

Docket: 2006-3889(EI)

BETWEEN:

9006-3611 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 2, 2007, at Montréal, Quebec.
Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant: Philippe Otis

Counsel for the Respondent: Julie David

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed and the decision of the Minister of National Revenue is set aside in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of January 2008.

"Paul Bédard"

Bédard J.

Translation certified true
on this 19th day of February 2008.
Monica F. Chamberlain, Reviser

Citation: 2008TCC9
Date: 20080107
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BETWEEN:

9006-3611 QUÉBEC INC.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

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REASONS FOR JUDGMENT

Bédard J.

[1] From February 19, 2002, to November 23, 2003 (the relevant period), Sylvie Paquin (the Worker) was employed by the Appellant as a waitress. In late November 2003, the Appellant dismissed the Worker. Following her dismissal, the Worker made a claim for employment insurance benefits. On July 8, 2005, the Canada Customs and Revenue Agency (the Agency) determined that, under sections 9.1 and 9.2 of the *Employment Insurance Regulations* (the Regulations), the Worker accumulated 1392 hours of insurable employment during her qualifying period, and that, under section 2 of the *Insurable Earnings and Collection of Premiums Regulations*, her insurable earnings during her qualifying period amounted to \$10,482.42. The Appellant appealed from this decision. The outcome of that administrative appeal was that, on October 5, 2006, the Minister of National Revenue ("the Minister") determined that the Worker had 1333.5 hours in her qualifying period and that her insurable earnings for that period totalled \$9,067.72. Hence the instant appeal.

[2] In order to explain his decision, the Minister relied on the following assumptions of fact, set out in paragraph 10 of the Reply to the Notice of Appeal. The Appellant admitted, denied or claimed no knowledge of these assumptions, as stated in parentheses:

[TRANSLATION]

- (a) The Appellant incorporated on June 13, 1994. (**admitted**)
- (b) The Appellant carried on business under the name "Restaurant le Centre-Ville Souvlaki". (**admitted**)
- (c) The Appellant operated a restaurant/bar/terrace in Trois-Rivières. (**admitted**)
- (d) The Worker was a waitress. (**admitted**)
- (e) The Worker's duties consisted of waiting and setting tables, and cleaning. (**admitted**)
- (f) The Appellant was the subject of an investigation by Yvon Côté of Human Resources and Skills Development Canada (HRSDC) with respect to roughly 15 workers. (**admitted**)
- (g) The Appellant paid some of its workers in cash. (**denied**)
- (h) These cash payments were not entered in the Appellant's payroll journal. (**denied**)
- (i) The Worker entered cheque or cash amounts received from the Appellant in a notebook along with the number of hours that she worked each day. (**omitted**)
- (j) The Worker began using such notebooks in 1995, and used them with the various employers for which she worked. (**omitted**)
- (k) The Appellant paid the Worker the minimum wage applicable to employees who receive tips. (**admitted**)
- (l) Every Sunday, the Worker received an envelope containing a paycheque and a cash amount. (**denied**)
- (m) The Appellant did not provide the Worker, or its other employees, with pay stubs. (**denied**)

- (n) On November 29, 2003, the Worker ceased rendering services to the Appellant following a disagreement with Ali Ismael, its manager and main shareholder. **(admitted)**
- (o) Following this, the Worker filed an unpaid wage complaint with the Commission des normes du travail. **(denied as worded)**
- (p) On February 20, 2004, the Commission des normes du travail told the Worker that a \$579.60 claim had been made on the Worker's behalf and that the Appellant paid that amount. **(admitted)**
- (q) For the period consisting of the last 53 pay weeks, and ending on November 23, 2003, the Worker did 1325.5 hours of work for the Appellant, plus eight hours of statutory holiday pay claimed and obtained by the Commission des normes du travail, for a total of 1333.5 hours. **(denied)**
- (r) The Worker's insurable earnings for the last 27 pay periods ending November 23, 2003, was \$9,067.72, which consists of the sum of the following amounts:

gross wages from payroll journal	\$3,276.64
tips from payroll journal	\$3,310.00
4% from payroll journal	\$253.38
cash paid by Appellant	\$1,648.10
Commission claim	\$579.60
	(denied)

The Worker's testimony

[3] The Worker's testimony can be summarized as follows:

- (i) She worked as a waitress at the Appellant's restaurant during the relevant period.
- (ii) At the end of the relevant period, she was dismissed by the Appellant. She filed a complaint with the Commission des normes du travail (the Commission) because the Appellant dismissed her without giving her two-weeks' notice. On February 20, 2004, the Commission sent her a letter (Exhibit I-5) stating that a claim in the amount of \$579.60 had been made on her behalf and that the Appellant had paid that amount.

