel "Linda Daniel" during the period at issue;

4. the evidence disclosed that, for equal work, Jean-Claude Géhu received less pay than the appellant did;

5. the appellant admitted that in some weeks she had worked for the payer without pay.

[17] The above can only lead this Court to conclude that the evidence adduced by the appellant was, to a large extent, calculating and self-interested, if not suspect.

[18] The Minister first justified his decision under the provisions of paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Employment Insurance Act* (the *"Act"*), as follows:

> (2) Insurable employment does not include
>
> [...]
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> (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.

[19] It is therefore appropriate to consider the legality of the Minister's exercise of his discretion under paragraph 5(3)(*b*) of the *Act,* having regard to the circumstances described, such as the remuneration paid, the duration and the nature and importance of the work performed by the appellant.

[20] The evidence established that the appellant received weekly remuneration of $450, while Jean-Claude Géhu, who performed the same tasks under the same conditions, received less remuneration for the same period.

[21] Moreover, the appellant enjoyed the same conditions of employment as the payer's other employees.

[22] The evidence disclosed that the appellant worked at two different places during the same period. The evidence adduced provides more support to her employment with Relais Chic-Choc, because it is corroborated by the documents submitted and by the testimony of a number of people who were independent, disinterested and not related to the appellant.

[23] According to the indications obtained by the Minister, the worker would have had enough hours to qualify for employment insurance benefits since she had accumulated 521.25 hours. However, she needed all of her weeks of work to reach the target of 490 hours of work so she could receive a higher rate of benefit. Thus, each week of employment in the period at issue mattered.

[24] The evidence adduced by the appellant supported her claim that her employment was necessary to the payer's business. However, she limited herself to proving that three people were required for operations on the vessel, while documents from Poissonnerie Blanchette clearly showed that the crew consisted of not three but four people and that it was this fourth person, namely, Jean-Claude Géhu, who had been hired for three of the four weeks in the period at issue.

[25] The appellant asks this Court to vacate the Minister's decision. The jurisdiction and role of this Court in a case like this were described by the Federal Court of Appeal in *Attorney General of Canada v. Jencan Ltd.* [1998] 1 F.C. 187. This oft-cited case represents the state of the law in this area. At paragraph 29 of this case, Isaac C.A. asked the question as follows:

> ...The critical issue in this application for judicial review is whether the Deputy Tax Court Judge erred in law in interfering with the discretionary determination made by the Minister under subparagraph 3(2)(c)(ii). This provision gives the Minister the discretionary authority to deem "related persons" to be at arm's length for the purposes of the UI Act where the Minister is of the view that the related persons would have entered into a substantially similar contract of service if they had been at arm's length.

[26] Continuing his analysis, Isaac C.J. stated:

> The decision of this Court in Tignish, supra, requires that the Tax Court undertake a two-stage inquiry when hearing an appeal from a determination by the Minister under subparagraph 3(2)(c)(ii). At the first stage, the Tax Court must confine the analysis to a determination of the legality of the Minister's decision. If, and only if, the Tax Court finds that one of the grounds for interference are established can it then consider the merits of the Minister's decision. As will be more fully developed below, it is by restricting the threshold inquiry that the Minister is granted judicial deference by the Tax Court when his discretionary determinations under subparagraph 3(2)(c)(ii) are reviewed on appeal. Desjardins J.A., speaking for this Court in Tignish, supra, described the Tax Court's circumscribed jurisdiction at the first stage of the inquiry as follows:
>
> > Subsection 71(1) of the Act provides that the Tax Court has authority to decide questions of fact and law. The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister. The respondent submits, however, that since the present determination is a discretionary one, the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of Minister of National Revenue v. Wrights' Canadian Ropes Ltd., contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(c)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere. Moreover, the court is entitled to examine the facts which are shown

> by evidence to have been before the Minister when he reached his conclusion so as to determine if these facts are proven. But 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. If, however, those facts are, in the opinion of the court, insufficient in law to support the conclusion arrived at by the Minister, his determination cannot stand and the court is justified in intervening.

[27] The Federal Court of Appeal, per Décary J., expressed similar views in *Ferme Émile Richard et Fils Inc. v. Minister of National Revenue et al.* (178 N.R. 361).

[28] At paragraph 33 of *Jencan* supra, Isaac, C.J. continued his review and stated:

> ...The jurisdiction of the Tax Court to review a determination by the Minister under subparagraph 3(2)(c)(ii) is circumscribed because Parliament, by the language of this provision, clearly intended to confer upon the Minister a discretionary power to make these decisions…

[29] Chief Justice Isaac, at paragraph 37 of *Jencan*, describes the power of this Court in a case with similar circumstances as follows:

> On the basis of the foregoing, the Deputy Tax Court Judge was justified in interfering with the Minister's determination under subparagraph 3(2)(c)(ii) only if it was established that the Minister exercised his discretion in a manner that was contrary to law. And, as I already said, there are specific grounds for interference implied by the requirement to exercise a discretion judicially. The Tax Court is justified in interfering with the Minister's determination under subparagraph 3(2)(c)(ii)-by proceeding to review the merits of the Minister's determination-where it is established that the Minister: (i) acted in bad faith or for an improper purpose or motive; (ii) failed to take into account all of the relevant circumstances, as expressly required by paragraph 3(2)(c)(ii); or (iii) took into account an irrelevant factor.

[30] It must be recognized that this Court is bound under the doctrine of *stare decisis* by the authority of the Federal Court of Appeal. *Jencan* makes it clear that

> ... the jurisdiction of the Tax Court is strictly circumscribed. The Minister is the only one who can satisfy himself, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions and importance of the work performed, that the applicant and its employee are to be deemed to deal with each other at arm's length. Under the authority of Minister of National Revenue v. Wrights' Canadian Ropes Ltd., contends the respondent, unless the Minister has not had regard to all the circumstances of the employment (as required by subparagraph 3(2)(c)(ii) of the Act), has considered irrelevant factors, or has acted in contravention of some principle of law, the court may not interfere...

[31] Having regard to the above, specifically the evidence gathered, the appellant's admissions, the unrefuted assumptions of fact of the Minister, the contradictions between the evidence at the hearing and the earlier declarations, this Court does not see that its intervention is warranted.

[32] Furthermore, this Court is of the opinion that the Minister, in the exercise of his discretion under subsections 5(3) and 93(3) of the *Employment Insurance Act* met the requirements of the Act by having regard to all the circumstances of the appellant's employment, as laid down in *Jencan,* supra.

[33] The onus was on the appellant to prove her case and she was entitled to adduce new evidence to contradict the facts relied on by the Minister to justify his decision; she did not do so.

[34] This Court must therefore conclude that, taking all the circumstances into account, it was reasonable for the Minister to decide that the appellant and the payer would not have entered into a substantially similar contract had they been dealing with each other at arm's length within the meaning of paragraph 5(3)(*b*) of the *Employment Insurance Act*.

[35] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 28th day of March 2003.

"S.J. Savoie"

D.J.T.C.C.

Translation certified true
on this 30th day of January 2004.

Leslie Harrar, Translator