

Docket: 2010-281(EI)

BETWEEN:

IDAEL LAZARO RAMOS ROMO,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 8, 2011, at Montréal, Quebec

Before: The Honourable Chief Justice Gerald J. Rip

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Emmanuel Jilwan

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision rendered by the Minister of National Revenue on January 20, 2010, in respect of the period from May 19, 2008, and May 23, 2009, is confirmed.

Signed at Ottawa, Canada, this 2nd day of May 2011.

"Gerald J. Rip"

Rip C.J.

Translation certified true
on this 8th day of June 2010
Margarita Gorbounova, Translator

Citation: 2011 TCC 228

Date: 20110502

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REASONS FOR JUDGMENT

Rip, C.J.

[1] This is an appeal by Idael Lazaro Ramos Romo from a decision rendered by the Minister of National Revenue (the Minister) under subsection 93(3) of the *Employment Insurance Act* (the Act), according to which he was not an employee of the payer Robert Lawson Inc. (the corporation) between May 19, 2008, and May 23, 2009. The Minister based his decision on paragraph 5(1)(a) of the Act. This appeal originated in Quebec.

[2] The corporation operates a business that provides servers and bartenders to caterers and to other businesses that provide meal services at various events. The corporation has a list of about 200 people who can serve at tables and bars. It contacts people whose names are on the list when its services are retained for an event and asks them if they would like to work at the event. The person contacted may accept or reject the work offer. There are no written contracts between the workers and the corporation; everything is arranged orally. The pay was \$16 per hour.

[3] Mr. Romo is a server. His work consisted in preparing tables, serving at tables and cleaning the tables after the meal. The maître d'hôtel told him which tables he was responsible for. Usually, he worked with a team; he was not the only person attending to a particular table.

[4] Mr. Romo worked as a server not only for the corporation but also for other persons, including perhaps five caterers. Usually, a caterer or the corporation would contact Mr. Romo about a week before the event. He was free to accept or reject the work offer. If two persons called him with a job, he would accept the first offer.

[5] All work supplies are provided by Mr. Romo. He pays for his clothes, shoes, tuxedo, shirt and anything else he may need to wear for a particular occasion.

[6] The corporation has a representative on site at the event to make sure that everything works satisfactorily according to the agreement between the corporation and its client. According to Mr. Lawson, its president, the corporation coordinates the event and does not exercise any supervision of the work performed by Mr. Romo. The payer's representative notes the hours worked by each worker at the event. According to Mr. Romo, the corporation's representative supervises his work. At the end of an event, the corporation takes note of the hours worked by Mr. Romo, and he is paid by cheque approximately one week after the event.

[7] Paragraph 5(1)(a) of the Act reads as follows:

5(1) Subject to subsection (2), insurable employment is	5(1) Sous réserve du paragraphe (2), est un emploi assurable :
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(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise.	a) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière.
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[8] Article 2085 of the *Civil Code of Québec* (the Civil Code) defines a contract of employment as follows:

A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or	Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le contrôle d'une autre
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control of another person, the employer. personne, l'employeur.

[9] A contract of enterprise or for services is defined in article 2098 as follows:

A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.	Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.
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[10] Based on the facts before the Court, did Mr. Romo do work according to the instructions and under the direction or control of the corporation, or was he a provider of services who carried out physical work for the corporation or provided a service for a price to the corporation?

[11] The Crown referred me to a recent decision in *10tation Event Catering Inc. v. M.N.R.*¹ where, on similar facts, the Court held that the workers were not engaged in insurable employment since they were not employees of the catering corporation. That appeal originated in Ontario, a common law province. In *10tation Event*, the judge based himself on several cases, in particular that in *Wiebe Door Services Ltd. v. M.N.R.*, a decision of the Federal Court of Appeal,² where various common law concepts of the employer-employee relationship were considered. As my colleague Archambault J. explained in his article "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It",³ there are differences in the way that common law and civil law distinguish an employee from an independent contractor. One major difference is that, in a contract of employment under the *Civil Code*, the employee works according to the instructions and under the direction or control of the employer.

[12] Mr. Romo was under no obligation to work for the corporation or any other party offering him work; he was free to accept or reject any offer to work without prejudice to being offered work in the future.

¹ 2008 TCC 562.

² (1986), 87 DTC 5025.

³ "Contract of Employment: Why *Wiebe Door Services Ltd.* Does Not Apply in Quebec and What Should Replace It", *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism: Second Collection of Studies in Tax Law*, (2005) Montreal: Association de planification fiscale et financière and the Department of Justice Canada.

[13] The corporation did give Mr. Romo directions concerning the work he would be doing for each event, told him which tables he would serve and indicated the team he would work with. However, once work commenced he was not under the direction or control of the corporation. He knew what he was doing, and that is why his services were retained. The relationship between the corporation and Mr. Romo was more than that which exists in a contract for services: Mr. Romo undertook to carry out physical work for the corporation for pay of \$16.00 per hour, which the corporation agreed to pay him.

[14] The appeal is dismissed.

Signed at Ottawa, Canada, this 2nd day of May 2011.

"Gerald J. Rip"

Rip C.J.

Translation certified true
on this 8th day of June 2011
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STYLE OF CAUSE: IDAEL LAZARO RAMOS ROMO v.
M.N.R.

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 8, 2011

REASONS FOR JUDGMENT BY: The Honourable Chief Justice Gerald J. Rip

DATE OF JUDGMENT: May 2, 2011

APPEARANCES:

For the appellant: The appellant himself
Counsel for the respondent: Emmanuel Jilwan

COUNSEL OF RECORD:

For the appellant:

Name:
Firm:

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