Docket: 2005-2331(EI)

BETWEEN:

JACQUES DUPUIS,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 26, 2006, at Montréal, Quebec.

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Counsel for the Appellant: Gilbert Nadon

Agent for the Respondent: Chantal Roberge (articling student)

JUDGMENT

The appeal is allowed and the Minister's decision is vacated in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick, this 7th day of July 2006.

"S.J. Savoie"

Savoie D. J.

Translation certified true
on this 6th day of July 2007.

Brian McCordick, Translator

Citation: 2006TCC360
Date: 20060707
Docket: 2005-2331(EI)

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Appellant,

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Respondent

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REASONS FOR JUDGMENT

Savoie D. J.

[1] This appeal was heard in Montréal, Quebec, on May 26, 2006.

[2] It is an appeal from the decision of the Minister of National Revenue ("the Minister") dated June 8, 2005, that the Appellant was not employed in insurable employment under a contract of service during the period of February 23 to February 27, 2004, while working for the Clinique de physiothérapie de Louiseville Inc. ("the payor").

[3] In the alternative, the Minister determined that even if it were ruled that the Appellant was employed in insurable employment, such employment would be excluded from insurable employment under paragraph 5(2)(*a*) of the *Employment Insurance Act* ("the Act") because it was employment of a casual nature other than for the purpose of the payor's trade or business.

[4] In making his decision, the Minister relied on the following factual assumptions, which are set out in paragraph 5 of the Reply to the Notice of Appeal:

[TRANSLATION]

(a) The payor incorporated on January 19, 2004.

(b) The payor operated a physiotherapy, osteopathy and massage therapy business.

(c) The Appellant is a carpenter.

(d) In 2004, the payor did some renovation work on its premises.

(e) In order to do this work, the payor hired the Appellant as well as a seam caulker and a rug and tile layer.

(f) The Appellant's duties consisted in enlarging an office and repairing a ceiling.

(g) The Appellant was paid $20.00 per hour.

(h) The Appellant billed the payor for 11 hours on Monday, 10.5 hours on Tuesday, 5 hours on Wednesday, 5 hours on Thursday and 8.5 hours on Friday, for a total of 40 hours for the period in issue.

(i) The Appellant began his work day at 2 p.m. on Monday, 11 a.m. on Tuesday, 5 p.m. on Wednesday, 6 p.m. on Thursday and 11 a.m. on Friday.

(j) The Appellant decided on his work schedule each day.

(k) The payor did not control the Appellant's work schedule.

(l) The Appellant used his own carpentry tools in performing his tasks for the payor.

(m) The carpentry activities were not integrated into the payor's activities.

(n) The Appellant was hired in order to meet a casual requirement of the payor.

(o) The Appellant was performing work under a contract of enterprise.

[5] The Appellant admitted to the assumptions of fact set out in subparagraphs (a), (b), (c), (g) and (m); he denied the assumptions set out in

subparagraphs (j), (k) and (o); and he sought to clarify the assumptions set out in subparagraphs (d), (e), (f), (h), (i), (l) and (n).

[6] The evidence disclosed that René Ebacher is a physiotherapist and is the payor's sole owner. He had known the Appellant for several years, having met him for the first time as a patient and then befriended him. The Appellant had already done carpentry work for him as a building contractor’s employee.

[7] Mr. Ebacher determined that the Appellant had the skills necessary to do the renovation work in his clinic. He approached the Appellant, and they agreed on the terms and conditions of his hire. The work in question was minor, and the payor wanted to keep down the costs of the work. The Appellant asked to be remunerated at a rate of $20.00 per hour for his work, which is within the norm for building renovation. The Appellant asked that the payor hire him and treat him like an employee. The payor agreed to the Appellant's proposal, and an informal agreement was made between them. The work in question was to set up a new room in the clinic that would be used as an office and a treatment room for Mr. Ebacher. No construction plans were drawn up. Mr. Ebacher knew what he wanted, and the work proceeded according to schedule during the week of the Appellant's employment.

[8] The Appellant's hours of work were established in such a way that they did not interfere with the clinic's operations. Mr. Ebacher was always present during the work, and assisted the Appellant with it. The Appellant proved competent, and performed the work in accordance with the payor's requirements. There was no question of the payor showing him how to do his work, as this would have been completely outside his field.

