

Docket: 2008-1168(EI)

BETWEEN:

MARIE-THÉRÈSE ROUSSEL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GAÉTAN ROUSSEL,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard December 18, 2007, at Miramichi, New Brunswick.

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the Appellant:	Ivan Robichaud
Counsel for the Respondent:	Geneviève Léveillé
For the Intervenor:	The Intervenor himself

JUDGMENT

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

Signed at Ottawa, Canada, this 9th day of February 2009.

"Paul Bédard"

Bédard J.

Translation certified true
on this 20th day of February 2009.

Elizabeth Tan, Translator

Citation: 2009 TCC 83
Date: 20090209
Docket: 2008-1168(EI)

BETWEEN:

MARIE-THÉRÈSE ROUSSEL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GAÉTAN ROUSSEL,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The Appellant is appealing from the decision rendered by the Minister of National Revenue (the Minister) pursuant to the *Employment Insurance Act* (the Act). The Minister determined that Marie-Thérèse Roussel (the Worker) was not engaged in insurable employment under a contract for services, and was therefore not employed in insurable employment within the meaning of paragraph 5(1)(a) of the Act when she was working for Gaétan Roussel (the Payor) during the period of August 12, 2007, to September 15, 2007 (the relevant period). Moreover, the Minister decided that the Worker did not hold insurable employment when she was working for the Payor during the relevant period since he found it was excluded employment because the Worker and the Payor would not have entered into a similar contract for employment if they had had an arm's length relationship.

[2] When rendering his decision, the Minister relied on the following presumptions of fact, stated at paragraph 7 of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) the Payor was a day labourer and assistant depending on the season, either for herring or lobster fishing; **(admitted)**
- (b) the Payor is a parent with custody of his daughter Gabrielle (Gabrielle), born July 29, 2003; **(admitted)**
- (c) the Appellant is the Payor's mother and Gabrielle's grandmother; **(admitted)**
- (d) since 2000 and during the period in question, the Payor and Gabrielle have been living at the same residence as the Appellant (the residence);
- (e) the Appellant and the Payor's father (Mr. Roussel) were owners of the residence; **(admitted)**
- (f) during all relevant times, Mr. Roussel and the Payor's sister resided in the residence; **(admitted)**
- (g) during the relevant period, the herring fishing season in the Northeast region of New Brunswick was from August 12 to September 15; **(admitted)**
- (h) herring fishing is done by drift net, in the evenings and at nights; **(admitted)**
- (i) during the period in question, the Payor assisted in herring fishing; **(admitted)**
- (j) during the period in question, the Payor's hours of work were from 5:30 p.m. to the next morning, Sunday night to Saturday morning, every week; **(admitted)**
- (k) the Payor had essentially hired the Appellant as a babysitter for Gabrielle while he was herring fishing; **(admitted)**
- (l) the Appellant's duties as babysitter included: giving Gabrielle a bath, getting her ready for bed and playing with her; **(denied as written)**
- (m) the Appellant also had to prepare dinner and feed Gabrielle; **(admitted)**
- (n) the Payor did not know Gabrielle's bedtime; **(denied)**
- (o) the Payor did not repay the Appellant's expenses for Gabrielle's food; **(denied)**
- (p) the Payor did not pay his parents any rent nor did he reimburse food or other housing expenses for himself and Gabrielle; **(denied)**

- (q) the Appellant babysat Gabrielle for the Payor and carried out the same duties outside the period in question and she did so without being paid; **(denied)**
- (r) the Payor assisted in lobster fishing from April 20, 2007, to June 29, 2007 (the lobster fishing season); **(admitted)**
- (s) during the lobster fishing season, Mr. Roussel took care of Gabrielle when the Payor was lobster fishing; **(denied)**
- (t) the Payor did not pay Mr. Roussel to babysit Gabrielle; **(admitted)**
- (u) sometimes during the lobster fishing season when Mr. Roussel was unavailable, the Payor paid a third party to babysit Gabrielle; **(denied as written)**
- (v) during 2006 and during the herring fishing season that year, the Appellant babysat Gabrielle without being paid; **(denied)**
- (w) during the period in question, neither the Appellant or the Payor kept track of the hours the Appellant worked; **(denied)**
- (x) during the period in question, the Payor did not pay the Appellant weekly; **(denied)**
- (y) the Appellant was not paid an hourly rate of \$5; **(denied)**
- (z) during the period in question, the Appellant did not receive a cheque or cash representing a weekly pay; **(denied)**
- (aa) the Appellant needed 420 hours of work to be eligible for employment insurance benefits; **(admitted)**
- (bb) the Appellant obtained 385 hours of work over seven weeks with another company; **(admitted)**
- (cc) the Appellant received a record of employment from the Payor, with serial number A83639198, indicating 240 hours and a total compensation of \$1,200; **(admitted)** and
- (dd) the record of employment, serial number A83639198, dated September 20, 2007, does not correspond to the actual commitment between the Appellant and the Payor during the period in question. **(denied)**