- (iii) Her work schedule was generally the same in that she worked the dinner shift on Sundays, the lunch and dinner shifts on Wednesdays, and the dinner shifts on Fridays and Saturdays. Since the restaurant had more customers during the summer, she averaged more hours per week during that season.
- (iv) Every Sunday evening, she received an envelope from the Appellant containing a cheque and some cash. The cheque was her net pay for the hours worked the previous week, as entered in the Appellant's payroll journal. For the hours entered in the Appellant's payroll journal, the Worker was paid the prescribed minimum wage for employees who receive tips. The cash was her remuneration for the hours that she worked the previous week but were not entered in the Appellant's payroll journal. For the hours not entered in the Appellant's payroll journal, the Worker was paid less than the prescribed minimum wage for employees who receive tips. The Worker explained that her hourly pay for hours paid in cash remained the same for each week during the relevant period.¹
- (v) Thus, the Worker was paid by cheque or in cash for all the hours that she worked.
- (vi) Ali Ismael, the Appellant's president, decided to use this method of payment with the Appellant's waitresses, who had no choice but to accept this method if they wanted to keep their jobs.
- (vii) The Appellant did not give the waitresses any pay stubs or other documents notifying them of the deductions from their gross wages during the relevant period.
- (viii) The tips were not pooled. Thus, the Worker kept the tips that customers paid her in cash. When a tip was paid to her by credit card, she kept an amount equal to that tip from her cash sales.

¹ See pages 100-102 of the transcript.

- (ix) Every day during the relevant period, the Worker used a notebook (Exhibit A-4) to record the amounts that she received from the Appellant, in cash or by cheque, along with the hours that she worked and the tips that she received. She began entering this information in such notebooks in 1995, and did so with each of her employers.
- (x) She did not report the cash amounts received from the Appellant in her income tax returns that she filed for the years in question.
- (xi) She was on vacation from September 22 to October 7, 2003.

Ali Ismael's testimony

[4] The testimony of Ali Ismael, the Appellant's president, can be summarized as follows:

- (i) He did not dismiss the Appellant. I would note, however, that Mr. Ismael ended up admitting that when he told the Worker that he did not need a person like her, this was an indirect dismissal. I would also point out that the Appellant's Record of Employment (Exhibit A-1) stated that the Worker voluntarily left her employment.
- (ii) The Appellant paid its employees by cheque every week. Mr. Ismael explained that the waitresses were paid for the work they did in the previous week, whereas the kitchen employees were paid for the week ending on the preceding Saturday.
- (iii) The Appellant's employees were never paid in cash.
- (iv) Until very recently, the Appellant never gave its employees pay stubs or other documents notifying them of the deductions from their gross wages. Mr. Ismael stated that this omission is attributable to the fact that the Appellant's accountant never told him that it was required to give its employees such documents. I would immediately point out that, on April 6, 2004, Mr. Ismael told Nicole Chouinard, the appeals officer in this matter, that all the Appellant's employees received cheques with stubs setting out the amounts withheld.

- (v) The Appellant paid its employees in cash seven or eight years ago. Mr. Ismael explained that the Appellant nonetheless withheld the prescribed amounts and remitted all of them to the authorities during this period.
- (vi) The waitresses' work schedules during the relevant period were posted in the Appellant's restaurant. However, Mr. Ismael added that the Appellant did not retain those work schedules.

The testimony of Nicole Chouinard

[5] My understanding of Ms. Chouinard's testimony and her appeal report (Exhibit I-1) is that she essentially recalculated the Worker's insurable hours and insurable earnings for the qualifying period based on the Worker's notebook. She explained that she prepared a table (Exhibit A-5) that was based on the Appellant's payroll journal and the Worker's notebook. Among other things, the table contains the following information for each week during the relevant period that the Worker was working for the Appellant:

- (i) The hours worked by the Worker according to the Appellant's payroll journal: Ms. Chouinard calculated that the Appellant's payroll journal attributes 1434 hours of work to the Worker for the relevant period.
- (ii) The Worker's gross salary according to the Appellant's payroll journal: Ms. Chouinard calculated that the Appellant's payroll journal attributes a gross salary of \$10,324.44 to the Worker for the relevant period.
- (iii) The Worker's net salary according to the Appellant's payroll journal: Ms. Chouinard calculated that the Appellant's payroll journal attributes a net salary of \$7,423.85 to the Worker for the relevant period.
- (iv) The Worker's tips according to the Appellant's payroll journal: Ms. Chouinard calculated that the Appellant's payroll journal attributes \$11,085 in tips to the Worker for the relevant period.

