Docket: 2003-2997(EI)

BETWEEN:

GILLES GAGNÉ,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 23, 2004, at Montréal, Quebec

Before: The Honourable Deputy Justice S. J. Savoie

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Simon-Nicolas Crépin

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand Barachois, New Brunswick, this 20th day of May 2004.

"S. J. Savoie"

Savoie D.J.

Translation certified true
on this 22nd day of October 2004.

Shulamit Day, Translator

Citation: 2004TCC362
Date: 20040520
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REASONS FOR JUDGMENT

Savoie D.J.

[1] This appeal was heard at Montréal, Quebec, on February 23, 2004.

[2] This appeal deals with the determination of the Appellant's insurable hours, within the meaning of the *Employment Insurance Act* (the "*Act*") for the period from October 29, 2002, to January 14, 2003, when employed by Écotherm Inc., hereinafter referred to as the Payor.

[3] On May 20, 2003, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that the Appellant's insurable hours totalled 560.

[4] In making his decision, the Minister relied on the following presumptions of fact:

> [TRANSLATION]
>
> (a) The Payor was incorporated on May 11, 2001; (no knowledge)
>
> (b) The Payor was starting an electric heater distribution business; (admitted)

(c) The Appellant was hired as a general manager; (admitted)

(d) The Appellant's duties included promoting sales and coordinating the Payor's activities; (admitted)

(e) The Appellant and the Payor had signed an employment agreement on November 28, 2002; (admitted)

(f) The Payor's business hours were from 9:00 a.m. to 5:00 p.m., Monday to Friday; (admitted)

(g) An agreement was reached between the Payor and the Appellant so that the Appellant began work at the office at 10:00 a.m. in order to avoid rush hour; (admitted subject to amplification)

(h) The Appellant's predecessor worked eight hours per day; (denied)

(i) The Appellant worked a bit more, i.e.: 10 hours a day; (denied)

(j) The first week, the Appellant worked four days for a total of 40 hours; (denied)

(k) The Appellant then worked 10 weeks at 50 hours per week for a total of 500 hours; (denied)

(l) The last week of the period, the Appellant only worked two days, for a total of 20 hours; (denied)

(m) The Appellant worked a total of 560 hours for the Payor; (denied)

(n) On January 27, 2003, the Payor gave the Appellant a Record of Employment indicating the first day of work as October 29, 2002, and the last day of work as January 14, 2003, indicating 560 insurable hours. (admitted)

[5] The Appellant claims he worked a total of 1,386 insurable hours, in other words that, during the period at issue, he worked 15 hours per day, seven days per week, for a total of 105 hours per week and furthermore that he had the right to two weeks' notice.

[6] The Minister determined the amount of insurable hours at 560, according to his calculation of 10 hours per day, five days per week, for 10 weeks. He added four days of work, for 40 hours, for the first week of work and two days of work, for 20 hours, for the last week, which totals 560 hours. The amount of insurable hours as determined by the Minister corresponds to the same total recorded on the

Record of Employment issued by the Payor to the Appellant on January 27, 2003, that is 560 insurable hours.

[7] The evidence established that an agreement had been reached between the parties but that it did not indicate the number of hours of work. However the agreement was not produced. In addition, the evidence revealed that from November 28, 2002, Mr. Prats, the Payor's vice-president and the owner's son-in-law, did not accept the number of hours claimed by the Appellant and that he informed him of this the very same day. The Appellant admits that Mr. Prats informed him that he did not accept this figure that, in his opinion, was unreasonable. He called the 105 hours per week "slavery". According to Mr. Prats, the employer did not require the Appellant to work that many hours. Also, he allegedly asked the Appellant to drop his claim for so many hours.

[8] The evidence revealed that the Appellant's predecessor worked eight hours per day but that he had not met the expectations of the Payor, who terminated his employment after five months. Mr. Prats stated that the Appellant's replacement works 40 hours per week; however, he admits that the replacement is profiting from the work completed by the Appellant. He established that the Payor did not expect the Appellant to work more than 50 hours per week, as is the case in France where the Payor's head office is located.

[9] A document entitled "MEMO" (Exhibit A-1) addressed by the Appellant to Mr. Prats and dated January 26, 2003, establishes that the Appellant worked long hours, often late into the night, in order to be able to communicate with the head office in France. The many activity reports support the Appellant's long hours of work, which were necessary to meet the Payor's requirements. These reports, filed together as Exhibit A-1, provide detailed documentation of the tasks accomplished by the Appellant as part of his duties acknowledged by the Payor, who considered the Appellant his principal contractor. He was the general manager and had been hired as such.

[10] The documentary evidence produced by the Appellant establishes that he accomplished a colossal amount of work during the period at issue. This was not contradicted by the Minister.

[11] The Payor's representative, Mr. Prats, emphasized that the Appellant's claim is unreasonable. He added that it was impossible for him to verify so many hours. However, he recognizes the existence of an agreement that the Appellant could

start work at the office at 10:00 a.m. in order to avoid rush hour traffic. Moreover, the Payor knew that the Appellant worked from home.

[12] It is appropriate to reproduce the Appellant's "memo" addressed to Pierick Prats, dated January 26, 2003. This "memo" is part of Exhibit A-1 and provides a detailed summary of the Appellant's position and supports his allegations. There are many reports that describe his activities throughout the period at issue. I reproduce the "memo" below:

> [TRANSLATION]
>
> **MEMO**
>
> **To:** Pierick Prats **FAX #:** 1-514-636-8733
>
> **From:** Gilles Gagné
>
> **RE:** Errors on the Record of Employment **Date:** Sunday, January 26, 2003
>
> **Block 15A, Insurable hours:** Following our telephone conversation of 22-01-03 and your refusal to include the period of two weeks' notice provided for in the employment agreement in case of termination, I checked with the Human Resources Development Canada support centre in order to fill out the Record of Employment, and with the tax services office of the Canada Customs and Revenue Agency. The reason the two weeks' notice must be taken into account when establishing the number of weeks in calculating the number of insurable hours is indicated in the "Summary chart for insurable earnings and hours" in the document you have in your possession entitled "How to complete the Record of Employment" at line #31 which we read together: "Salary paid for the period of notice worked or not" must be included in the calculation of the number of insurable hours indicated in block # 15A, or a total of 132 weeks.
>
> **Block 11, Last day for which paid:** For the reason indicated in 15A, the last day paid is the last day of the last week of insurable earnings, or the last day of the last week of advance notice, therefore 28-01-03.
>
> **Block 12, Final pay period ending date:** For the same reason as in block 15A, the last day of the last insurable pay period, or the last week of the advance notice is therefore 31-01-03.
>
> **Block 15B, Total insurable earnings and Block 17A, Vacation pay:** In checking with the Commission des Normes du Travail, 6% also applies to the week of vacation for New Year's Day.

With respect to the number of days per week used to calculate the number of insurable hours in block 15A, you confirm that you could use six days of work rather than the five days used in the original Record of Employment in order to somewhat better reflect the amount of work I did, but you refuse to use seven days, which would reflect the real number of days worked. Regarding the number of hours worked per day, you confirm using 10 hours per day rather than eight hours, but you refuse to use 15 hours per day, which is the actual number of hours worked.

You justify this by saying it is unreasonable and that you were not able to verify the number of hours per day and the number of days per week. Reasonable or not, that is the actual number of hours and days I actually worked. We all know that your expectations and the deadlines to be met in order to recover what could be salvaged from the heating season were not reasonable. As soon as I started work you indicated to me how urgent it was to generate cash flow, given the many errors you had made to date, since August 2001, or more than one full year; given pure losses of more than $300,000; and the possibility that Mr. Peyronny would put an abrupt end to the North American adventure.

Since you indicated to me, from the start, that I could work at office or at home, you are in fact unable to verify all the hours worked. You can verify neither those worked at home, because you were not there, nor those worked at the office. You cannot check the work performed at the office evenings and weekends because you were not there. I can confirm them for you because I was there. You may even have difficulty verifying the hours worked at the office during the day since you were frequently absent.

