

Docket: 2017-3051(EI)

BETWEEN:

RAED KASSAWAT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on February 19, 2018, at Montréal, Quebec

Before: The Honourable Justice Dominique Lafleur

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Julien Dubé-Sénécal

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**JUDGMENT**

The appeal under paragraph 103(1) of the *Employment Insurance Act* is dismissed and the decision by the Minister of National Revenue from July 10, 2017, that the appellant, Raed Kassawat, did not hold insurable employment during the period from June 13, 2016 to March 31, 2017, while working for Qualité 2K Plus K Ltée, is affirmed, in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, the 15th day of March 2018.

“Dominique Lafleur”

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Lafleur J.

Citation: 2018 TCC 54  
Date: 20180315  
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## **REASONS FOR JUDGMENT**

Lafleur J.

### **I. BACKGROUND**

[1] Raed Kassawat appealed to this Court the decision (the “Decision”) by the Minister of National Revenue (the “Minister”) that was sent by letter dated July 10, 2017, in which Mr. Kassawat’s job with Qualité 2K Plus K Ltée (the “Payor”) for the period from June 13, 2016 to March 31, 2017 (the “Period”), is not insurable employment under paragraph 5(2)(i) of the *Employment Insurance Act* (SC 1996, c. 23, as amended) (the “Act”). After reviewing all the circumstances of this job, the Minister is not satisfied that they would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm’s length.

[2] All references to a legislative provision in these reasons refer to the Act, unless otherwise stated.

### **II. PRELIMINARY ISSUE**

[3] At the start of the hearing, the respondent filed a motion seeking leave to submit an amended Reply to the Notice of Appeal, adding the following allegation: Mr. Kassawat allegedly chose not to be a shareholder in the Payor in order to be eligible for employment insurance, and adding the following alternate ground:

Mr. Kassawat's job with the Payor was excluded under paragraph 5(2)(b) because he controlled more than 40% of the Payor's voting shares.

[4] Court doctrine in the matter of amendments was summarized in *Forest Fibers Inc. v The Queen*, 2013 TCC 402, [2013] TCJ No. 348 (QL):

24 It is clear from the jurisprudence dealing with amendments, that the general rule is that an amendment should be allowed at any stage of a tax appeal for the purpose of determining the real questions in controversy between the parties, provided that it will serve the interests of justice and allowing the amendment does not result in prejudice to the opposing party that cannot be compensated with costs.

[5] However, regarding litigations governed by informal procedure, Bowman J. is instead of the view that the Court must not necessarily allow the filing of amended pleadings because the principles of procedural fairness would not be respected. With respect to *Poulton v The Queen*, [2002] TCJ No. 81, Bowman J. thus refused the filing of an amended reply because this amendment had been made on the same day as the hearing and amended the legislative provisions on which the assessment was based:

17 Procedural fairness requires that in cases governed by the informal procedure the Crown not be permitted at the 11th hour to spring a brand new argument on a taxpayer. [...]

[6] In *Burton v The Queen*, 2006 FCA 67, [2006] FCJ No. 254 (QL), the Federal Court of Appeal affirmed the findings of Bowman J. (para 16) and thus specified:

12 As I understand his reasoning, Bowman A.C.J.T.C. was of the view that in cases governed by the informal procedure, the Tax Court should not always be willing to grant a motion by the Crown "at the eleventh hour to spring a brand new argument on a taxpayer". Where an adjournment results "in undue delay" of "relatively small informal appeals", the Tax Court judge must carefully exercise his or her discretion in deciding whether to allow the amendment and the consequent adjournment. He notes that in informal appeals, denying the Crown the opportunity to amend at the last minute would not result in a "jurisprudential or fiscal catastrophe".

[7] At the hearing, I dismissed the respondent's motion and refused the filing of the reply as amended because I am of the view that such an amendment would have caused prejudice to Mr. Kassawat and did not respect the principles of procedural fairness for the following reasons: the amended reply cited another legislative provision (paragraph 5(2)(b)) and detailed additional facts and grounds.

As a result, the burden of proof for Mr. Kassawat would have been made heavier. In addition, the amended reply dated February 9, 2018, appears to have been sent to Mr. Kassawat on February 9, 2018, which is only 5 working days before the hearing date, set for February 19, 2018. It would be unfair to allow the filing of the amended reply at the eleventh hour, particularly given the fact that Mr. Kassawat is representing himself at the hearing.

### III. ISSUES AND RELEVANT PRINCIPLES

[8] The Minister's position is that Mr. Kassawat's job with the Payor was not insurable employment under paragraph 5(2)(i); in fact, Mr. Kassawat did not have an arm's-length relationship with the Payor and the Minister found that the conditions for the exception under paragraph 5(3)(b) were not met.

[9] Therefore, this is a matter of finding out whether the Minister correctly assessed the relationship between Mr. Kassawat and the Payor within the meaning of paragraph 5(3)(b): In light of the evidence before her, was the Minister's finding reasonable?

[10] It is well-established law that the Court's mission is to describe, in law, the facts on which the Minister is relying to make her decision. The factors listed in paragraph 5(3)(b) are in particular: the remuneration paid, the terms and conditions, the duration of the job and the nature and importance of the work performed.

[11] It is essential to specify that the burden of proof falls to Mr. Kassawat. He must show on a balance of probabilities that the Minister made an error or did not consider all the relevant facts.

[12] In *Livreur Plus Inc v Canada (Minister of National Revenue)*, 2004 FCA 68, [2004] FCJ No. 267 (QL), Létourneau J. summarizes the Court's role when hearing this type of appeal:

12 As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.

13 The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide

in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 310; *Massignani v. Canada (Minister of National Revenue – M.N.R.)*, 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue – M.N.R.)*, 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.

14 In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed: *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, *supra*, paragraph 15.

15 The judge must make a legal analysis of the facts alleged by the Minister to determine whether they support the conclusion drawn by the latter from them. By this I mean that he must indicate how and why these facts establish, or tend to establish, the existence of a contract of employment rather than a contract of enterprise between the parties.

[Emphasis added]

[13] And recently, in *Lalande v MNR*, 2016 TCC 33, [2016] TCJ No 26 (QL), the Court summarized the relevant principles:

31 The following principles are derived from the cases referred to above:

- (a) When reviewing a conclusion of the Minister in the context of paragraph 5(3)(b) of the EIA, this Court is to verify the facts inferred or relied on by the Minister, in order to confirm that those facts are real and were correctly assessed by the Minister.
- (b) After investigating all the facts, this Court must decide whether the Minister's conclusion seems reasonable.
- (c) The EIA requires this Court to show some deference to the Minister's initial assessment.
- (d) When there are no new facts and there is nothing to indicate that the known facts were misunderstood by the Minister, this Court is not to substitute its opinion for that of the Minister.

#### IV. THE FACTS

[14] At paragraph 8 of the Reply to the Notice of Appeal, the Minister listed the presumptions of fact on which she relied to make the Decision:

[TRANSLATION]

8. In determining that the Appellant was not engaged in insurable employment by the Payor during the period in dispute, the following presumptions of fact were considered:
  - a. the Payor is a company that was incorporated in 2003;
  - b. the Payor works in the field of management and project management;
  - c. the appellant is a civil engineer with 32 years of experience;
  - d. the appellant's spouse, Kendah Abdin, holds 100% of the Payor's voting shares;
  - e. the Payor's headquarters was located at the residential address of the appellant and his spouse;
  - f. the agreement between the Payor and the appellant was made verbally in the province of Quebec;
  - g. the common intention of the Payor and the appellant was that the appellant worked as the Payor's employee;
  - h. the appellant provided his services as a project manager to the Payor;
  - i. the appellant's job status is not at issue;
  - j. the appellant obtained a contract of employment with Telus on behalf of the Payor;
  - k. the Payor invoiced Telus for the services rendered by the appellant;
  - l. the appellant was responsible for managing the day-to-day operations of the Payor's activities;
  - m. Ms. Abdin occasionally dedicated herself to the Payor's administrative activities;
  - n. the appellant was tasked with managing schedules, subcontractors, payments, costs and expenses regarding the project with Telus;