[9] The Appellant used his own tools in the performance of his tasks, as is common in carpentry. However, the payor rented a tool for the Appellant which was used to remove the linoleum.

[10] The payor remunerated the Appellant at a rate of $20.00 per hour and made source deductions in respect of QPP, Employment Insurance and federal and provincial income tax.

[11] In order to carry out his renovation project, the payor also retained the services of a seam caulker and a tile layer. Both of those persons had bid successfully on a contract and did not receive Records of Employment from the payor.

[12] It was established that the Appellant entered his hours of work in an appointment book. He produced a copy at the hearing as Exhibit A-4.

[13] The issue is whether the Appellant was employed in insurable employment for the purposes of the Act. The relevant provision is subsection 5(1)(*a*) of the Act, which states:

> Subject to subsection (2), insurable employment includes
>
> (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> [Emphasis added.]

[14] When dealing with a dispute such as the one in the instant case, where the context is a contract in Quebec, we must also take account of section 8.1 of the *Interpretation Act*, R.S., 1985, c. I-21, an amendment to which came into force on June 1, 2001. In that section, Parliament has enacted as follows:

> *Property and Civil Rights*
>
> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied. [Emphasis added.]

[15] It is appropriate to reproduce the relevant provisions of the *Civil Code of Québec* which will serve to determine whether a contract of employment exists in Quebec and will distinguish such a contract from a contract of enterprise:

> Contract of employment
>
> 2085 A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.
>
> 2086 A contract of employment is for a fixed term or an indeterminate term.

> Contract of enterprise or of service
>
> 2098 A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client, or to provide a service, for a price which the client binds himself to pay.
>
> 2099 The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance. [Emphasis added.]

[16] The provisions of the *Civil Code of Québec* reproduced above establish three essential conditions for the existence of an employment contract: (1) the employee's performance of work; (2) remuneration by the employer for that work; and (3) a relationship of subordination. The significant distinction between a contract of service and a contract of employment is the existence of a relationship of subordination — the fact that the employer has a power of direction or control over the worker.

[17] The evidence established that Mr. Ebacher was at the work site throughout the period during which the Appellant was performing the work, and that he assisted the Appellant. The Appellant proved that the payor determined the place of work, the materials to be used and the renovations to be done. A relationship of subordination was shown to exist. It is true that the payor was not in a position to direct the way in which the Appellant carried out his tasks, but the payor's lack of carpentry qualifications does not rule out the existence of control by the payor over the Appellant. In this regard, the remarks made by Marceau J.A. of the Federal Court of Appeal in *Freddy Caron v. M.N.R.*, [1987] F.C.J. No. 270, are worth emphasizing:

> On the question of whether there was in fact a contract of service, the judge did not dispute that there was a contractual relationship but questioned whether that relationship had produced a contract of service or a contract for services, and his conclusion that the employer did not have the control over the employee's work which is characteristic of a contract of service is contained in the following paragraph:

> With regard to control of the appellant's work by the employer, Roberto Caron, the evidence provided facts that we must analyse in terms of control, because the recipient of the services exercises such control over the work of the provider of the services, thus constituting the subordinate relationship characteristic of a contract of service. However, the degree of control varies with the circumstances and the nature of the work to be done. The appellant's work consisted in logging, which obviously required experience, which the appellant had. On the other hand, the employer, Roberto Caron, who was a truck driver, admitted that neither he nor his mother had any experience in this field. Since neither the employer nor his mother had any experience, they could exercise no control whatever over the appellant's work. Even though he went to the worksite on Saturdays to inspect the work and even though his mother saw the logs cut by the appellant being hauled away, that did not prove that the required control was being exercised over the appellant's work. It can be said that there was a total absence of control by the employer, Roberto Caron, and his mother. Moreover, the employer stated that he gave the appellant full leeway in his work. He confined himself merely to checking on Saturdays at quitting time to see whether or not the work had been done. [Footnote: It was not in fact the mother but the daughter-in-law, the employer's wife, who was involved.]
>
> In my view, in considering the situation the judge relied on a concept of control which goes beyond that which is legally required to establish a master-servant relationship. If such a concept were to be accepted, a contract of service could never be created between an employer inexperienced in performing the work to be done and an employee whose occupation is the performance of such work. The facts as stated by the judge certainly do not provide any basis for saying that the employer could not determine the working hours, define the services to be provided, and decide what work was to be done from day to day, and the judge's conclusion cannot be supported otherwise.