However you cannot claim ignorance. My Activities report #1 (created at **5:58 a.m.** Monday 25-11-02 and printed at **7:56 a.m.** Tuesday 26-11-02) which was placed in your hands, indicates on page 2 that on **Saturday** 02-11-02, you and I together completed the installation of the radiators in the office showroom and that on **Sunday** 03-11-02 I reviewed the European brochures in preparation for writing a Quebec brochure. My Activities Report #2 (created at **8:26 a.m.** Friday 22-11-02 and printed at **5:55 a.m.** Monday 25-11-02) indicates on page 3 that **Saturday** and **Sunday** 8 & 9-11-03 were spent writing a pamphlet as you had agreed the previous Friday, since the deadlines for advertising in decorating magazines were close. On 28-11-02 I showed you a confirmation of employment form for Emploi Québec on which I confirmed I worked **105 hours per week**.

Saturday 30-11-02 and **Sunday** 01-12-02 were spent writing the brochure, as indicated in the report of 24-12-02 to Mr. Peyronny in which I explained that to meet the unrealistic deadline of 20-12-02 for the brochure, the graphics artist required the text by 28-11-02 and the photos by Monday 2-12-02, which only left me the **weekend** to do it all.

In my report #4 dated **Saturday** 14-12-02, (created at **8:06 a.m.** Thursday 12-12-02, printed at 11:32 a.m. and sent by fax at 11:33 a.m. on **Saturday** 14-12-02) I indicate to Mr. Peyronny that the delivery of the three first clients and replacement of the radiators for one of the clients occurred on **Saturday** 07-12-02. Furthermore, on **Saturday** 07-12-02 I brought handling and storage equipment, in order to reduce Écotherm's costs, as had been previously agreed with you and which you then refused to reimburse. It was also on **Saturday** 07-12-02 that I received a ticket while making these deliveries. In the same report I indicated "that I work **15 hours per day, 7 days per week** in order to move forward on things that should have been accomplished a year ago, and that **105 hours/week** is equal to three, 35-hour weeks in one, at $11/hour."

In the report #5 dated 24-12-02, created at **8:42 a.m.** on **Sunday** 22-12-02, printed at 2:55 p.m. and sent at 2:59 p.m. by fax on Tuesday 24-12-02 (a sick day), I indicated that the fourth sale had occurred on **Saturday** 21-12-02 and would be delivered the following **Saturday**, the 28-12-02. On 27-12-02, during a telephone conversation with Mr. Peyronny, I again explained that I had to work **15 hours per day, 7 days per week, or 105 hours per week** to recover what was salvageable of the heating season and to meet all the deadlines: on 30-12-02 in order to promote the draw at the Montréal National Home Show, on 03-01-03, to be used in the Montréal National Home Show kiosk; hiring two advisors for 06-01-03; replacement of the secretary as I had been asked, etc. . . .

As indicated in report #6 dated **Sunday** January 5, if I had not been able to take a single day of the week of vacation that was imposed on me at New Years' Day; such a holiday would have been more than deserved given the amount of work achieved by that point. I could not allow myself to take it because there was still too much for me to do.

In my report #6 of **Sunday** 05-01-03, I also indicated to Mr. Peyronny that the delivery planned for **Saturday** 28-12-02 was delegated to you to allow me to spend **Saturday** and **Sunday** 28 & 29-12-02 interviewing candidates for the two advisor positions.

The Écotherm development plan and the budget use report which accompany this report are both dated **Sunday** 05-01-03. Mr. Peyronny sent his response to me at the office by fax, on **Sunday** evening 05-01-03 at 1:30 a.m., when I was still at the office, I even returned the required information with respect to my personal telephone numbers several minutes later that same **Sunday**-to-Monday night, the 05-01-03.

In my report dated **Saturday** 11-01-03, I again indicate to Mr. Peyronny that the candidate interviews for the two advisor positions were held **Saturday** and **Sunday** 28 & 29-12-02, that "I have to work **15 hours per day, 7 days per week**. . . and that over the past two and a half months my daughters have lost their father." The Écotherm development plan and budget use report that accompany this report are both dated **Sunday** 12-01-03.