- o. the appellant set his own annual salary at \$75,000 in 2016;
- p. the appellant reduced his own annual salary to \$55,000 in 2017;
- q. according to information on the labour market, a civil engineer received an annual salary of between \$52,000 and \$118,560 in Quebec;
- r. the appellant worked from his residence;
- s. the appellant worked from 8:30 a.m. to 5:00 p.m. from Monday to Friday;
- t. the appellant did not take note of the hours that he worked;
- u. the appellant was not paid for overtime;
- v. the Payor paid the appellant by direct deposit to his personal account;
- w. the Payor had to pay the appellant on the 15th of every month;
- x. the appellant was not regularly paid;
- y. the appellant was listed in the Payor's payroll;
- z. the appellant transferred his own pay from the Payor's bank account to his personal account;
- aa. the payment amounts and dates for the appellant's monthly salary that are listed in the Payor's payroll do not match the amounts and dates that are listed from the appellant's bank account;
- bb. the appellant was not entitled to paid vacation;
- cc. the Payor did not offer any benefits to the appellant;
- dd. the appellant was not supervised by the Payor;
- ee. the Payor provided all tools necessary for the appellant to perform his work;
- ff. the Payor paid for the appellant's cell phone; and
- gg. the appellant was the signing authority for the Payor's bank account.

[15] Those facts that were presumed by the Minister will be taken as proven, unless refuted by Mr. Kassawat or the Payor.

[16] The following facts were admitted:

- Mr. Kassawat's spouse controls 100% of the Payor;
- Mr. Kassawat had to perform work for Telus as an employee of a third-party corporation; and
- Mr. Kassawat obtained a contract of employment from Telus on behalf of the Payor, on the conditions that he personally provide services to the Payor.

[17] Mr. Kassawat testified at the hearing. Mr. Kassawat's spouse was absent and therefore did not testify.

[18] Mr. Kassawat is an engineer and has 32 years of experience in the field of civil engineering. He stated that he sold his corporation in 2015 and therefore was unemployed after that sale.

[19] In 2016, a friend working for Telus in Winnipeg contacted him to offer him management of a project to transform a commercial building in order to make it suitable for television broadcasting. Management had to be done by Mr. Kassawat personally.

[20] However, as a condition for granting management of the project, Mr. Kassawat had to offer his services to Telus through a corporation. Telus offered remuneration of \$65 per hour on a basis of 40 hours per week and 8 hours per day from Monday to Friday. Telus proposed that Mr. Kassawat use a third party for billing and payments if he could not find a corporation to do this. No insurance, benefits or leave were offered by Telus. However, Telus provided a laptop and various software to Mr. Kassawat.

[21] According to Mr. Kassawat, Telus had promised him that after managing 2 or 3 projects, he could enter service with Telus as an employee, but that never happened.

[22] Thus, after discussing it with his spouse, Mr. Kassawat agreed to use the inactive corporation held completely by her, the Payor, to offer his services to



Telus. In fact, that formula allowed Mr. Kassawat to receive \$65 per hour from Telus instead of \$60 per hour if he used the third party proposed by Telus.

[23] In the first months after the project was granted, Mr. Kassawat agreed that his annual salary would be \$75,000. A few months later, he decided to reduce his annual salary to \$55,000, which also allowed him to reduce his source deduction payments. No insurance, benefits or leave were offered by the Payor. Mr. Kassawat was the Payor's sole employee.