[3] The Worker testified. The Payor and the Worker's spouse also testified in support of the Worker's position.

[4] Essentially, the Payor's testimony revealed that:

- (i) during the relevant period (representing 35 days), he did not work a complete week because of violent winds that made high seas fishing impossible;
- (ii) during the four other weeks of the relevant period, he worked from Sunday night to Saturday morning, or six days a week; this suggests that the Payor worked 24 days during the relevant period;
- (iii) generally, he left the family home around 3:30 p.m. to go to work and came back home around 4:30 a.m.; this suggests that during the relevant period, the Payor was absent from the family home for 13 hours a day, 6 days a week for 4 weeks, meaning the Payor was absent from the family home for at least a period of 312 hours during the relevant period;
- (iv) generally, upon his return from work, he slept from 6:00 a.m. to 9:00 a.m., or three hours. Considering the Payor had worked 24 hours during the relevant period, this suggests that he slept at least 72 hours during this 24-day period;
- (v) he bought the food required to feed his daughter himself. I must immediately point out that this claim contradicts a written declaration¹ he had previously made. In fact, according to the written declaration, it was the Worker who had bought the food for the Appellant's daughter;
- (vi) the Worker was paid weekly by cheque. The Worker would therefore have received four cheques from the Payor for \$300 during the relevant period.

¹ See question 4 of I-1.

Worker's testimony

[5] The Worker essentially testified as the Payor did.

Analysis and conclusion

[6] The Worker had to demonstrate that she was engaged in insurable employment under a contract of services. To do so, the Worker had to show that she was paid by the Payor for the work she carried out. In fact, compensation given in consideration for work carried out is an essential element of a contract of services.

[7] In this case, the Worker had the burden of showing, on a balance of probabilities, that the Minister's allegation that she did not receive any compensation for the work carried out was false. The Worker's evidence in this regard was based essentially on her testimony and that of the Payor. The Worker was to submit the four cheques to evidence. She did not do so when she was able to. From this, I deduce that the cheques did not exist. The non-submission of this documentary evidence is even more inexcusable in this case because the Worker and the Payor were represented by counsel and the Minister had asked for this evidence to be produced, before and after rendering his decisions.

[8] I must note that even if the Worker had convinced me that she was paid for the work carried out during the relevant period, I would still have dismissed her appeal. In fact, the evidence showed that during the relevant period, the Worker was responsible for the Payor's daughter and was to babysit her for a minimum of 384 hours.² She would therefore have been paid at an hourly rate of \$3.12, which is clearly unreasonable. The Payor himself felt that \$5 an hour was reasonable in the circumstances. The Minister therefore correctly found, even if based solely on the compensation factor, that the Appellant and the Payor would not have entered into a similar contract for employment if they had had an arm's length relationship.

[9] For these grounds, the appeal is dismissed.

Signed at Ottawa, Canada, this 9th day of February 2009.

"Paul Bédard"

² See subparagraphs (iii) and (iv) of paragraph 4 above.

Bédard J.

Translation certified true
on this 20th day of February 2009.

Elizabeth Tan, Translator

CITATION: 2009 TCC 83

COURT FILE NO.: 2008-1168(EI)

STYLE OF CAUSE: MARIE-THÉRÈSE ROUSSEL AND M.N.R.
AND GAÉTAN ROUSSEL.

PLACE OF HEARING: Miramichi, New Brunswick

DATE OF HEARING: December 18, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: February 9, 2009

APPEARANCES:

Counsel for the Appellant: Ivan Robichaud
Counsel for the Respondent: Geneviève Léveillé
For the Intervenor: The Intervenor himself

COUNSEL OF RECORD:

For the Appellant:

Name: Ivan Robichaud
Firm: Godin, Lizotte, Robichaud, Guignard
Shippegan, New Brunswick

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada