Docket: 2006-3566(EI)

BETWEEN:

SONIA GIRARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 30, 2007 at Québec, Quebec

Before: The Honourable Justice Gaston Jorré

Appearances:

Counsel for the Appellant: Frédéric St-Jean

Counsel for the Respondent: Christina Ham

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed in accordance with the attached Reasons for Judgment and the Minister's decision is varied to state that the Appellant held insurable employment during the periods of June 12 to September 16, 2000, June 11 to September 15, 2001, June 17 to September 21, 2002, June 16 to September 20, 2003, June 7 to September 25, 2004 and June 20 to September 24, 2005.

Signed at Ottawa, Canada, this 30th day of April 2008.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 27th day of June 2008.

Brian McCordick, Translator

Citation: 2008TCC245
Date: 20080430
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BETWEEN:

SONIA GIRARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Jorré J.

[1] The issue is whether the employment of the Appellant, Sonia Girard, was excluded from insurable employment because she and the payor were not dealing with each other at arm's length.

[2] The Appellant argues that the Minister improperly exercised his discretion under paragraph 5(3)(*b*) of the *Employment Insurance Act* by determining that it was not reasonable to conclude that she and the business would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[3] The existence of the non-arm's length relationship is not in dispute.

[4] The periods in issue are from early or mid-June to mid- or late September each year from 2000 through 2005.[1]

[5] Testimony was given by the Appellant, Sylvain Desbiens (her husband) and Louise Dessureault (Appeals Officer, Canada Revenue Agency).

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1 Periods of June 12 to September 16, 2000, June 11 to September 15, 2001, June 17 to September 21, 2002, June 16 to September 20, 2003, June 7 to September 25, 2004 and June 20 to September 24, 2005.

Facts

[6] The payor is Sylvain Desbiens, the owner of Ferme Sylvain Desbiens Enr.

[7] The payor is in the business of rearing livestock for meat, growing grain crops and vegetables, making hay, selling vegetables at a roadside stand on the farm and, in winter, operating a snow removal service. The farm is located along route 138 in Clermont, Quebec.

[8] The Appellant began working at the farm in 1993.

[9] From mid-June until mid-September, she worked 10 to 11 hours a day, or about 70 hours a week. She did the hoeing and helped with the curing, baling and removal of the hay.

[10] From mid-July until the end of the season, she worked at the stand on route 138. She washed the vegetables, tied them in bundles and sold them. She worked about 55 or 60 hours a week at the stand.

[11] During the time when the stand was being operated, she spent about one evening a week picking vegetables. During the second cutting of hay — a period of two or three weeks, generally in August — she spent about three hours every evening wrapping the hay after the stand closed.

[12] The payor did not record the hours worked by the Appellant in the payroll journal.

[13] Sylvain Desbiens testified that a salary of $10 an hour for 55 hours of work, or $550 a week,[2] was consistent with market standards. He paid the Appellant the same amount whether she worked 55 or 70 hours. He said that he could not afford to pay more than $550 a week.[3]

[14] The Appellant made two interest-free loans to the payor with no repayment terms, for a total of $35,000. Those loans were made from one spouse to the other

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2 In her testimony, the Appellant said that, in farming, [TRANSLATION] "we don't count our time, we don't count our hours, and that's the way the work is paid for". This was in answer to a question about the fact that $550 a week amounted to less than $10 an hour given the number of hours she worked.

3 Before 2002, the Appellant was paid $500 a week.

and are not connected with the contract of employment between the Appellant and the payor.

[15] The Appellant purchased 200 square feet of land in 2004 and allowed Ferme Sylvain Desbiens to cultivate the land on condition that it pay the property taxes.[4]

Minister's decision

[16] Louise Dessureault, Appeals Officer, testified about the Minister's reasons for concluding that the employment was excluded. Those reasons are part of the report on an appeal, form CPT110 (Exhibit I-1).

[17] The Minister relied on the following facts:

(a) Terms and conditions: an unrelated employee would not have agreed to make an interest-free $35,000 loan to her employer. Moreover, an unrelated employee would not have allowed her employer to use her land solely in return for the payment of property taxes.[5]

(b) Duration of the employment:[6]

> [TRANSLATION]
>
> The Appellant's records of employment indicate that she worked for the payor for 14 weeks a year (16 weeks in 2004), working 60 hours a week in 2005, 55 hours a week in 2004 and 54 hours a week from 2000 to 2003.
>
> According to the parties, the last day worked was the day the stand closed, since there were no more vegetables to sell.
>
> The worker's periods of employment coincided with the haying season. However, it is odd that the hoeing period did not begin until around June 17 or 20 if the payor sowed around May 10.

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4 The Appellant has proved that she did the same work for the business in 1993, that the Canada Revenue Agency determined that her employment was not insurable because she was not dealing with the payor at arm's length and that she subsequently appealed to the Tax Court of Canada and the Minister consented to a judgment in her favour. Since I must determine the facts for the periods under appeal, I am not taking that evidence into consideration.

5 Exhibit I-1, page 6.

6 The quote that follows is from the bottom of page 6 of Exhibit I-1.

> Moreover, the number of hours worked each week by the Appellant was not controlled by the payor.
>
> Thus, according to the records of employment issued to the Appellant, she worked 60 hours a week in 2005, 55 hours a week in 2004 and 54 hours a week from 2000 to 2003.
>
> In her claims for benefits, the worker stated that she had worked 65 hours a week in 2005, 54 hours a week in 2004, 60 hours a week in 2002 and 55 hours a week in 2001.
>
> The records of employment issued to the worker also do not reflect the increase in her working hours during the haying season.
>
> The duration of the employment would have been very different for an unrelated worker.

(c) Remuneration paid:[7] since the number of hours varied but the weekly salary was fixed, the hourly earnings varied and were often less than $10 an hour. [TRANSLATION] "An unrelated worker would not accept such a fluctuation in the hourly rate."

(d) Nature and importance of the work:[8]

> [TRANSLATION]
>
> The worker's work was integrated into the payor's activities.
>
> However, it is strange that the payor's income from the sale of vegetables made up only 14 percent of all his income for the 2003 and 2004 fiscal years, that is, $11,735 in 2004 and $12,139 in 2003, while the worker was paid a total of $8,800 in 2004 and $7,700 in 2003, not to mention the payor's employer costs and operating expenses.
>
> Since the sale of vegetables did not generate much income, it is unreasonable to think that the payor would have hired an unrelated worker in the same circumstances.

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[7] Exhibit I-1, page 7.

[8] The quote that follows is from page 7 of Exhibit I-1.

Analysis

[18] In *Richard Birkland v. Canada (Minister of National Revenue)*, 2005 TCC 291, Bowie J. examined the case law[9] on paragraph 5(3)(*b*) of the *Employment Insurance Act*[10] and concluded as follows at paragraph 4:

> This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(*b*) accords to the Minister's opinion.

[19] With these considerations in mind, I will look at the evidence.

[20] Both parties agree that the Appellant worked for the business during the periods in question. However, after considering the four factors described in paragraph 17 above, the Respondent concluded that the employment was excluded. I will look at each of those factors individually.

[21] Terms and conditions: although an employee would undoubtedly not have agreed to lend the payor $35,000 without interest, the Respondent could not explain why this loan must be considered part of the employment relationship between the Appellant and the payor. It was simply a case of spouses helping each other out. The Respondent should not have taken this fact into consideration.

[22] For similar reasons, the fact that the Appellant allowed the payor to use the small plot of land should not have been considered by the Respondent.

[23] Duration of the employment: the Respondent attached some importance to the fact that the hours varied and were not recorded. It is true that the payor did not keep a record of the Appellant's hours of work, but the payor was in a position to know

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9 Including the decision of Marceau J.A. in *Légaré v. Canada*, [1999] F.C.J. No. 878.

10 See paragraphs 2 to 4 of the judgment.

whether the work was being done or not and, in this sense, he exercised control over the Appellant's work.

[24] In light of the evidence, I disagree with the Respondent's conclusion that [TRANSLATION] "[t]he duration of the employment would have been very different for an unrelated worker". The work to be done changed during the work period, and it is normal that the hours of work varied. I do not understand on what basis the Minister could conclude that unrelated persons would not agree to a work schedule that varied between 55 and 70 hours a week.

[25] Remuneration paid: the number of hours the Appellant worked varied. The evidence shows that she always worked at least 54 or 55 hours a week when the stand was open and that she could work many more hours during certain weeks, particularly during the second hay-cutting period. Before the stand opened, the Appellant worked about 70 hours a week.

[26] Since the Appellant had fixed earnings of $550 a week, the mathematical consequence was that her hourly earnings varied from week to week. However, is this fact sufficient to conclude that [TRANSLATION] "[a]n unrelated worker would not accept such a fluctuation in the hourly rate"? The issue may be put a little differently: would an unrelated worker have agreed to perform work similar to the Appellant's for between 55 and 70 hours a week with a fixed salary of $550?

[27] Mr. Desbiens testified that paying a fixed salary of $550 for 55 hours of work was within the norm and that he would not have paid a third party more.[11] As well, the evidence does not show that the Respondent relied on a study or other data about the farm labour market to conclude that an unrelated person would not have accepted a salary of $550 for a work week of 55 to 70 hours.[12]

[28] In *Théberge v. Canada (Minister of National Revenue)*, 2002 FCA 123, the situation was partly similar in terms of the hours and remuneration. The majority decision was rendered by Décary J.A.,[13] who wrote:

> 4 In his reply to the notice of appeal, the Minister stated that he relied on the following facts, *inter alia*:

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[11] The Appellant testified that hours are not counted in farming.

[12] Since it is common knowledge that we are living in an era when many employees work overtime without additional pay, is it reasonable simply to assume that unrelated persons working in farming would not have accepted a contract of employment with a fixed weekly salary for 55 to 70 hours of work?

[13] Noël J.A. dissented.

[TRANSLATION]

(a) the payer has operated a dairy and crop farm since 1959;

(b) his farmland includes approximately 200 cultivated acres (grain, pasture, and hay) and 500 wooded acres;

(c) in 1996, his herd consisted of 46 head, 23 of which were dairy cows;

(d) he also sells wood and maple sugar products;

(e) the Appellant is the son of André Théberge;

(f) the Appellant performed all of the work involved in operating the farm, including the ploughing, seeding, harvesting, milking, wood cutting and miscellaneous repairs;

(g) he worked with his brother Carol;

(h) he also took care of the bookkeeping throughout the year;

(i) in late spring and all summer, the Appellant worked 40 to 80 hours a week;

(j) for that work, he received a fixed weekly salary, regardless of the number of hours he worked;

(k) the hours worked were not recorded;

(l) he was usually paid after 2 to 6 weeks;

. . .

7 The judge therefore proceeded to examine the evidence given before him and concluded that the employment had to be excepted. With respect, I am of the opinion that this Court must intervene. The judge erred by failing to consider both the Minister's allegations and the criteria referred to in paragraph 3(2)(*c*): the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed. He also erred by considering almost exclusively the duration and the nature and importance of the work performed outside of the periods of employment at issue.

8 The evidence showed that the applicant actually worked on the farm throughout his period of employment, that he worked forty to eighty hours per week as required and his salary was established based on an average of sixty hours, that the period in question fell within the active season in agriculture, and that he was paid an hourly wage consistent with the applicable standards. He was paid that wage after two to six weeks, but the employer-father explained this as follows:

> A. Well, it's true that the payroll is not necessarily done every week. When you say six weeks, yes it's true, and I must tell you at the same time that me too, my pay for milking, if I start milking cows on September 1, it will be November 15 before I get my first paycheck. So, I wait six weeks too. You aren't paid every week, every Thursday evening. We are paid every month and you have to do a month before getting your paycheque. Also, it takes 15 days to do the payroll. So, you're producing for six weeks before you get paid.
>
> (Applicant's Record, vol. 1, p. 125)
>
> 9 The evidence also showed that the dates when the active season started and ended varied over the years, and that on an average farm in the area, the season ran from May 15 to October 15, but that on the Théberge farm, [TRANSLATION] "it's not like that. Here, we start working when the bulk of the work has started and we finish when ... the bulk of the harvesting is done ..." (Applicant's record, vol. 1, p. 165). This would explain why the applicant worked from July 11 to October 1 in 1994; from June 5 to August 28 in 1995; and from June 6 to August 17 in 1996; and that his brother Carol worked from July 4 to September 24 in 1994; from June 12 to September 10 in 1995; and from May 20 to August 24 in 1996.
>
> 10 In my opinion, this disposes of paragraphs (*i*),(*j*),(*k*) and (*l*) of the Minister's allegations; it cannot reasonably be concluded from any of those allegations that the employer and employee were not dealing with each other at arm's length.
>
> [Emphasis added.]

Applying the approach taken by the Federal Court of Appeal to this aspect of the instant case, I must find that the Minister could not reasonably conclude from the remuneration paid that a third party would not have accepted such remuneration.

[29] Nature and importance of the work: the Respondent seems to conclude that the payor would not have paid a third party the same salary because, after that salary was paid, the income from the sale of vegetables was too low. This conclusion is not justified for two reasons. First, the evidence shows that part of the Appellant's work was related to haymaking. The amount of her salary attributable to the sale of vegetables must therefore be reduced accordingly. Second, even without this adjustment, it cannot be concluded from either the facts in evidence or the facts considered by the Minister (i) that the sale of vegetables was not profitable and that the farm would have been more profitable if vegetables were not grown, (ii) that the farm would have been more profitable if the stand were not operated and the vegetables were sold in some other way, or (iii) that a third party could have been hired for a lower salary, with the result that growing the vegetables and operating the stand would have generated a higher profit. Therefore, the Minister could not reasonably conclude that, [TRANSLATION] "[s]ince the sale of vegetables did not generate much income . . .", the payor would not have entered into a similar contract with a third party.

Conclusion

[30] For all these reasons, I conclude that the Respondent could not reasonably conclude that a third party would not have accepted remuneration and conditions of employment similar to those of the Appellant.

[31] Accordingly, the appeal is allowed and the Minister's decision is varied to state that the Appellant held insurable employment during the periods in issue.

Signed at Ottawa, Canada, this 30th day of April 2008.

"Gaston Jorré"

Jorré J.

Translation certified true
on this 27th day of June 2008.

Brian McCordick, Translator

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