The many exchanges of correspondence in each of the files on which I worked with the graphic artist for advertising in decorating magazines and for the directory of exhibitors for the Montréal National Home Show and for writing the brochure, the correspondence with the decorating magazine staff and all the Montréal National Home Show and Place Bonaventure staff, correspondence sent and received, sometimes at unearthly hours, and to which you were a witness on occasion, demonstrate without a shadow of a doubt the truth of the colossal amount of uninterrupted work, 75 long 15-hour days, 7 days a week.

The correspondence that was addressed to you personally and the correspondence with Mr. Peyronny also confirm this. See the table . . . which shows the size of the schedule for the general manager of Écotherm Canada for the last ten days of work. The hours are taken from statistical data in the documents and files saved on my computer, from the fax transmission report from my fax machine and my telephone bill for overseas calls to France.

Although it is perfectly true that you are in no way able to verify each of the hours worked (which no employer can do in any case!) and for this reason you can only confirm that this colossal work performed was done so at the cost of an unusual investment of time, you are no more able to reduce the time I invested by arguing that it is an arbitrary 560 hours based on eight or 10 hours of work per day for five or six days per week, nor can you refuse to include in the calculation of the number of insurable hours the two weeks' notice provided for in the employment agreement.

> Your refusal to include the recognized two weeks' notice, in compliance with the guidelines of Human Resources Development Canada, and your attitude of wanting to reduce, at any price, the colossal investment of my time during my employment with Écotherm is beginning to look like bad faith and a false declaration by an employer's representative, an offence punishable by prosecution and a penalty of up to $25,000, under section 39 of the *Employment Insurance Act* and/or the *Criminal Code*.

[13] The expert quality of the Appellant's work was never questioned by the Payor. On the contrary, the Payor acknowledged having benefited from the Appellant's work even after he had left and even to this very day. At the hearing, the evidence was presented that, unlike his predecessor (a Mr. Lamoureux who had to be laid off), the Appellant performed priceless services for the Payor from which it is still deriving benefit.

[14] The Payor's vice-president, Mr. Prats, at the hearing admitted that the Appellant, in his opinion, doubtlessly had to work 10 hours per day, 5 days per week and even sometimes on weekends. However, he was not able to establish how often he worked weekends, nor could he verify the number of hours worked. He admitted that he was unaware of the time at which the Appellant arrived at the office and that the Appellant was still on the job when he left at 4:00 p.m. Mr. Prats added that the Payor did not require the Appellant to work a specific number of hours but he recognized that the Appellant [TRANSLATION] "accomplished an enormous amount of work. . . too early to bear fruit. . . it takes time. . . in relation to the structure he began to implement. . ."

[15] Mr. Prats is the Appellant's replacement. He works 40 hours per week. But he clarified:

> [TRANSLATION]
>
> It's true that we are profiting from the work he did, what he put in place. The company is making progress.

[16] Faced with this impasse, the Minister relied on subsection 10(3) of the *Employment Insurance Regulations* in making a decision in this file. The subsection in question reads as follows:

> Where the number of hours agreed to by the employer and the worker or group of workers under subsection (2) is not reasonable or no agreement can be reached, each worker is deemed

> to have worked the number of hours in insurable employment established by the Minister of National Revenue, based on an examination of the terms and conditions of the employment and a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.

[17] At the hearing, the Appellant was questioned by Counsel for the Minister with respect to the management of his packed schedule, given that he was divorced with shared custody of two adolescents, that he had to maintain a home, do housekeeping, prepare meals and shop for groceries. The Appellant had to admit that this was difficult but that he had managed.

[18] However sympathetic the Appellant, here is another file that must be resolved in accordance with the provisions of the legislator. It provided the regulation in subsection 10(3) of the *Regulations* mentioned above. The Minister made his decision as required by the subsection in question, in light of the information collected from the Payor.

[19] Under the circumstances, the intervention of this Court is not justified. The appeal is dismissed and the Minister's decision is upheld.

Signed at Grand Barachois, New Brunswick, this 20th day of May 2004.

"S. J. Savoie"

Savoie D.J.

Translation certified true
on this 22nd day of October 2004.

Shulamit Day, Translator