Docket: 2011-1876(EI)

BETWEEN:

DIANE JACQUES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 18, 2011, at Québec, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Agents of the appellant:	Maude Caron-Morin Maxime Dupuis
Counsel for the respondent:	Emmanuel Jilwan

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister is confirmed.

Signed at Ottawa, Canada, this 29th day of March 2012.

"François Angers"

Angers J.

Translation certified true
on this th day of September 2012

François Brunet, Revisor

Citation: 2012 TCC 82
Date: 20120329
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REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a determination of the Minister of National Revenue (the Minister), according to which the employment held by Diane Jacques (the appellant) with Gestion Sergili inc. (the payer) from September 1, 2005, to January 29, 2006, from January 18, 2007 to January 25, 2008, and from January 11, 2010 to June 25, 2010, was not insurable employment within the meaning of paragraph 5(2)(*i*) and subsection 5(3) of the *Employment Insurance Act* (the Act). The Minister determined that the appellant and the payer were not dealing with each other at arm's length in the context of this employment. Paragraph 5(2)(*i*) of the Act provides that employment is not insurable in such a situation. It was admitted that the appellant and payer are related within the meaning of the *Income Tax Act*.

[2] The Minister, therefore, proceeded to analyze the factors set out in subsection 5(3) of the Act and was satisfied that it was not reasonable to conclude that the appellant and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length having regard to said circumstances.

[3] At the commencement of the hearing, the appellant's agents argued, on a preliminary basis, that the Minister's determination was barred or that the assessment period, namely, that from January 29, 2006, to January 18, 2007, was barred under subsection 52(1) of the Act. However, this preliminary argument is not found in the Notice of Appeal filed by the appellant, and the parties were invited to present their respective arguments to me in writing.

[4] It is clear from reading the Notice of Appeal that the limitation period was not raised by the appellant as an argument which she intended to invoke and that she had not mentioned it in her allegations of fact. The appellant's argument is based mainly on the fact that this case is being heard under the informal procedure and hence, the Court must apply the rules that govern that procedure and grant the appellant the remedy sought. The appellant argues that the Employment Insurance Commission did not have, based on the provisions of the Act, the power to reconsider the assessment beyond the period of 36 months following the period from January 29, 2006, to January 18, 2007.

[5] I must first point out that the first period at issue goes from September 1, 2005, to January 29, 2006, not from January 29, 2006, to January 18, 2007. Second, this is not an appeal from an assessment issued by the Employment Insurance Commission. This is an appeal from a determination by the Minister of National Revenue on the issue of whether the appellant held insurable employment during the periods at issue. The period of 36 months raised by the appellant's agents, which is set out in section 52 of the Act, does not apply to the issue of whether employment is insurable. Section 52 of the Act deals with the Commission's power to consider any claim for benefits and to make decisions regarding entitlement to benefits. The appeal before this Court resulted from a determination by the Minister of National Revenue made under section 90, Part IV, of the Act.

[6] Subsection 18.29(1) of the *Tax Court of Canada Act* (TCCA) provides that an appeal before the Court is governed by the informal procedure set out in sections 18.1 to 18.28 of the TCCA. Hence, it is provided in subsection 18.15(3) that the Court is not bound by any legal or technical rules of evidence when hearing an appeal under the informal procedure. The SOR/90-690 Regulations of the TCC (TCC Rules of Procedure respecting the *Employment Insurance Act*) also set out the procedure to follow and provide that an appeal may be filed using the form in Schedule 5. It is clear that the specific format of the notice of appeal does not matter, but it must contain a summary of the alleged facts that the appellant intends to establish and the grounds on which the appeal is based. In my view, the Court has some flexibility but this flexibility cannot apply to the issue of limitations periods. In

such circumstances, a party must state this ground for appeal in its notice of appeal in order to inform the opposing party and to prevent it from being taken by surprise or suffering prejudice. It is a matter of fairness.

[7] In my opinion, an appellant must allege in a notice of appeal or revised notice of appeal the grounds which he or she intends to invoke to put forward his or her position, especially as to limitation periods.

