

Docket: 2002-365(EI)

BETWEEN:

CONSTRUCTION NORRACH INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard November 24, 2003, at Montreal, Quebec

Before: The Honourable Justice P. R. Dussault

Appearances:

Counsel for the Appellant: Virginie Falardeau

Counsel for the Respondent: Emmanuelle Faulkner

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* regarding a November 8, 2001, decision by the Minister of National Revenue (the Minister), is allowed and the Minister's decision is amended to take into consideration that Gérald Léger's insurable hours and insurable earnings while working for the Appellant from May 28 to July 29, 2000, are as indicated on the record of employment the Appellant issued on July 14, 2000.

Signed at Ottawa, Canada, this 28th day of November 2003.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 26th day of February 2008.
Elizabeth Tan, Translator

Citation: 2003TCC880

Date: 20031128

Docket: 2002-365(EI)

BETWEEN:

CONSTRUCTION NORRACH INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Dussault J.

[1] This is an appeal from a determination by the Minister of National Revenue (the Minister) for the insurable hours and insurable earnings of Gérald Léger, while working for the Appellant, "Construction Norrrach Inc.," between May 28 and July 29, 2000.

[2] The Minister determined that Gérald Léger's insurable hours and insurable earnings were, respectively, 186.2 and \$6,702.23 during this period.

[3] In rendering his decision, the Minister relied on the following presumptions of fact, found at subparagraphs 5(a) to (k) of the Reply to the Notice of Appeal:

[TRANSLATION]

- (a) The Appellant is a construction contractor.
- (b) The Worker is a painter.
- (c) In 2000, the Worker provided services to the Appellant.
- (d) The Worker lived in a trailer the Appellant provided for him on the worksite.

- (e) The Appellant issued a record of employment dated July 14, 2000, indicating the Worker had worked 58 hours between June 28 and July 14, 2000, earning of \$1,304.13.
- (f) In fact, the Worker had worked from May 28 to July 29, 2000.
- (g) During this period, he worked 186.2 hours.
- (h) The Worker filed a claim for unpaid wages with the Commission de la construction du Québec (C.C.Q.).
- (i) According to this claim, the Worker was to be compensated for 186.2 hours of work, for \$5,945.85.
- (j) According to this claim, the Worker should also have received \$582.72 for paid leave and \$173.76 as layoff notice.
- (k) According to this claim, the Worker's total insurable earnings should have been \$6,702.23 instead of \$1,304.13 as indicated on the record of employment.

[4] The Appellant denies subparagraphs (f), (g), (i), (j) and (k) as written.

[5] The Respondent relies on section 9.2 of the *Employment Insurance Regulations* and on subsection 2(2) of the *Insurable Earnings and Collection of Premiums Regulations* to ask that the appeal be dismissed on the simple ground that Mr. Léger actually filed a claim for unpaid wages with the Commission de la Construction du Québec ("C.C.Q.") and the assessment made by the Minister is valid to the extent that it takes this claim into consideration.

[6] The Appellant claims that it paid Mr. Léger all the earnings for his hours of work while at its service during the period in question, and this was confirmed by the Court of Québec in a judgment rendered April 10, 2003, dismissing the C.C.Q. claim filed against the Appellant on behalf of Mr. Léger (Exhibit A-2).

[7] As a result, the Appellant relies on the application of section 9.1 of the *Employment Insurance Regulations*. It considers that section 9.2 does not apply in this case because Mr. Léger received the full compensation to which he had a right.

[8] The parties relied on the following provisions from the regulations:

Employment Insurance Regulations

- 9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated
- 9.2 Subject to section 10, where a person's earnings or a portion of a person's earnings for a period of insurable employment remains unpaid for the reasons described in subsection 2(2) of the *Insurable Earnings and Collection of Premiums Regulations*, the person is deemed to have worked in insurable employment for the number of hours that the person actually worked in the period, whether or not the person was remunerated.

Insurable Earnings and Collection of Premiums Regulations

- 2(2) For the purposes of this Part, the total amount of earnings that an insured person has from insurable employment includes the portion of any amount of such earnings that remains unpaid because of the employer's bankruptcy, receivership, impending receivership or non-payment of remuneration for which the person has filed a complaint with the federal or provincial labour authorities, except for any unpaid amount that is in respect of overtime or that would have been paid by reason of termination of the employment.

[9] Francine Brodeur and Alain Charron testified for the Appellant. They both explained the way the hours of work for Mr. Léger, hired as a painter, were calculated and verified by them and also by the work site foreman during the period in question. Hours of work are recorded in the Appellant's books and indicated on the record of employment completed by the Appellant. The cheques issued as payment were also submitted (see Exhibit A-1 in a bundle).

[10] Nobody testified for the Respondent. During Ms. Brodeur's testimony, counsel for the Respondent merely acknowledged that Mr. Léger had filed a claim with the C.C.Q.

[11] The Respondent's position during the hearing is without merit and unjustified in the circumstances.

[12] Even if subsection 2(2) of the *Insurable Earnings and Collection of Premiums Regulations* was not drafted the best way, to claim that section 9.2 of the *Employment Insurance Regulations* applies, it still must first be established that

"... a person's earnings or a portion of a person's earnings for a period of insurable employment remains unpaid..." In law, it is unthinkable to consider that a simple complaint by a worker to a federal or provincial body could constitute evidence that earnings were not paid in whole or in part.

[13] The Minister relied on the assumption of fact that part of Mr. Léger's earnings was not paid. The evidence submitted by the Appellant shows the contrary.

[14] First, the claim for unpaid wages filed by Mr. Léger to the C.C.Q. and subsequently taken to the Court of Québec by the C.C.Q., was completely nonsuited. The Respondent did not submit any evidence that this claim had any merit whatsoever. Particularly, Mr. Léger was never called to testify. Finally, the Appellant had Ms. Brodeur and Mr. Charron testify that the earnings Mr. Léger might have claimed, considering the hours of work during the period in question, were paid in full. The testimony of these witnesses was not contradicted and is believable.

[15] There is no need to say more.

[16] As a result of the above, the appeal is allowed and the Minister's decision is amended to take into consideration that the insurable hours and insurable earnings of Gérald Léger, while working for the Appellant between May 28 and July 29, 2000, are as indicated on the record of employment issued by the Appellant on July 14, 2000.

Signed at Ottawa, Canada this 28th day of November 2003.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 26th day of February 2009.

Elizabeth Tan, Translator

CITATION: 2003TCC880

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STYLE OF CAUSE: Construction Norrach Inc.
and MNR

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 24, 2003

REASONS FOR JUDGMENT BY: The Honourable Justice P.R. Dussault

DATE OF JUDGMENT: November 28, 2003

APPEARANCES:

Counsel for the Appellant: Virginie Falardeau

Counsel for the Respondent: Emmanuelle Faulkner

COUNSEL OF RECORD:

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