[OFFICIAL ENGLISH TRANSLATION]

File: 2003-3093(EI)

BETWEEN:

ALMA-ROSE LANDRY,

Appellant,

And

REVENUE CANADA,

Respondent.

Appeal heard January 6, 2004, in Bathurst, New Brunswick

Before: The Honourable Judge François Angers

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Claude Lamoureux

JUDGMENT

The appeal is dismissed and the decision rendered by the Minister of National Revenue is upheld in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 13th day of February 2004.

"François Angers"

Angers J.

Certified true translation
Manon Boucher

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Reference: 2004TCC85
Date: 20040213
File: 2003-3093(EI)

BETWEEN:

ALMA-ROSE LANDRY,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal of a decision by the Minister of National Revenue (the "Minister") that the Appellant's employment between November 4 and 30, 2002, with Savoie Export Ltd. (the "Payer"), is not insurable employment within the meaning of the *Employment Insurance Act* (the "Act") since it was not a position held under an employment contract.

[2] In making its decision, the Respondent relied on the following assumptions, which were either admitted or denied by the Appellant as indicated below:

(a) the Payer purchased Christmas wreaths ("wreaths" made by hand by various people including the Appellant; (admitted)

(b) the Payer supplied the Appellant with the labels, wire and rings necessary to make the wreaths; (admitted)

(c) the Appellant supplied the branches used to make the wreaths she sold to the Payer; (admitted)

(d) the Payer paid the Appellant $27 a dozen for the 10 inch wreaths and $29 a dozen for the 12 inch wreaths; (admitted)

(e) the Payer's invoices show the Appellant's purchase of wreaths on the following dates for the amounts shown: (admitted)

invoice	date	Quantity	total
28	November 9, 2002	18 doz. @ $27	$486.00
03	November 16	19 doz. @ $29	$551.00
30	November 23	18 doz. @ $29	$522.00
07	November 30	19 doz. @ $29	$551.00
total		74 doz.	$2110.00

(f) the Payer paid less per dozen when the workers did not supply the branches; (admitted)

(g) the Appellant was responsible for cutting her own branches on land of her choosing and for transporting them to her home; (admitted)

(h) the Appellant made the wreaths at her home; (admitted)

(i) the Payer did not monitor the Appellant's production volume; (denied)

(j) the Payer did not monitor the Appellant's working hours; (denied)

(k) it took the Appellant 10 to 15 minutes to make a wreath; (admitted)

(l) neither the Payer nor the Appellant knew how many hours the Appellant worked; (denied)

(m) the Appellant received a record of employment from the Payer showing 220 hours and $2110.00;

(n) the number of hours shown on the Appellant's record of employment is an estimate of the number of hours worked by the Appellant; (admitted)

(o) the Payer did not supervise the Appellant; and (denied)

(p) the Appellant had the choice to increase her earnings by supplying the branches to the Payer or not. (denied)

[3] On November 4, 2002, the Appellant signed an "employment contract" with the Payer in which she undertook to make Christmas wreaths. "Employment contract" is marked on the contract itself. The duration of employment is not indicated, but the contract does stipulate that the Payer reserves the right to terminate the contract at any time without advance notice. The Appellant undertook to provide a product of acceptable quality and, under the terms of the contract, she reported to a supervisor who was to visit her at her home. The Appellant also agreed to give the supervisor access to her place of work.

[4] The hours of work are not specified in the contract, but the Appellant agreed to produce 3 or 4 wreaths for each hour of work indicated by the Payer. The rate of pay was different if the Appellant did not supply the branches, but this did in fact not happen. The other terms are indicated in the excerpt from the Response to the Notice of Appeal reproduced above. It should be noted that the Appellant used her own scissors to make the wreaths.

[5] A supervisor, Jeannine LeBreton, visited the Appellant three times per week, for about thirty minutes each time. Ms. LeBreton counted the wreaths the Appellant had made and checked the quality of the product. During her visits, she brought the Appellant the necessary supplies to make the wreaths, except for the branches. The approximate number of hours worked by the Appellant was estimated based on the number of wreaths made. The actual hours of work were not recorded by the Appellant or the Payer.

[6] There is no evidence of the Appellant's work schedule but, according to her testimony, she worked seven days a week. She spent two days gathering branches and the five remaining days making the wreaths. Her rate of pay for a dozen wreaths was higher because she supplied the branches herself, but the time she spent gathering branches was not figured into the number of wreaths made per hour.

[7] The Appellant's spouse and the Payer signed a rental contract for a garage. This is the garage where the Appellant did her work during the period in dispute. The Payer allegedly rented the garage in question for $50 for the wreath-making season. Yet this evidence contradicts the "employment contract," which notes in the preamble that the Payer does not have large enough premises for the Appellant

to make wreaths and that the Appellant agrees to do her work at home. This raises the question why it was necessary for the Payer to rent a garage.