[8] Therefore, the only issue in this case is whether, in the light of all of the facts, the Minister's determination made under subsection 5(3) of the Act is reasonable. The facts on which the Minister relied in making his determination are found in paragraph 6 of the Reply to the Notice of Appeal. The appellant admitted some of following paragraphs and denied the others as shown below:

> (a) The payer has been operating a bar with a capacity for 140 people with 3 Loto Québec slot machines and an apartment-style motel for about 18 years; (admitted)
>
> (b) The motel comprises 5 rooms and 7 one-bedroom apartments; in addition, there are 3 one-bedroom apartments and 1 2-bedroom apartment for the shareholder and the appellant in addition to their St-Georges residence; (admitted)
>
> (c) The payer's hours of operation were from 8 a.m. to 3 a.m., 7 days per week; (admitted)
>
> (d) The hours of operation were divided into 3 work shifts: 8 a.m. to noon, noon to 6 p.m. and 6 p.m. to 3 a.m. (admitted)
>
> (e) The payer employed 6 girls, including the manager, in order to cover the hours of operation; (denied)
>
> (f) The appellant has worked for the payer since the opening of the bar; (admitted)
>
> (g) The appellant's tasks were to count money for the slot machines, verify barmaids' cash tills from the day before, prepare bank deposits, complete reports for Loto Québec, purchase juice, milk and drinks and inventory the bar, verify the hours worked by the barmaids each week and report them to Desjardins Payroll Services and clean the bar, namely, floors, windows and bathrooms; (denied)
>
> (h) When there was a manager working at the same time as the appellant, the appellant helped the manager; (denied)
>
> (i) The appellant recorded her hours worked at the payer's cash register from 8 a.m. to noon, while her other hours of work were not recorded; (admitted)

(j) The appellant worked 40 hours per week; (admitted)

(k) The appellant was paid a fixed weekly salary at minimum wage for 40 hours per week; (admitted)

(l) Even when there was another manager, she was paid the same fixed weekly salary; (admitted)

(m) The appellant lived in the apartment above the bar, especially when the sole shareholder of the payer was away, which allowed her to be available at all times if she was needed at the bar; (denied)

(n) On an unknown date, the payer issued the appellant a record of employment bearing number A81336764, which stated that her first day of work was September 1, 2005, and her last day of work was January 29, 2006; (admitted)

(o) On January 28, 2008, the payer issued the appellant a record of employment bearing number A84894438, which stated that her first day of work was January 18, 2007, and her last day of work was January 25, 2008; (admitted)

(p) On June 28, 2010, the payer issued the appellant a record of employment bearing number A88362110 stating that her first day of work was January 11, 2010, and her last day of work was June 25, 2010; (admitted)

(q) An analysis of the appellant's work periods compared to those of the other managers employed by the payer shows a rotation in the hiring of managers, who are all different, except for the appellant, who returns regularly; (denied)

(r) During her layoff periods, the appellant remained available to the payer to help the manager as needed and to continue signing the payer's cheques and reporting to him the amounts of invoices to be paid, which he paid online even when he was working elsewhere; (denied)

(s) According to the payer, the appellant has always provided services to the bar; (admitted)

(t) Starting in September 2006, the payer's sole shareholder worked for long periods elsewhere; (admitted)

(u) During those periods, the appellant was responsible for the bar. Yet, during some of these periods, she was not in the appellant's payroll journal; (denied)

[9] The role of the Court with respect to the Minister's determination is to verify that the facts on which the Minister's assumptions are based are real and were correctly assessed having regard to the context in which they had occurred, and, after

doing so, the Court must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable (see *Légaré v. Canada*, 1999 CanLII 8105 (FCA). The judge's role was also defined as follows in *Perusse v. Canada*, 2000 CanLII 15136 (FCA) by the Federal Court of Appeal at paragraph 15:

> 15. The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[10] The question of whether the appellant performed work is not at issue in this case.

[11] The appellant and her spouse acquired a restaurant through a numbered company on September 30, 1991 (Exhibit A-1, tab 10). At that time, the appellant was the vice-president of that company. The evidence does not show how the payer became its sole proprietor, other than that the appellant's spouse is now the sole director. According to the appellant, she did not invest anything in the company. The company has been in business since 1991. The appellant was hired by the payer only in 1997. Her tasks consisted in opening the bar in the morning, cleaning, verifying reports from the day before and, if there were enough patrons, working in the afternoon. She placed drink orders, made deposits, got change and, until the motel rooms were converted into apartments, cleaned the rooms. She said that there was always something to do, including opening loto-poker machines and preparing reports. According to her spouse, the motel rooms were converted into apartments in 1995, and the appellant worked on this. During that entire period, the appellant was not paid.

[12] The appellant began to be paid on September 1, 2005. According to her testimony, she performed the same tasks as before that date. She was paid for 40 hours of work per week, but her hours were not recorded except for those in the morning, from 8 a.m. to noon. In the evening, a manager performed the duties that

the appellant performed during the day. The manager did the accounting, recruited barmaids and was present during the evening. According to the appellant, her spouse trained the managers, but she also sometimes gave them instructions.

[13] The work schedules were prepared by the manager. The manager worked 40 hours or more per week and was paid per hour like the barmaids. Although there was no control, the hours were recorded in a payroll journal (Exhibit I-5). It appears from the payroll journal, however, that, until January 26, 2008, the appellant was the only person who worked 40 hours per week. It was only on October 26, 2008, that managers started to be paid for 40 hours per week. This continued until August 7, 2010.

