[OFFICIAL ENGLISH TRANSLATION]

Docket: 1999-3411(EI)

BETWEEN:

JOSÉE GIRARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May, 26, 2003, at Québec, Quebec

Before: The Honourable Judge Brent Paris

Appearances:

Counsel for the Appellant: Michel Poulin

Counsel for the Respondent: Nancy Dagenais

JUDGMENT

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

Signed at Ottawa, Canada, this 17th day of September 2003.

"B. Paris"

J.T.C.C.

Translation certified true
on this 15th day of September 2003.

Sophie Debbané, Revisor

[OFFICIAL ENGLISH TRANSLATION]

Citation: 2003TCC643
Date: 200309
Docket: 1999-3411(EI)

BETWEEN:

JOSÉE GIRARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Paris, J.T.C.C.

[1] This is an appeal from a decision of the Minister of National Revenue (the "Minister"), made on May 19, 1999, that the employment of the Appellant by Gertrex R.S.I. Inc., the "Payor", during the periods from May 6 to August 2, 1991; September 3 to November 8, 1991; March 26, 1992, to June 11, 1993; and March 15, 1995, to March 15, 1996, was not insurable employment under paragraph 3(2)(*c*) of the *Unemployment Insurance Act* and subsection 5(3) of the *Employment Insurance Act*.

[2] The fact that the Appellant worked for the Payor during these periods under a contract of service is not at issue. Rather, the issue is whether the Minister properly exercised his discretion in determining that the Appellant and the Payor would not have entered into a substantially similar contract of employment if they had been dealing at arm's length.

[3] The facts relied upon by the Minister in making his decision are set out in paragraph 5 of the Reply to the Notice of Appeal. They are as follows:

[TRANSLATION]

(a) The payor, incorporated on November 12, 1986, operates a renovation and interior designing business for commercial and industrial buildings.

(b) Pauline Tremblay, the appellant's mother-in-law, was the sole shareholder of the payor.

(c) Gilles A. Tremblay, spouse of Pauline Tremblay and the appellant's father-in-law, was the director of the payor; it was he who ensured that the corporation was in compliance with the Régie de la Construction du Québec.

(d) The corporation is the owner of the building in which it is located and in which it leases six other commercial units.

(e) The appellant worked for a number of years as a secretary-receptionist at the payor's head office.

(f) During the periods in issue, the appellant apparently lent the payor up to $7,000 interest-free.

(g) The appellant claimed that her hours of work were tallied up by the payor whereas Gilles A. Tremblay, sole director of the payor, did not know the appellant's work hours.

(h) The appellant claimed that she worked Monday to Friday, from 8:30 a.m. to 4:30 p.m., during the periods in issue whereas she worked only a few hours a week during the periods where she received unemployment/employment insurance benefits.

(i) When she was entered on the payroll full-time, the appellant was receiving a weekly fixed salary of $500 without the hours she actually worked being considered.

(j) During the periods in issue, in addition to her salary, the appellant received $4,700 in 1993 and $2,000 in 1995 from the payor.

(k) The appellant was entered on the payor's payroll when her spouse was not and was not entered when her husband was entered full-time.

(l) The appellant rendered services to the payor year-round; there was an arrangement between her and the payor so as to enable her to

qualify for unemployment/employment insurance benefits between her alleged periods of employment.

(m) The records of employment submitted by the appellant do not reflect reality with respect to the periods she worked and the salary she earned.

[4] The evidence adduced by the parties shows that subparagraphs 5(a), (b), (c) and (e) were accepted as true by the Appellant. Subparagraph 5(d) was also accepted as true by the Appellant except that the Payor leased only five rather than six other units in the building it owned. The Appellant also admitted lending money to the Payor (subparagraph 5(f)) and said that the money referred to in subparagraph 5(j) was a repayment of the money she had lent the Payor. I accept her evidence on this point.

[5] With respect to the Appellant's hours of work and salary, she testified that she worked as many hours per week as was necessary to get the work done. She said that some weeks she worked 30 hours while others she worked more than 40 hours. Her salary was set at $500 per week, but there were times when she was paid less because the Payor was short of funds.

[6] The Minister's assumption in subparagraph 5(k) was based on the evidence. Linda Bousquet, an Appeals Officer for the Canada Customs and Revenue Agency (CCRA) who handled the Appellant's file, was called as a witness. She produced a chart (Exhibit I-5) in which she recorded the periods during which the Appellant and her spouse, Mario Tremblay, worked for the Payor and the periods during which they were laid-off and collected unemployment and employment insurance benefits. This table confirmed that the Appellant worked for the Payor for substantial periods when her spouse was unemployed and receiving benefits and that, when her spouse was working for the Payor, she was unemployed and receiving benefits. The Appellant was not replaced when she was laid-off by the Payor. Instead, she continued to do the Payor's work, sometimes on a voluntary basis and sometimes receiving $100 per week.

[7] Ms. Bousquet testified that the Appellant told her that when her spouse (Tremblay) was working for the Payor, there was enough work to keep her busy full time. When her spouse was not working for the Payor, her father-in-law, Gilles Tremblay, would sometimes get work for the Payor but this did not usually result in enough work to keep her occupied full time. Ms. Bousquet was not cross-examined on this point and the Appellant, although recalled to give additional evidence, was not questioned about her earlier statements. The evidence confirmed

that Mario Tremblay was primarily responsible for the operations of the Payor, which included obtaining and executing the construction contracts, and that Gilles Tremblay played only a minor role and was away four months of every year.

[8] The periods of the Appellant's employment did not coincide with the periods of employment of her spouse by the Payor. For the most part, in fact, the contrary was true. The Appellant worked for the Payor when her spouse was collecting benefits and was laid off during the periods when her spouse was working for the Payor.

[9] With respect to the Minister's assumption set out in subparagraph 5(l), the evidence is clear that the Appellant continued to work for the Payor after she was laid off. The Appellant said that she worked less during those periods, but this is inconsistent with the fact that the Payor's work was generated by Mario Tremblay and that he was employed by the Payor for substantial periods when the Appellant was laid off. I am satisfied by the evidence that the arrangement referred to in that subparagraph did exist and that there was little correlation between the periods worked by the Appellant and the amount of work to be done for the Payor.

[10] In summary, I am not satisfied that the Appellant has shown that the Minister erred in the exercise of his discretion pursuant to paragraph 3(2)(*c*) of the *Unemployment Insurance Act* and subsection 5(3) of the *Employment Insurance Act* for the relevant periods. Only two minor assumptions (subparagraphs 5(f) and (j)) were shown to be erroneous, and this alone is not sufficient to interfere with the discretion exercised by the Minister. The remaining factors taken into account were all relevant and there is no evidence of bad faith on the part of the Minister. Given my finding relating to the exercise of the Minister's discretion, it is not necessary for me to consider whether the Minister's conclusion that the parties would not have entered into a substantially similar contract of employment if they had been dealing at arm's length was founded.

[11] Counsel for the Appellant raised one final issue concerning the Minister's jurisdiction to make the decision that is the subject of this appeal. Mr. Poulin produced a letter dated June 17, 1995, in which a claims officer at the CCRA informed the Appellant that the employment at issue in this appeal was insurable. Two years later another claims officer reached the opposite conclusion, which led to this appeal. Counsel argued that it is not open to the Minister to reverse the earlier decision. He stated that the Appellant had been prejudicially affected in that she is now out of time to request a refund of the unemployment insurance contributions she made in respect of the early periods of employment because the

time limit for doing so is three years. Had she been told in June 1996 that her employment was not insurable, she would have applied for a refund at that time.

[12] However, in the case of *Breault v. M.N.R.* [1990] F.C.J. No 286, the Federal Court of Appeal held that the fact that an earlier decision regarding insurability has been made by a claims officer does not preclude a second, new decision on the matter from being made at a later date. The Minister does not lose jurisdiction because of an earlier position taken.

[13] For all of these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 17th day of September 2003.

"B. Paris"

J.T.C.C.

Translation certified true
on this 15th day of September 2003.

Sophie Debbané, Revisor