Date: 20081008

Dockets: A-410-07
A-411-07

Citation: 2008 FCA 301

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
PELLETIER J.A.

BETWEEN:

A-410-07

JEAN-FRANÇOIS DUMAIS

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

- -

A-411-07

CHRISTIANE DUMAIS

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Heard at Québec, Quebec, on September 30, 2008.

Judgment delivered at Ottawa, Ontario, on October 8, 2008.

REASONS FOR JUDGEMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: NADON J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issue and procedural history

[1] These are two appeals (A-410-07 and A-411-07). They have been combined for a joint hearing. These reasons will serve for both dockets, the original being filed in docket A-410-07 and a copy being filed in the second docket.

[2] The issue is the insurability of the employment of the two appellants. Justice Bédard of the Tax Court of Canada (judge) dismissed the appeals of Jean-François Dumais and Christiane Dumais.

[3] That dismissal confirmed the decision of the Minister of National Revenue (Minister) under which he determined that the appellants did not hold insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[4] The Minister was of the opinion that the appellants did not have an arm's length relationship with the payer, Mario Dumais, who operates the Auberge sur la Côte, Reg'd. (inn), in the county of Charlevoix. In fact, Ms. Dumais is the payer’s spouse, and Jean-François Dumais his son. Later, the inn was incorporated and became the payer. Mario Dumais was its sole shareholder and director.

[5] The Minister was also of the opinion that, if they had been dealing with the payer at arm's length, the appellants would not have entered into the contract of service that they did in fact enter into. Hence the exclusion of their employment from the category of insurable employment in accordance with paragraphs 5(2)(*i*) and 5(3)(*a*) and (*b*) of the Act:

5. (2) Insurable employment does not include	**5.** (2) N'est pas un emploi assurable :
…	[…]
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.
(3) For the purposes of paragraph (2)(i),	(3) Pour l'application de l'alinéa (2)i) :
(*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and	*a*) la question de savoir si des personnes ont entre elles un lien de dépendance est déterminée conformément à la *Loi de l'impôt sur le revenu*;
(*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 <u>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</u>.	*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 <u>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</u>.

[Emphasis added.]

The nature of the work performed and the years in question

[6] Jean-François Dumais worked as the inn's chef, while his mother held the position of assistant manager, which involved various tasks including taking care of the reception, reservations and check-outs, helping accommodations employees, keeping time sheets and doing the business's bookkeeping.

[7] For both Ms. Dumais and her son, the years in question are 1999, 2000, 2001, 2002 and 2003.

Tax Court of Canada decision

[8] The judge reviewed and analysed the evidence in great detail. He noted the appellants' refusal to cooperate with the Commission investigator and to provide the investigator with the relevant records concerning the operation of the business, which would have allowed both the Minister and the Court tasked with reviewing his decision to make a more informed decision.

[9] He dismissed the appellants' claims that the investigator acted in bad faith and only wanted to trap them. He emphasized and deplored the fact that the appellants, who had the burden of rebutting the presumptions established by the Minister, had not introduced into evidence certain records, particularly the accounting records and the restaurant's reservations records, although they

were in a position to do so. From this deliberate failure, he concluded that this documentary evidence would have been to the appellants' disadvantage.

[10] The judge did not accept the appellants' arguments that the unpaid work they did during the period of unemployment was minimal, marginal and infrequent. The appellants stated that, in addition, the work was unrelated to their jobs and was performed for only very short periods. In contrast, the judge concluded that the unpaid work was both substantial and part of the duties normally assigned to the appellant by the payer under the employment contract that bound them. He therefore distinguished the facts of this case from those set out in *Théberge v. Canada (Minister of National Revenue – M.N.R.)*, [2002] F.C.J. No. 464 (QL).

[11] Here is what the judge had to say about the unpaid work carried out by Jean-François Dumais at paragraph 35 of his reasons for decision:

> [35] As regards the Male Worker, the evidence showed that the unpaid work performed by him outside of the relevant periods for each of the years in question was substantial and that this work was part of the tasks assigned to him by the Payers under the contract of employment entered into by them. I note on this point that before the beginning of the high season, therefore outside of the relevant periods for each of the years in question, the Male Worker did major housekeeping chores in the kitchen, hired the kitchen employees, developed new menus at home, negotiated the cost of food with suppliers, determined the cost of meals which were on the menu and trained the kitchen employees. I also note that the evidence showed that the Male Worker performed unpaid work for a minimum of 150 hours in performing these tasks, which he was bound to perform under the terms of his contract of employment, as appears from his job description, which was filed in the court record by the appellants. In addition, I note that the evidence showed that the Male Worker had prepared dinners on a voluntary basis outside of the relevant periods. On this point, the appellants claimed that the guestbook of the inn for the year 2001, as well as the GST returns prepared by the payers, which were pivotal in the Minister's decisions, did not in any way show that the volume of business of the Payers outside of the relevant periods was related to the operation of the restaurant. On this point, the appellants added that if the Minister had taken pains to study the restaurant reservations book and to analyze the volume of business of the

> Payers, which was mentioned in their accounting books, he would have noted that few dinners were served at the restaurant outside of the relevant periods, and he would have concluded that the employee spent only a little time on this task. I note that the appellants, who had the burden of proof, had an unhoped-for opportunity to submit these documents, which they were in a position to submit, and thereby satisfy me that the Minister reached mistaken conclusions on the basis of the documents he studied and of his investigation. Unfortunately, the appellants did not consider it worthwhile to submit these documents, even though they were in a position to do so. I infer from this that this evidence would have been unfavourable to the appellants, because it would have shown that many more dinners were served in the restaurant outside of the relevant periods than what they tried to have me believe, and that an important part of the volume of business of the Payers was related to catering activities, wedding and funeral receptions and dinners served to clients who were not staying at the inn. In my opinion, these activities required a head cook. I conclude that it would be completely unreasonable to think that a person who was dealing at arm's length with the Payers would have agreed under his or her contract of employment to work on an unpaid basis for so many hours outside of the relevant periods.
>
> [Emphasis added.]

[12] Regarding the payer’s spouse, he wrote at paragraph 36:

> [36] As regards the unpaid work performed by the Female Worker outside of the relevant periods, the appellants submitted that it was infrequent, minimal and marginal. They claimed that the Female Worker's services were not really required during the low season, because the inn was not very busy during this period. They added that the majority of the tasks performed by the Female Worker during the high season were performed by Mario Dumais during the low season. The appellants' evidence on this point was based solely on the testimonies of Mario Dumais the Female Worker, who testified to the same effect as her spouse. I note that Mario Dumais testified to the effect that his spouse regularly came to the inn during the low season to spend time and not to work, if only for three or fours hours per week. I immediately note that these testimonies did not satisfy me, especially considering that they were contradicted by the very credible testimonies of several of the Payer's employees. In addition, even if the evidence showed that the inn was not as busy during the low season, it nevertheless showed that a significant number of clients stayed there during this period and, accordingly, that the operation of the inn required, if only to a lesser extent, that someone be available to answer the telephone, take reservations, supervise the accommodations and restaurant employees (waiters and waitresses), wash the tablecloths and place mats, fold and put them away, act as a maître d' for the restaurant and bar, do the accounting (entries in the general ledger and pay sheets) and see to guests' check-ins and check-outs, although there were fewer of them during this period. Considering the very credible testimonies of several of the Payers' employees, I am of the view that it is more likely than not that this person was the Female Worker and not Mario Dumais. In my opinion, during the low season, the Female Worker had essentially the same responsibilities as in the high season and performed her tasks on an unpaid basis. I am also of the opinion

> that the Female Worker devoted a significant amount of time, although less than in the high season, to the performance of such tasks on an unpaid basis. For these reasons, I conclude that no person unrelated to the Payers would have accepted such working conditions.
>
> [Emphasis added.]

[13] Finally, the judge considered the remuneration paid to the appellants, pointing out that the appellants also bore the burden of proof in that respect. Even though he referred to the fact that the appellant had to establish that their remuneration was reasonable in the circumstances, which, according to counsel for the appellant is an error in terms of the test to be applied, it is clear that, when this reference is put in the context of the dispute between the parties and the statutory provision that he had to interpret, he wondered whether "having regard to all the circumstances of the employment, including the remuneration paid, . . . it is reasonable to conclude" that the payer and the appellants "would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length": see the wording of paragraph 5(3)(*b*). In any case, the appellants tried to establish through expert evidence that their remuneration was reasonable: see paragraph 59 of the appellant Jean-François Dumais's memorandum of fact and law. The judge also considered this particular argument of the appellants.

[14] On the basis of the evidence before him, the judge estimated the number of hours worked by each of the appellants. Taking into account the weekly wages paid by the payer, he calculated each appellant's hourly rate and compared these rates with those normally paid for equivalent positions and duties. He concluded that the rate paid to the appellants was much lower than the market rate

and that, consequently, no one with the same skills, dealing at arm's length with the payer, would have accepted such low wages.

[15] I reproduce paragraphs 40 and 41 of the reasons for the decision, which set out the approach followed and the rate differential:

> [40] However, only because the evidence showed that the Male Worker had generally worked for a minimum of 975 hours during the high season and for a minimum of 150 hours in the low season during each of the years in question, I may conclude that the Male Worker had been paid at an hourly rate of $7.84 in 1999, $8.87 in 2000, $9.23 in 2001, $9.32 in 2002 and $14.92 in 2003. It is obvious that these hourly rates, especially on the basis of the study published in May 2001 for the CQHRT (cited by the expert for the appellants), which established the hourly rate for a head cook as being between $17 and $26, that the overall earnings of the employee were not reasonable, having regard to all the circumstances. Having regard to all the circumstance, I am of the opinion that no one would have agreed to be paid such an hourly rate unless they were related to the Payers.
>
> [41] Furthermore, only because the evidence showed that the Female Worker had generally worked for a minimum of 1,391 hours in the high season, I may conclude that she was paid at an hourly rate of $5.77 in 1999, $5.51 in 2000, $5.71 in 2001, $5.71 in 2002 and $5.09 in 2003. I may therefore conclude that no person unrelated to the Payers who is so competent and who has as many responsibilities as the Female Worker did would have agreed to be paid at such a low hourly rate. This conclusion is obvious, especially if I take into consideration the numerous hours of unpaid work performed by the employee during the low season.

Analysis of the decision

[16] The inn where the appellants worked appeared on the Commission's radar screen because it engaged in what counsel for the respondent calls “banking” or accumulating hours. This operation consists in crediting employees with hours of work performed for the payer, often outside the period of paid employment when the employee is receiving unemployment insurance benefits. These hours

appear on the record of employment as hours paid by the employer although they were not. Employees consequently increase the number of their insurable hours entitling them to benefits, the amount of their eligible earnings and, consequently, the amount of the benefits they will earn when their seasonal employment comes to an end: *Geoffroy v. Canada (Minister of National Revenue - M.N.R.)*, [2003] T.C.J. No. 102, by Justice Tardif, and *Proulx v. Canada (Minister of National Revenue - M.N.R.)*, [2003] T.C.J. No. 100. The employer also benefits because it receives services free of charge during the period in question. When determining an employee's wages and working conditions, payers can also take into account that the employee will be receiving employment insurance benefits for several months.

[17] Once the inn was under the Commission’s scrutiny, the initial investigation of the banking of hours was expanded to the company's entire organization and operations. This resulted in the review of the insurability of the appellants' employment.

[18] Counsel for the appellant argues that, first, the judge committed an error in law by taking the appellants' unpaid work into account when determining the insurability of their employment.

[19] Secondly, he submits, quite convincingly, that the judge improperly applied the legal rules governing the arm's length relationship in his analysis of the appellants' working conditions. More specifically, with respect to the remuneration paid to the appellants, he complains that the judge erred when he converted the appellants' weekly wages into hourly rates and then compared them with industry rates.

[20] According to counsel for the appellants, the appellants had managerial positions at the inn. Like other managers in other companies, they were paid by the week and were not entitled to overtime for hours exceeding the regular work week. It was therefore unfair to divide the weekly earnings by the number of hours worked and to compare them with other employees of the same category for regular work weeks, the average length of which was at forty (40) hours.

[21] Lastly, the appellants complained that the judge had, first, rejected in part the report of the expert hired by the appellants to review the wage packages of comparable positions and, second, disregarded the expert's conclusion that the appellants' salaries were reasonable in the circumstances.

[22] Given the conclusion I have reached on the issue of the unpaid work, it is not necessary for me to address the last two grounds of appeal.

The unpaid work and insurability of the employment

[23] I think it appropriate to recall the purpose of paragraph 5(2)(*i*) of the Act, the severity of which is somewhat mitigated by paragraph 5(3)(*b*), as difficult as that paragraph is to apply.

[24] It will be recalled that paragraph 5(2)(*i*), cited above, excludes from the category of insurable employment, employment between related persons, that is, employment where the

employee is not dealing with the employer at arm's length. The Act assumes that “persons . . . related by blood, marriage or adoption are more likely to be able, and to want, to abuse the . . . Act”: see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 878 (QL), by Justice Desjardins. Moreover, in the same judgment, at paragraph 29, Justice Décary held:

> [29] I do not think that persons connected by family ties, and so subject to natural and legal obligations to each other, could reasonably be surprised or upset that Parliament felt the need to determine, where a contract of service is concerned, whether such ties, perhaps even without their knowledge, could have influenced the working conditions laid down.

[25] One of the undeniable and undoubtedly laudable objectives of the provision is thus to provide the employment insurance system with protection against claims for benefits based on artifice, fictitious employment contracts or real employment contracts containing fictitious or farfetched conditions: see *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, (1999), 246 N.R. 176, at paragraph 12; *Pérusse v. Canada*, cited above; *Paul v. M.N.R.*, [1986] F.C.J. No. 961 (F.C.A.); *Crawford and Co. v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 850 (QL); *Maldrik v. Canada (Minister of National Revenue – M.N.R.)*, [2006] T.C.J. No. 359 (QL); *Kabatoff v. Canada (Minister of National Revenue – M.N.R.)*, [2000] T.C.J. No. 822 (QL). It is in that context that the issue of work that is allegedly unpaid and that is performed while the person performing it is receiving employment insurance benefits arises.

[26] As such, performing unpaid work does not necessarily mean exclusion under paragraph 5(2)(*i*) of the Act. Everything is a question of circumstance and degree. Each case must

be examined individually. Care must be taken not to generalize the application of the conclusion drawn in Théberge, cited above.

[27] As the majority pointed out in that case, the business in question was a family farm business. At paragraph 19 of the reasons for his decision, Justice Décary wrote:

> Excepting seasonal employment, in a family farm business, on the ground that cows are milked year-round amounts, for all practical purposes, to depriving family members who qualify by working during the active season of unemployment insurance and to overlooking the two main characteristics of such a business: that it is a family business and a seasonal business.
>
> [Emphasis added.]

While I am far from being disposed to characterizing this as a supporting principle, there was a vital requirement in that case: the dairy cows had to be milked; their survival depended on it. Although it was not specifically mentioned, I believe that this was a circumstance that, as it should, was considered by our Court.

[28] Moreover, as emphasized by Justice Décary, the farming community is treated differently in that, for example, subsection 43(3) of the *Unemployment Insurance Regulations* (now subsection 30(4) of the *Employment Insurance Regulations*, SOR/96-332, as amended) means that claimants employed in farming are not considered to have worked a full working week during the October 1 to March 31 period if they prove that they were employed to such a minor extent that it would not have prevented them from accepting full-time employment. To quote my colleague, this particular treatment of availability is nonetheless part of the backdrop.

[29] I agree with Justice Archambault of the Tax Court of Canada in *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 16, at paragraphs 73 to 75, where he recalls that workers in family businesses can earn up to 25% of their employment insurance benefits without being deprived of the protection offered by employment insurance. Related individuals may work in the family business in the low season when there are fewer working hours and be remunerated by the payer. It is not necessary, to use his expression, to "cheat" by colluding to have the employment insurance program bear the cost of the services delivered to the payer at no cost.

[30] As we can see, the penalty for such abuse by related persons is severe. An employment that was insurable stops being so and, retroactively, requires the claimant to reimburse the money paid as benefits, which may be substantial if several benefit periods are involved: see *Malenfant v. Canada (Attorney General)*, 2006 FCA 226. But this is the deterrent that Parliament chose to ensure the integrity of the employment insurance system, which relies on the good faith and honesty of both employers and claimants.

[31] As Justice Marceau stated at paragraph 12 in *Légaré*, cited above, "[i]t is the essential elements of the employment contract that must be examined to confirm that the fact the contracting parties were not dealing with each other at arm’s length did not have undue influence on the determination of the terms and conditions of employment".

[32] Three factors seem essential for the purposes of paragraph 5(2)(*i*) when analysing the impact of unpaid work between related persons: the nature of duties performed, their number and their frequency. These are, in fact, what Justice Marceau in *Pérusse*, cited above, referred to as the circumstances that relate to the terms of the contract and its conditions of performance: see paragraph 5 of the reasons for that decision. The more similar the duties performed at no charge are to those described under the contract for paid work and the higher their number and frequency, the less likely and reasonable it becomes to conclude that the employer and employee "would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length". If, as is the case here, one added the factor of continuity in the delivery of services, the conclusion that the employment must be excluded becomes inevitable.

[33] In fact, the day following the alleged termination of employment, the appellants were performing exactly the same duties during the alleged period of unemployment as those for which, virtually the day before, they had been paid under their employment contract.

[34] As mentioned earlier, the judge concluded that the work performed by the appellants while they were receiving unemployment insurance benefits was substantial and that the duties they carried out and the responsibilities they had in the low season were substantially the same as during the busy season. Further, he found that, in fact, Jean-François Dumais's work as a chef and Christiane Dumais's work as an assistant manager were required for the inn's operations during the low season. In my view, although the hours of work had been reduced in comparison with the busy

season, there was a full pursuit of the very object of the contract for paid work. There had been no true work stoppage while the remuneration was being borne by the employment insurance program.

[35] The judge's findings and inferences of fact and those based on the credibility of the witnesses are, it must be said, supported by the evidence in the record. In fact, counsel for the appellants acknowledged that Ms. Dumais's situation was much more difficult to defend than her son's. Absent a palpable and overriding error, I am not allowed to set aside these findings and substitute my own.

[36] For these reasons, I would dismiss the appeals with costs, but would limit the costs for the hearing of the appeals, which was a joint one, to a single set.

"Gilles Létourneau"

J.A.

"I concur.
Marc Nadon J.A."

"I concur.
J.D. Denis Pelletier J.A."

Certified true translation
Johanna Kratz

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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DATED:	October 8, 2008

APPEARANCES:

Sarto Veilleux	FOR THE APPELLANT
Claude Lamoureux	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Langlois Kronström Desjardins, L.L.P. Lévis, Quebec	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT

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