[24] Mr. Kassawat explained that his spouse was in no way involved in the Payor's administration, except for signing cheques and certain communications with the accountant and in no way controlled the activities of the Payor or Mr. Kassawat.

[25] The Payor also provided all the tools necessary so that Mr. Kassawat could render services to Telus, such as the cell phone, printers, Internet connection, etc. The Payor deducted those expenses when calculating its income, along with the salary expenses for Mr. Kassawat, the rent and supplies to reach a net income of \$9,290. A portion of the family residence was used as an office for the Payor.

[26] Mr. Kassawat explained that he placed his salary in the account named "Advance to Troiska by R.K." and he payed himself when he felt it was right to do so, with Troiska being another name used by the Payor. It was only when the Payor had the funds that he paid himself a salary; however, the amounts could vary. He also added that he did not cash paycheques, but counted everything in his advance account, as mentioned above.

[27] According to the Payor's statement of earnings, Mr. Kassawat would have received a gross salary of \$47,719 and would have worked 1,306 hours during the Period, that being over 42 weeks; thus, his remuneration was at a rate of \$36.50/hour.

[28] In addition, Mr. Kassawat testified that he did not want to be a shareholder in the Payor because he knew that he would then be unable to receive employment insurance benefits.

[29] Mr. Kassawat explained that the Telus project did not materialize; he was paid by Telus for doing nothing over 10 months, from June 13, 2016 to the end of March 2017. For Mr. Kassawat, that money was unexpected. No one controlled him.

[30] Chantal Pilote, a public employee at the Canada Revenue Agency, also testified at the hearing. She was tasked with complex cases and she was tasked with Mr. Kassawat's file at the stage of the initial request for determining the eligibility of Mr. Kassawat's job with the Payor for the Period.

[31] Ms. Pilote explained the analysis that was done in this file. She reported that Mr. Kassawat's spouse authorized her to argue the facts as reported by him for the Payor as well.

[32] According to Ms. Pilote, this job was not insurable under paragraph 5(2)(i). Although Mr. Kassawat was an employee of the Payor, she is of the view that the Payor and Mr. Kassawat would not have entered into a similar contract if they had been dealing with each other at arm's length. In her view, the determinative factor is the annual salary of \$75,000, which does not correspond at all to the average salary of an engineer with Mr. Kassawat's experience.

[33] In addition, that salary was reduced by \$20,000 during the Period—thus, according to Ms. Pilote, the hourly rate went from \$36.05/hour to \$26.44/hour, with no reduction in Mr. Kassawat's working hours for or responsibilities with the Payor. According to the information from the information site on the labour market in Quebec, the salary for a civil engineer is a minimum of \$25/hour and a maximum of \$57/hour, with a median of \$36.81/hour. In addition, the Payor did not pay for any leave, insurance or benefits. Mr. Kassawat took care of all the management for the Payor.

## V. POSITIONS OF THE PARTIES

### 1. Mr. Kassawat

[34] Mr. Kassawat maintains that the Decision is illogical and the fact that his spouse is the Payor's shareholder should not have any impact whatsoever regarding the description of his job for the purposes of the Act. He had to be employed by a corporation so that Telus could offer him the contract for the management project. If he had not offered his services through the Payor, Telus would have provided him with the name of a third-party corporation (a subcontractor for Telus) that would be tasked with billing and payments. He also adds that he could not be replaced by another person, since the contract with Telus was very clear: services had to be provided personally by Mr. Kassawat. He maintains that the Minister did not consider the uniqueness of his situation.

## 2. The respondent

[35] At the start of her argument, the respondent raised the question of whether Mr. Kassawat and the Payor had entered into a contract of employment, in light of Mr. Kassawat's admission that he had not performed any work for Telus during the Period.

[36] However, if we assume that there was a contract of employment between Mr. Kassawat and the Payor, the respondent maintains that the Decision remains reasonable, given the facts that were noted at the hearing.

## VI. THE LAW

[37] The relevant statutory provisions are as follows:

|   |  |
|---|--|
| <b>5(1) Types of insurable employment</b> — Subject to subsection (2), insurable employment is  | <b>5(1) Sens de <i>emploi assurable</i></b> — Sous réserve du paragraphe (2), est un emploi assurable :  |
| (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; |
| ...   | [...]  |
| <b>5(2) Excluded employment</b> — Insurable employment does not include   | <b>5(2) Restriction</b> — N'est pas un emploi assurable :  |
| (a) ...   | a) [...]   |
| (i) employment if the employer and employee are not dealing with each other at arm's length.  | i) l'emploi dans le cadre duquel l'employeur et l'employé ont entre eux un lien de dépendance.   |
| <b>5(3) Arm's length dealing</b> — For the purposes of paragraph (2)(i),  | <b>5(3) Personnes liées</b> — Pour l'application de l'alinéa (2)i) :   |
| (a) the question of whether persons are not dealing with each other at  | a) la question de savoir si des personnes ont entre elles un lien de dépendance est déterminée   |

arm's length shall be determined in accordance with the *Income Tax Act*; and

(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.

conformément à la *Loi de l'impôt sur le revenu*;

b) l'employeur et l'employé, lorsqu'ils sont des personnes liées au sens de cette loi, sont réputés ne pas avoir de lien de dépendance si le ministre du Revenu national est convaincu qu'il est raisonnable de conclure, compte tenu de toutes les circonstances, notamment la rétribution versée, les modalités d'emploi ainsi que la durée, la nature et l'importance du travail accompli, qu'ils auraient conclu entre eux un contrat de travail à peu près semblable s'ils n'avaient pas eu de lien de dépendance.

[Emphasis added]

## VII. DISCUSSION

### 1. General

[38] As mentioned above, the Act specifies that if the employer is related to the employee within the meaning of the *Income Tax Act* (RSC (1985), ch. 1 (5th Supp.)), as amended) (the "ITA"), they are deemed to deal with each other at arm's length if the Minister 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.

[39] The Court must therefore verify the existence and accuracy of the facts on which the Minister is relying to make her decision, and her assessment, and research whether the decision still seems reasonable. It is essential to specify that the burden of proof falls to Mr. Kassawat: he must show on a balance of probabilities that the Minister made an error or did not consider all the relevant facts.

[40] In addition, we must consider that the Act is social legislation, the ultimate goal of which is to provide financial assistance to workers who lose their jobs for various periods of time (*Quincaillerie Le Faubourg (1990) Inc v MNR*, 2009 TCC 411 at para 8, [2009] TCJ No. 336 (QL)).

[41] In addition, it must be remembered that the purpose of paragraph 5(2)(i) is to prevent abuse. In *Légaré v MNR*, 246 NR 176, [1999] FCJ No. 878 (QL), the Federal Court of Appeal thus expressed itself on the purpose and the origin of the exception set forth by paragraph 5(3)(b):

12 [...] Under the *Unemployment Insurance Act*, excepted employment between related persons is clearly based on the idea that it is difficult to rely on the statements of interested parties and that the possibility that jobs may be invented or established with unreal conditions of employment is too great between people who can so easily act together. And the purpose of the 1990 exception was simply to reduce the impact of the presumption of fact by permitting an exception from the penalty (which is only just) in cases in which the fear of abuse is no longer justified. [...]

## 2. Work

[42] At the hearing, counsel for the respondent raised the question of whether Mr. Kassawat was related to the Payor by a contract of employment in light of Mr. Kassawat's admission during the hearing that he had not performed any work for Telus for the entire duration of the contract; thus, he did not perform any work for the Payor during that time.

[43] Article 2085 of the *Civil Code of Québec* thus defines a contract of employment:

**2085.** A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.

**2085.** 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 personne, l'employeur.

[44] One of the conditions that is essential to the existence of a contract of employment is that one person is obligated to perform work. In fact, it is not because a person did not perform work and then received pay that we can find that we can find that a contract of employment does not exist (*Garneau v MNR*, 2006

TCC 160 at para 57, [2006] TCJ No. 224 (QL); *Massignani v MNR*, 2004 TCC 75 at para 55, [2004] TCJ No. 127 (QL)).

[45] Thus, the Court is of the view that the evidence showed that Mr. Kassawat was related to the Payor by a contract of employment because all the elements that are essential for such a contract to exist were present at the start of the Period.

### 3. The Decision under paragraph 5(3)(b)

[46] Given the assumptions of fact on which the Minister relied to make the Decision and that were not refuted at the hearing by Mr. Kassawat, as well as evidence presented at the hearing, the Court is of the view that the Decision is reasonable: the Minister could reasonably find that, if Mr. Kassawat and the Payor were dealing at arm's length, they would not have entered into a substantially similar contract of employment between them.

[47] It is clear that Mr. Kassawat and his spouse are related within the meaning of paragraphs 251(2)(a) and 251(6)(b) of the ITA:

|  |  |
|--|--|
| <b>251(2) Definition of <i>related persons</i></b><br>— For the purpose of this Act, <b><i>related persons</i></b> , or persons related to each other, are | <b>251(2) Définition de <i>personnes liées</i></b><br>— Pour l'application de la présente loi, sont des <b><i>personnes liées</i></b> ou des personnes liées entre elles : |
|--|--|

(a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

...

a) des particuliers unis par les liens du sang, du mariage, de l'union de fait ou de l'adoption;

[...]

**251(6) Blood relationship, etc.** — For the purposes of this Act, persons are connected by

...

(b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

**251(6) Personnes liées par les liens du sang** — Pour l'application de la présente loi :

[...]

b) des personnes sont unies par les liens du mariage si l'une est mariée à l'autre ou à une personne qui est ainsi unie à l'autre par les liens du sang;

[48] Furthermore, Mr. Kassawat and the Payor are related within the meaning of subparagraph 251(2)(b)(iii) of the ITA since Mr. Kassawat is married to the shareholder who holds all the shares issued by the Payor:

|  |  |
|--|--|
| <b>251(2) Definition of <i>related persons</i></b><br>— For the purpose of this Act, <b><i>related persons</i></b> , or persons related to each other, are | <b>251(2) Définition de <i>personnes liées</i></b><br>— Pour l'application de la présente loi, sont des <b><i>personnes liées</i></b> ou des personnes liées entre elles : |
| ...  | [...]  |
| (b) a corporation and  | b) une société et :  |
| (i) a person who controls the corporation, if it is controlled by one person,  | i) une personne qui contrôle la société si cette dernière est contrôlée par une personne,  |
| ...  | [...]  |
| (iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and  | iii) toute personne liée à une personne visée au sous-alinéa (i) ou (ii);  |
| ...  | [...]  |

[49] As a result, Mr. Kassawat and the Payor are not dealing at arm's length within the meaning of paragraph 251(1)(a) of the ITA;

|  |   |
|--|---|
| <b>251(1) Arm's length</b> — For the purpose of this Act,                        | <b>251(1) Lien de dépendance</b> — Pour l'application de la présente loi :    |
| (a) related persons shall be deemed not to deal with each other at arm's length; | a) des personnes liées sont réputées avoir entre elles un lien de dépendance; |
| ...  | [...]   |

[50] Therefore, if the conditions for the exception under paragraph 5(3)(b) are not met, Mr. Kassawat's job with the Payor will be excluded employment in accordance with paragraph 5(2)(i). We must now examine the criteria set forth by paragraph 5(3)(b).

i) *Remuneration*

[51] Mr. Kassawat set himself an annual salary payable by the Payor in the amount of \$75,000; Mr. Kassawat did not provide any supporting documents of any kind for that amount. After a few months, he decided to reduce his salary by \$20,000. Mr. Kassawat explained that he decided to reduce his salary because he wanted to reduce the Payor's source deductions. Therefore, what stood out from the evidence is that Mr. Kassawat himself set his salary and adjusted it as he saw

fit, although Telus continued to pay the amounts owing to the Payor under the project management contract.

[52] Thus, after the reduction of his salary, Mr. Kassawat's hourly rate went from \$36.05/hour to \$26.44/hour. As indicated by Ms. Pilote and the information from the information site on the Quebec labour market, the salary for civil engineers is a minimum of \$25/hour and a maximum of \$57/hour, with a median of \$36.81/hour. The Court is of the view that an engineer with Mr. Kassawat's experience and an arm's-length relationship with the Payor would not have negotiated such a salary, especially given the absence of any insurance, benefits or leave.

[53] During the Period, Telus paid around \$104,500 to the Payor under the project management contract (approximately \$11,400 per month); carried over on an annual basis, that would represent around \$130,000. In addition, as indicated above, for the Period, Mr. Kassawat's gross salary was \$47,719. Once again, that gross salary, which corresponds to 1,306 hours (according to the statement of earnings), equals an hourly rate of \$36.50/hour, which is much lower than what an engineer of Mr. Kassawat's experience would have entered into with person dealing at arm's length. In its assessment, the Court also finds that the amounts paid by Telus to the Payor equalled an hourly rate of \$65/hour.

[54] It was also established at the hearing that Mr. Kassawat loaned his salary to the Payor. In fact, he placed his salary in the account named "Advance to Troiska by R.K." and paid himself when he felt it was right to do so. Mr. Kassawat was not paid regularly; in addition, what stands out from the evidence is that the amounts that were paid to him were irregular. Mr. Kassawat explained that he thought of his family and decided to behave accordingly, allowing him to pay other expenses in that way through the Payor. The Court is of the view that a person dealing at arm's length with the Payor would not have accepted such an arrangement.

ii) *Terms of employment*

[55] Mr. Kassawat agreed that although the Payor was paid by Telus during the Period, Mr. Kassawat did not perform any work. According to the respondent, it is clear that Mr. Kassawat himself was hired and that a person dealing at arm's length would not have entered into such a contract with the Payor. The Court agrees with this.

[56] In addition, Mr. Kassawat controlled all the Payor's decisions. Mr. Kassawat's testimony is clear: his spouse, who is the shareholder who holds all



the Payor's shares, did not take part in any decisions regarding the Payor or Mr. Kassawat's work. Mr. Kassawat took care of all the Payor's accounting and banking matters. Mr. Kassawat confirmed several times that his spouse was not involved in any way. It is clear that the Payor was used by Mr. Kassawat to obtain the management contract from Telus and that Mr. Kassawat made all of the Payor's decisions. From all those facts, it is impossible to identify an arm's-length relationship. The Court is of the view that a person dealing at arm's length would not have entered into such an agreement.

iii) *The duration, nature and importance of the work performed*

[57] In the Court's view, these factors are not relevant in this appeal, given the fact that Mr. Kassawat did not perform any work during the Period.

VIII. CONCLUSION

[58] For these reasons, the Court is of the view that the relevant facts were considered and assessed in their context by the Minister, and thus, the Minister's finding appears reasonable to the Court. Mr. Kassawat did not succeed in showing on a balance of probabilities that the Minister made an error or that she did not consider relevant factors.

[59] Consequently, Mr. Kassawat's job for the Payor during the Period is not insurable employment within the meaning of the Act. Therefore, the appeal is dismissed and the Decision is affirmed.

Signed at Ottawa, Canada, the 15th day of March 2018.

“Dominique Lafleur”

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Lafleur J.

CITATION: 2018 TCC 54

COURT FILE NO.: 2017-3051(EI)

STYLE OF CAUSE: RAED KASSAWAT AND THE  
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APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Julien Dubé-Senéal

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: Nathalie G. Drouin  
Deputy Attorney General of Canada  
Ottawa, Canada