[8] The Federal Court of Appeal in *Wiebe Door Services Ltd. v. Minister of National Revenue*, [1986] 3 F.C. 553, set out a useful guide to differentiate an "employment contract" from a "business contract." The Supreme Court of Canada, in decision *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 R.C.S. 983, endorsed this guide, summarizing the state of the law as follows in paragraphs 47 and 48:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[9] In *Charbonneau v. Canada*, [1996] F.C.A. no 1337 (Q.L.), Marceau J.A. of the Federal Court of Appeal reminds us that the factors in question are generally helpful points of reference but that they should not be used to the extent of jeopardizing the ultimate purpose of the exercise, which is to ascertain the overall relationship between the parties.

[10] In this case, the Appellant and Payer obviously went to great lengths to establish an "employment contract" between them in accordance with the criteria usually required for such contracts. The "employment contract" filed as evidence and the rental of the garage are the main factors supporting the Appellant's arguments. The Court must nevertheless consider all the facts and determine the exact nature of the relationship between the Appellant and the Payer.

[11] The “employment contract” signed by the Appellant and the Payer stipulates that 3 or 4 wreaths are to be made for each hour of work indicated by the Payer. The contract does not however indicate the number of hours the Appellant must work for the Payer per day or per week. The Appellant’s revenues thus depended on her desire to make 3 or 4 wreaths per hour at a rate of $27 per dozen wreaths, representing an average rate of three hours of work.

[12] As to the rental contract, as I already pointed out, it contradicts the preamble of the “employment contract.” In a true rental contract, the Payer would be the owner of the premises where the Appellant works and the Appellant’s consent to perform the work at home would not be required in the “employment contract.” The rental contract filed as evidence does not indicate who was responsible for paying the electrical and heating bills for the space. This leads us to question the purpose of the rental contract. In any case, even though the parties choose to present their relationship as being governed by an “employment contract,” that does not prevent this Court from examining this relationship in light of criteria established in case law. (See *Standing v. Canada*, [1992] F.C.J. no 890 (F.C.A.).)

[13] The supervisor’s visits three times per week for thirty minutes each time do not in this case create a relationship of subordination. The purpose of the visits was really to check the quantity and quality of the product, or in other words to monitor the result and not the Appellant herself. During these visits, the supervisor also provided supplies to the Appellant and collected the finished product that was deemed acceptable. Given the frequency and duration of these visits, they are far from sufficient to constitute appropriate supervision.

[14] One must also consider who was monitoring the Appellant when she was gathering branches. The time spent gathering branches was not recorded. In fact, since the Appellant was paid more for her wreaths made with branches she supplied herself, she was in a sense paid for the sale of her branches. This sale was included in the pay the Appellant received such that it was not pay for services rendered but rather payment for a product sold. This is contrary to the provisions of the Act, especially paragraph 5(1)*a*).

[15] In a case similar to the one before us, Tremblay J. of our Court, in *Denis v. Canada*, [1994] A.C.I. no 32 (Q.L.) analyzed the criterion of opportunity for profit and risk of loss as follows:

> [TRANSLATION:]

> 18 This criterion is based on the principle that, in an employer-employee relationship, the employee does not incur any expenses in performing his work, does not risk anything financially and does not have any opportunity to reap a profit. His only financial asset is his salary.
>
> 19 In the instant case, I wonder what would have happened to the salary, if it is indeed salary, if the Appellant, reported to his Payer that for one reason or another (accident, theft) his 200 wreaths had been destroyed or stolen. Would she have been paid nevertheless?
>
> 20 If not, I see this as an indication that this person is not an employee but instead an independent worker. If the answer is yes, I would conclude the opposite. No evidence in this regard was submitted however.
>
> 21 Moreover, if the Payer does not pay for a defective wreath, I doubt very much that he would pay for the work done on wreaths that were destroyed, even if it is not the Appellant's fault.

[16] In my opinion, Judge Tremblay's analysis is applicable to this case.

[17] The ownership of tools does not appear to be a decisive factor in this case. The Appellant's work was part of the Payer's business, which sold wreaths. This criterion supports the Appellant's position.

[18] It is incumbent on the Appellant to demonstrate on the balance of probabilities that she was truly bound to the Payer by an employment contract. Given all of the evidence and for the reasons cited above, I conclude that the balance of the evidence is not in the Appellant's favour. She was therefore not bound to the Payer by a true employment contract.

[19] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 13th day of February 2004.

"François Angers"

Angers J.

Certified true translation

Manon Boucher