- (v) The hours worked by the Worker according to the notebook that she kept: Ms. Chouinard calculated that the notebook says that she worked for 2361.5 hours during the relevant period. Thus, according to Ms. Chouinard's calculations, 927.5 hours of the Appellant's work during the relevant period were not entered in the Appellant's payroll journal.
- (vi) The cash received from the Appellant in envelopes on Sunday evenings based on the notebook that the Worker kept for the hours that she worked but were not entered in the Appellant's payroll journal: Ms. Chouinard calculated that, during the relevant period, the Worker received \$5,292.10 from the Appellant for the 927.5 hours of work that were not entered in the Appellant's payroll journal.
- (vii) The Worker's tips according to the notebook that she kept: Ms. Chouinard calculated that the worker received \$28,995.71 in tips, \$17,901.71 of which were not reported in the income tax returns that she filed for the years involved.

Analysis and determination

[6] It should be borne in mind that the standard of proof in the case at bar is proof on a balance of probabilities. It should also be borne in mind that the Minister relies on assumptions to make his decisions, and that the Appellant bears the initial onus of demolishing the assumptions underpinning the Minister's decision. To meet this initial onus, the Appellant need only demolish the Minister's exact assumptions. In this regard, it is sufficient for the Appellant to make a *prima facie* case. As a general rule, a *prima facie* case means enough evidence to establish a fact unless the contrary is proved. Once the Appellant has demolished the Minister's assumptions, the onus shifts to the Minister, who must rebut the *prima facie* case.

[7] In the case at bar, the Appellant met its initial onus of demolishing the essential tenor of the factual assumptions underpinning the Minister's decision.

[8] I would note that the Minister's decision that the worker accumulated 1334 hours of insurable employment according to sections 9.1 and 9.2 of the *Employment Insurance Regulations*, and that the worker's insurable earnings amounted to \$9,067.72 according to section 2 of the *Insurable Earnings and Collection of Premiums Regulations*, essentially relied on the truth and accuracy of the notebooks in which the Worker allegedly entered the hours that she actually worked and the remuneration that she actually received from the Appellant in connection with her employment.

[9] As we have seen, the Worker testified as follows upon being cross-examined about her notebooks: Every day during the relevant period, she recorded, in a notebook (Exhibit A-4), the amounts received from the Appellant by cheque or in cash, the hours that she actually worked, and the tips that she received. Every Sunday evening, she received an envelope from the Appellant, containing a cheque and some cash. The cheque was her net salary for the hours worked the previous week, as entered in the Appellant's payroll journal. The wage paid for the hours of work entered in the Appellant's payroll journal was the minimum prescribed wage for employees who receive tips. The cash was her remuneration for hours that she worked during the previous week but which were not entered in the Appellant's payroll journal. For the hours of work not entered in the Appellant's payroll journal, the Worker testified that she was paid less than the prescribed hourly wage for employees who receive tips, though she was unable to specify that hourly wage. I would also note that, during her cross-examination, the Worker explained several times that her hourly wage for hours paid in cash every Sunday evening remained the same throughout the relevant period, and that this cash remuneration was never a source of conflict between the Appellant and her.

[10] However, counsel for the Appellant clearly showed that the table (Exhibit A-5), which Ms. Chouinard prepared based on the information from the Worker's notebook concerning the undeclared hours for which she was paid in cash, was not at all consistent with the Worker's testimony that her hourly wage for undeclared hours paid in cash was the same for each week during the relevant period.

[11] Counsel for the Appellant showed, among other things, that, with respect to week 1344 and week 1346, both of which are referred to in Exhibit A-5, the Worker's hours that were not entered in the Appellant's payroll journal, and for which she was paid in cash, totalled 13 hours. Further, it appears that the Worker received \$63 in undeclared cash for her 13 hours during week 1344, and \$47 in remuneration for her 13 hours during week 1346. Thus, according to the Worker's notebook, the Worker received \$4.84 per hour for her 13 undeclared hours of work during week 1344, and \$3.61 per hour for her 13 undeclared hours during week 1346. A careful examination of Exhibit A-5, which, as I stated, accurately reflects the Worker's notebook, clearly shows that, contrary to the Worker's testimony, the hourly wage for undeclared hours varied considerably from week to week. For example, the hourly wage was apparently \$41.66, \$12.25, and \$0.47 for weeks 1287, 1288 and 1289, respectively.

[12] I am of the opinion that the Appellant in the case at bar has shown, on a balance of probabilities, that the Worker's notebook was unreliable in that the entries therein were questionable at best, considering the Worker's testimony on the subject. In my view, the Appellant has adduced sufficient *prima facie* evidence to demolish the factual assumption on which the Minister relied in making his decision – an assumption that essentially depended on the truth and accuracy of the information entered in the Worker's notebook.

[13] For these reasons, the appeal is allowed.

Signed at Ottawa, Canada, this 7th day of January 2008.

Bédard J.

Translation certified true
on this 19th day of February 2008.
Monica F. Chamberlain, Reviser

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Appearances:

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Counsel for the Respondent: Julie David

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