[18] The evidence established the existence of an oral agreement between the parties. Although there was nothing formal about the agreement, the parties agreed upon the terms and conditions thereof. The case law has recognized that the intention expressed by the parties is important. That is what the Federal Court of Appeal held in *Wolf v. Canada,* [2002] F.C.J. No. 375 (QL), where Desjardins J.A. wrote as follows:

> 119 Taxpayers may arrange their affairs in such a lawful way as they wish. No one has suggested that Mr. Wolf or Canadair or Kirk-Mayer are not what they say they are or have arranged their affairs in such a way as to deceive the taxing authorities or anybody else. When a contract is genuinely entered into as a

> contract for services and is performed as such, the common intention of the parties is clear and that should be the end of the search. . . .

[19] In fact, Lamarre Proulx J. of this Court acknowledged the meaning of the principle enunciated in the case cited above when she wrote as follows in *Drapeau v. Canada (Minister of National Revenue — M.N.R.)*, [2006] T.C.J. No. 186, 2006 TCC 242:

> [TRANSLATION]
>
> [25] The principle recently laid down by the Federal Court of Appeal is that the common intention of the parties is an important factor in determining the nature of a contract. See *Wolf v. Canada*, [2002] 4 F.C. 396 and *Royal Winnipeg Ballet v. M.N.R.*, [2006] FCA 87 No.339. At the same time, the Federal Court of Appeal has always specified that the aim of this intention must not be to unlawfully circumvent the law. The Respondent is not alleging this here.
>
> [26] The intention of the parties, expressed clearly in the various documents adduced in support of this appeal, is obvious: they wished to have a contract of employment. The assertion by one party that the relationship during the last period was a contract of enterprise is contradicted by the documents signed by that very party.

[20] Although there was no written contract between the parties, their intention can be ascertained from their actions and from the documents adduced at the hearing, such as the Record of Employment, the Appellant's appointment book, the pay report and the parties' statements to the investigators.

[21] This Court recognized the merits of this reasoning in *Whitney Elizabeth Gleason v. M.N.R.*, (83-177(UI)), where Deputy Judge Millar wrote:

> A fifth test is to look at the nature of a contract and to ask what the parties intended.
>
> In this case, there was no document, and little to add … that during the material period source deductions were made, and this included Unemployment Insurance.
>
> From this one draws the inference from [*sic*] that if the proprietor put his mind to the subject at all, then he thought he was employing someone in a contract of service.

[22] Accordingly, I must find that the Appellant has succeeded in proving the existence of his contract of employment with the payor within the meaning of the *Civil Code of Québec*, and his contract of service within the meaning of paragraph 5(1)(*a*) of the Act.

[23] We must now analyze the evidence adduced in support of the Appellant's submission that his employment is not excluded under paragraph 5(2)(*a*) of the Act, which reads:

> 5(2) Insurable employment does not include
>
> (*a*) employment of a casual nature other than for the purpose of the employer's trade or business

[24] An examination of the case law will clarify the principles involved in a case such as this one and the way in which the courts have applied these principles in similar circumstances.

[25] In *Roussy v. Canada (Minister of National Revenue – M.N.R.,* [1992] F.C.J. No. 913 (QL) (C.A.), Linden J.A. of the Federal Court of Appeal wrote as follows:

> 5 The Supreme Court of Canada in Abrahams v. A/G Canada [1983], 1 S.C.R. 2, has shed some light on the meaning of casual in a case involving the different but related section 44(1)(c) (now s. 31(1)(c)) which is concerned with workers regularly engaged in some other occupation during a strike. Madam Justice Wilson contrasted regular employment with "casual" or "intermittent" employment, explaining that if you were "simply on call to report on such days as you were required", that would not be "regularly engaged". She observed that "regularly" required a "fixed pattern rather than a fixed period of employment". She concluded:
>
> > The required characteristic was not the duration of the hiring but the regularity of the work schedule. It is implicit in this interpretation that the employment need not be long term ... so long as it is regular during the period of its subsistence.
>
> 6 A further helpful decision is CEIC v. Roy, [1986] 1 F.C. 193, at p. 209, where Mr. Justice MacGuigan, following Madam Justice Wilson's reasons, explained that
>
> > ... the only regularity required of the employment depends on the nature of the work itself. In this sense, the durability required of

> seasonal employment is only seasonal duration, or of short-term employment, temporary duration. Of course, a period might be much too short to be accepted as genuine, as for example if it were "a day or two here and there with no firm commitment by either the claimant or the new employer" ...

Mr. Justice Pratte also commented, in Roy, at p. 197-8, that casual employment occurred when "a person is hired for so short a time that it is actually impossible to determine the regularity of the work schedule".

[26] In *Abrahams*, *supra*, the Supreme Court had to make a determination with respect to a job similar to the one in issue. The following specific circumstances were before the Court:

> Following the loss of his employment by reason of a stoppage of work attributable to a labour dispute, appellant worked three days a week during six months for another employer. He left that job for medical reasons and applied for unemployment insurance benefits. He was advised by the Unemployment Insurance Commission and on appeal by the Board of Referees that he was disentitled to benefits by virtue of s. 44(1) of the *Unemployment Insurance Act, 1971*. An Umpire set aside the Board's decision but the Federal Court of Appeal overturned the Umpire's decision. Hence this appeal to determine the proper interpretation of s. 44(1)(*c*) of the Act.

[27] The Supreme Court allowed the appeal, and held:

> The requirement of being "regularly engaged" in some other occupation is directed not to the duration of the hiring but to the regularity of the work schedule -- the word "regularly" in s. 44(1)(*c*) of the Act requiring a fixed pattern rather than a fixed period of employment. Consequently, the employment need not be long-term. It may be for the duration of the strike only so long as it is "regular" during the period of its subsistence.

[28] In *Roussy*, *supra*, Linden J.A. held as follows:

> 7 Hence, the duration of the time a person works is not conclusive in categorizing employment as casual; the length of time may be a factor to be considered, but a more important aspect is whether the employment is "ephemeral" or "transitory" or, if you will, unpredictable and unreliable. It must be impossible to determine its regularity. In other words, if someone is spasmodically called upon once in a while to do a bit of work for an indeterminate time, that may be considered to be casual work. If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one. The Tax Court

> Judge was, therefore, wrong to focus exclusively on the "built-in expiration known to both at the commencement", and on the need to provide "ongoing employment". That is not an automatic requirement.
>
> 8. Mr. Justice Marceau's statement in Belanger, quoted above, should not be taken to require an open-ended term of employment for such employment to be stable, continuous and relied upon; there can be stable, continuous employment that is relied upon which lasts only for a short period. As declared by Mr. Justice MacGuigan in Roy, *supra*, at p. 209, "all short-term employments cannot be excluded". If Parliament wished to exclude them, it could have enacted that temporary employment is excepted. It did not. Parliament obviously thought that it could protect the integrity of the Unemployment Insurance Act scheme, *inter alia*, by requiring a minimum number of qualifying weeks to be worked in order to be eligible for unemployment insurance benefits.

[29] The Appellant's employment in the case at bar was admittedly short, but, as the Supreme Court and the Federal Court of Appeal have held, this is but one factor to consider, and there is a more fundamental aspect. I reproduce the remarks of Linden J.A. in *Roussy*, *supra*:

> If, however, someone is hired to work specified hours for a definite period or on a particular project until it is completed, this is not casual, even if the period is a short one.

[30] Based on the facts of the instant case, I must find that the Appellant's employment was not casual employment within the meaning of paragraph 5(2)(*a*) of the Act. The Appellant worked under the payor's direction at all times, and did so in accordance with the payor's schedule, which coincided with the clinic's business hours. The duration of the Appellant's work was one week, or however long it would take for the project to be completed. This was a short period, but it was determined by the precise nature of the project. The agreement between the parties was precise and was not vague, transient or ephemeral.

[31] In light of the foregoing, I must find, firstly, that the Appellant was employed in insurable employment under the terms of an employment contract by virtue of the *Civil Code of Québec* and a contract of service within the meaning of paragraph 5(1)(*a*) of the Act; and, secondly, that the Appellant's employment was not excluded from insurable employment under paragraph 5(2)(*a)* of the Act.

[32] Consequently, the appeal is allowed and the Minister's decision is vacated.

Signed at Grand-Barachois, New Brunswick, this 7th day of July 2006.

"S.J. Savoie"

Savoie D. J.

Translation certified true
on this 6th day of July 2007.

Brian McCordick, Translator

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