[14] The appellant, just like the barmaids, received minimum wage and salary increases coincided with minimum wage increases. During the periods at issue, the appellant lived in an apartment above the bar three or four days per week and then went home.

[15] During the periods at issue, the appellant's spouse was absent since he was employed as a construction worker. He was able to work at the bar on weekends for a time, then once per month and then once every three months. However, he could be reached at all times. The appellant and her spouse spoke on the telephone every day. She made reports to him, and sometimes he authorized her to make expenditures. The business's invoices were paid online by the appellant's spouse. The appellant had a power of attorney, which allowed her to sign the payer's paycheques and to make deposits.

[16] The appellant was laid off three times between 2005 and 2010. The first time was on January 29, 2006, that is, five months after she began to be paid. The Record of Employment shows code A as reason for dismissal but provides no details. She began receiving employment insurance benefits in March 2006 and finished on December 16, 2006, receiving all the benefits to which she had been entitled. The reason stated was lack of work due to the opening of highway 173. Between her layoff and receiving her benefits, on February 11, 2006, the appellant received, $1,674.81 in vacation pay corresponding to over 19% of the wages received during that period. No one has been able to explain the payment of this amount to the appellant.

[17] On January 18, 2007, the appellant returned to paid work until January 25, 2008, when she was again laid off. The Record of Employment indicates that the reason for dismissal was shortage of work/end of season or contract. At the hearing,

the appellant and her spouse explained that the patron volume had dropped because of the ban on smoking in public areas. The appellant received all of her employment insurance benefits by October 18, 2008. She returned to work on January 10, 2010.

[18] The last period of work ended on June 20, 2010. At that time, she had accumulated 960 hours and she was therefore again eligible for employment insurance since the minimum number of hours is 910. The Record of Employment indicates the same reason for the layoff as the previous Record of Employment, and the reason stated at the hearing was that the road to their establishment was closed because of construction work. The appellant received benefits until the end of September 2010, when the benefits were suspended and the investigation was launched.

[19] The appellant performed duties for the payer even during periods when she received employment insurance benefits and even during periods when she was not paid. In her first few interviews with the investigators (Exhibit I-4) and according to the testimony of Jany Gilbert, the appellant admitted that, in 2008 and 2009, after receiving all of her benefits, she continued to work for the payer without being paid. The appellant explained to Ms. Gilbert that, in a business, there are highs and lows – there are periods when the volume of work and revenues decrease. The appellant therefore continued to look after the business but, given that it did not take her very long, she was not paid. She admitted that she had worked in 2009, but did not know why no record of employment was completed. Finally, she confirmed that she had worked without income because it was her spouse's business. However, at the hearing, the appellant denied having made such statements.

[20] In her testimony, the appellant acknowledged that she had performed tasks for the payer during her periods of unemployment. She explained that the bar had been in operation for 20 years, that it was her place and that she went there regularly. She ran errands, folded dish towels and did what she called volunteer work. She stated that other employees also did this. She said that she did this no more then once per month. In redirect, she returned to the topic and said that she did no more than 1 hour of volunteer work per week for the payer.

[21] Her spouse also acknowledged that the appellant performed some tasks during her periods of unemployment. Since he was absent during all of the periods at issue, the appellant sent him the invoices to be paid, which he paid online. She helped him file his GST and QST reports and ran errands for the bar. In his interview with Ms. Gilbert, the appellant's spouse acknowledged that, even though the appellant was not paid during his absences, she still had to ensure the bar's proper functioning. The

appellant's spouse acknowledged that he had given power of attorney for signing the payer's cheques, including paycheques, only to the appellant.

[22] The appeals officer conducted a fairly detailed analysis of the information she had gathered during her investigation and from the reports she had consulted. She based her analysis on the factors set out in paragraph 5(3)(*b*) of the Act. The following are her conclusions for each type of factor:

> [TRANSLATION]
> **Nature and importance of the work accomplished**
>
> The worker's duties consisted in opening the bar in the morning, from 8 a.m. to noon, Monday to Friday. In addition, she verified daily deposits made by the barmaids and filled out daily forms for Loto Québec slot machine reports and the ATM. She also cleaned the bar, made purchases, performed inventory control, and got change, paycheques, juice, milk, etc.
>
> It is true that these tasks were necessary for the payer's activities. However, the payer also employed a manager, and the worker confirmed that, when there was a manager, she did those tasks. We are of the opinion that, if the worker's job was needed full time during the periods at issue, it was needed just as much between those periods. In addition, the worker stated that she had continued to manage the business, but since it did not take her very long, she was not paid.
>
> It is therefore not reasonable to believe that an arm's-length person would have worked for the payer in this way.
>
> **Duration of employment**
>
> The periods of employment have no correlation with the periods of employment of bar managers.
>
> Since the sole shareholder worked for some periods outside of Quebec, the worker had to supervise the bar's activities. However, the worker was not employed by the payer at the end of 2006, while the sole shareholder worked in Calgary, as well as at the end of 2008, when he was in Ontario; yet, there was no manager in September and October 2008. She was also employed when the sole shareholder was not working elsewhere.
>
> The worker did some volunteer work for the payer, for example, in 2009, as she had mentioned to the rulings officer and to the investigator from Human Resources and Skills Development Canada. The payer had then said the same thing.
>
> It is not reasonable to believe that an arm's-length person would have had periods of employment similar to those of the worker.

Conditions of employment

It is true that the worker could stay in an apartment above the bar and that she could thus go to the bar when she was not on the payroll. She continued to oversee the bar's operations voluntarily, which an arm's-length person would not have done regularly.

The worker was always paid for a set number of hours per week regardless of whether there was a manager. Yet, when there was a manager, the worker should have had a much lighter workload.

In 2010, the worker was on the payroll for only 6 months, yet, she took 3 weeks of vacation during that time, for which she was paid by the payer. In addition, the employer paid her the 4% when she stopped working.

For the first two periods at issue, the worker received all of the employment insurance benefits to which she was entitled before she was rehired. In 2010, her Record of Employment indicated 960 hours, while a minimum of 910 is required to be eligible for employment insurance benefits.

It is reasonable to conclude that an arm's-length person would not have had similar conditions to those granted to the worker.

Compensation

The worker was paid minimum wage when she was on the payroll. However, unlike other employees, except the manager, she was paid for a set number of hours of work per week.

In addition, the worker continued to work for the payer without remuneration between her periods of employment.

The payer and the worker were unable to explain why the Record of Employment for the period at issue from September 1, 2005, to January 29, 2010, shows $1,674.81 in vacation pay, which corresponds to over 19% of the remuneration paid during that period.

It is reasonable to conclude that an arm's-length person would not have been remunerated in this way or worked voluntarily.

[23] All of the evidence heard at the hearing of this appeal leads me to conclude that the Minister's determination, in the circumstances of this case, was reasonable. Although there might be some differences between the evidence heard and the facts

relied on by the Minister, the fact remains that all of the evidence put forward by the appellant is insufficient to satisfy me that the determination is unreasonable.

[24] Related persons are deemed to be dealing with each other at arm's length when the Minister is satisfied that, having regard to all the circumstances listed above, 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. It is therefore possible for related persons to enter into a contract of employment and to have the employment in question be insurable in accordance with the Act. It must be ensured that the employer-employee relationship between related persons is substantially similar to that between arm's-length persons.

[25] In this case, we have a business that was purchased by a numbered company, of which the appellant was the vice-president. Later, there seems to have been a transfer of the title to the property to the spouse, but the appellant implied in her testimony that the property had belonged to both of them for 20 years. It is undisputed in view of the evidence that the appellant had worked there since 1997 without pay and since 2005 with pay. There is no evidence that the appellant stopped working during the unpaid periods or that her duties were modified. It is certain that, starting in 2005, the appellant's spouse was absent from the bar: first, during the week, and later, during longer and longer periods, up to three months at a time. However, the appellant communicated daily with her spouse about the operation of the bar.

[26] In addition, she was the only person who could sign paycheques and pay some supplier invoices that her spouse could not pay online. The appellant tried to downplay her role during the periods when she received employment insurance benefits, but it seems rather implausible to me that her role diminished to the point she is claiming. In my view, the appellant needed to be present at all times to ensure the proper operation of the business.

[27] I cannot ignore the fact that, starting in November 2008, the appellant and another employee were the only ones who worked 40 hours per week and who did not have to keep track of their hours. The appellant was also at the bar on weekends, which leads me to believe that the hours worked were not very important to the appellant. Only non-arm's-length persons would accept such working conditions. Her hours also did not change when there was a manager on site.

[28] It is difficult to justify the appellant's layoffs given that her spouse was absent most of the time. The appellant's presence was necessary, and an arm's-length person would not have accepted such working conditions.

[29] Overall, the circumstances of this case and the evidence put forward do not allow me to find that the Minister made an unreasonable determination.

[30] The appeal is dismissed.

Signed at Ottawa, Canada, this 29th day of March 2012.

"François Angers"

Angers J.

Translation certified true
on this th day of September 2012

François Brunet, Revisor

CITATION:	2012 TCC 82
COURT FILE NO.:	2011-1876(EI)
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APPEARANCES:

Agents of the appellant:	Maude Caron-Morin Maxime Dupuis
Counsel for the respondent:	Emmanuel Jilwan

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada