

Docket: 1999-4721(EI)

BETWEEN:

JEAN-GUY GRÉGOIRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on January 20, 2003, at Sept-Îles, Quebec

Before: the Honourable Deputy Judge J.F. Somers

Appearances

Counsel for the Appellant:

M<sup>e</sup> Raynald Bernatchez

Counsel for the Respondent: M<sup>e</sup> Alain Gareau

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JUDGMENT

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

Signed at Ottawa, Canada, this 4th day of March 2003.

“J.F. Somers”

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D.J.T.C.C.

Citation: 2003TCC54

Date: 20030304

Docket: 1999-4721(EI)

BETWEEN:

JEAN-GUY GRÉGOIRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

**REASONS FOR JUDGMENT**

**Deputy Judge Somers, T.C.C.**

[1] This appeal was heard at Sept-Îles, Quebec, on January 20, 2003.

[2] The appellant appeals from the decision of the Minister of National Revenue, (the “Minister”) according to which the employment held during the period at issue, namely, from December 8, 1997, to January 18, 1998, when the appellant was employed with Julien Régis, the payer, was not insurable because it did not meet the requirements of a contract of service.

[3] Subsection 5(1) of the *Employment Insurance Act* reads in part as follows:

5.(1) Subject to subsection (2), insurable employment is

(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;

[...]

[4] The Minister relied, in reaching his decision, on the following facts, which were admitted or denied:

[Translation]

- (a) The payer was the sole proprietor of a welding shop that he had operated under the name of “Ti-Kay Sikuman” for four or five years; (admitted)
- (b) The payer, a welder by trade, did electrical and oxy-acetylene welding; (admitted)
- (c) The payer’s business hours were from 8:00 a.m. to 8:00 p.m., six days a week; (denied)
- (d) There were always one or two experienced welders on site: the payer and Yvan Ambroise; (denied)
- (e) The payer’s business was operated throughout the year; (admitted)

- (f) The payer claimed that he regularly hired workers without welding experience to help them obtain their “unemployment stamps”; (denied)
- (g) During the period at issue, the payer hired the appellant to do painting and clean up in his shop; (denied)
- (h) The appellant had no experience to work as a welder in the payer’s shop; he said he did some welding under the payer’s supervision; (denied)
- (i) The appellant and the payer had no idea of the number of hours actually worked by the appellant; he came to work at all hours and left when he wanted; (denied)
- (j) The appellant had allegedly received \$27 an hour for the work he did at the payer’s shop; he said he was paid in cash and there was no evidence of payment of the remuneration; (denied)
- (k) The appellant was a friend of the payer and he often performed services for the payer without remuneration (before and after the period at issue); (admitted)

- (l) The appellant said he had been laid off by the payer on January 18, 1998, for lack of work, whereas the payer hired a new worker on January 19, 1998; (denied)
  
- (m) The record of employment submitted by the appellant does not reflect reality with regard to the period of work and the remuneration paid; (denied)
  
- (n) There was an arrangement between the parties for the sole purpose of enabling the appellant to qualify for employment insurance benefits; (denied).

[4] The burden of proof rests with the appellant. He must establish, on a preponderance of the evidence, that the Minister's decision is unfounded in fact and in law. Each case must be decided on its own merits.

[5] The payer was the sole owner of a welding shop that he had operated for five years all year long under the name of "Ti-Kay Sikuman.

[6] According to the payer, the shop was open six or seven days a week and from 8:00 a.m. to midnight, but generally from 8:00 a.m. to 5:00 p.m.

[7] During the period at issue, the payer hired the appellant. The appellant did some welding although he was not a professional welder.

[8] The appellant cut pieces and the payer assembled them. Sometimes, according to the payer, the appellant did some welding when the work was not complicated.

[9] The payer hired the appellant at the latter's request; the payer had known the appellant since 1970 and had confidence in him. In his testimony, the payer denied hiring the appellant so he could get "employment insurance stamps".

[10] The payer said he did not remember the days when the appellant worked for him and did not adduce any document, such as a payroll journal or business figure, to prove the hours worked or the financial ability to pay a worker who was not a professional welder and whose salary was \$20.00 to \$22.00 an hour. The appellant, Jean-Guy Grégoire, said that he earned \$26.00 to \$27.00 an hour. Yvan Ambroise, a welder, was paid \$17.00 to \$18.00 an hour. The payer admitted that Yvan Ambroise had more skill than the appellant did.



[11] On cross-examination, the payer stated that business slowed down in the winter; business hours were accordingly from 8:00 a.m. to 5:00 p.m. instead.

[12] Counsel for the respondent showed the payer a statutory declaration that he signed on January 6, 1999, (Exhibit I-1). The payer acknowledged his signature on it and added [Translation] “ ...if I signed it, it’s because it’s true.”

[13] The payer’s statutory declaration on the subject of the appellant’s employment reads in part as follows:

[Translation]

Q. For what reasons did you hire Mr. Grégoire for 504 hours between 08/12/97 and 18/01/98?

A. He came with me to Natashquan because I had a contract to make a big cross.

Q. How was he hired?

A. He asked me if I had some work and I had the contract at Natashquan so I hired him.

Q. When his employment ended, did Mr. Grégoire tell you that he wanted to stop working?

A. It's always the same with Indians, and he's the same, he had made his unemployment and he didn't want to continue any longer.

Q. What were his duties?

A. He welded a little but he mainly did painting and clean up in the shop.

Q. What was Mr. Grégoire's schedule?

A. His schedule was, like, mixed, he would come any time and leave, I didn't keep track of his hours.

Q. What was Mr. Grégoire's salary?

A. I thought he earned \$26.00 per hour but the separation says \$27.04, so that's his salary.

Q. What justified this salary?

A. Before I hired him, he had often helped me out and I didn't pay him so I gave him that salary to compensate him. We're friends and he often comes and helps me without being paid; he comes by the shop every week.

Q. How was Mr. Grégoire paid, by cheque, in cash, or what?

A. Sometimes by cheque but more often than not he was paid in cash.

Q. Why did you indicate that the reason for the separation was a lack of work while you hired another welder on January 19, 1998?

A. It's because if I had told the accountant to put the real reason that he didn't want to work anymore he would have trouble with his unemployment. I knew that it wasn't the real reason and that I was giving the unemployment false information.

Q. What agreement did you make with Mr. Grégoire to give him an ROE with a phoney reason for separation from employment?

A. I hadn't discussed this with him but I knew that if I marked that he had left he would have problems with his unemployment.

Q. Do you have anything to add concerning Jean-Guy Grégoire?

A. He asked me for work but I said no because it cost me a lot this summer to pay all the people I hired so they could make their stamps.

[14] At the hearing, the payer admitted that he did not know the appellant's work schedule. He added that the appellant arrived at the shop [Translation] "early" but did not know whether he worked eight hours a day.

[15] Although he did not know the number of hours and days worked by the appellant, the payer signed the appellant's record of employment which the accountant had prepared according to his instructions. The record of employment

indicates that the appellant was a welder, worked for 504 hours and received remuneration of \$13,628.16 during the period at issue.

[16] A record of employment (Exhibit I-3) signed by the payer indicates that a certain Jérôme Kevin began to work for the payer as a welder on January 19, 1998, that is, the day after the end of the appellant's period of employment. During his testimony, the payer stated that the appellant had ceased to work at the shop because there was less work.

[17] The appellant, Jean-Guy Grégoire, testified that he was a truck driver and not a welder. He said that he worked the hours indicated on the record of employment.

[18] He said he had worked with a welding gun to cut pieces, according to the instructions given by the payer, and had to polish the "snow buckets".

[19] The appellant stated that he worked flexible hours, sometimes from 8:00 a.m. to 5:00 p.m. and sometimes until 2:00 a.m. On occasion, he worked 10 to 12 hours a day. However, his hours of work were not recorded.

[20] Although he was not a professional welder, he said he acquired a certain experience that enabled him to do a little welding. During his employment with the payer he did painting and clean up, which represented 10% of the work.

[21] The appellant stated that he worked for the payer without being paid.

[22] On cross-examination, he stated that he had repaired a “snow bucket” and had redone two of them in the presence of the payer and sometimes Yvan Ambroise.

[23] The appellant stated that he marked down his hours and that he checked whether the payer did the same. However, the payer did not record the hours and when he testified he said that he did not know the appellant’s hours of work.

[24] The payer stated that the shop was generally open from 8:00 a.m. to 5:00 p.m. every day and sometimes in the evening and also at night, which contradicts the appellant’s testimony that he worked 84 hours a week, that is, from 10 to 12 hours a day.

[25] The business did not flourish in the winter, and accordingly business hours were from 8:00 a.m. to 5:00 p.m. instead. If there was less work, why did the appellant then work from 10 to 12 hours a day for a total of 84 hours a week? The payer said that the appellant worked at times that the latter determined himself and he did not verify his hours.

[26] Some other contradictions in the evidence: the payer maintained in his statutory declaration that the appellant worked doing painting and cleaning. The appellant testified that painting and cleaning represented only 10% of his work. It must therefore be concluded that the rest of the time he did welding. This is not credible; the appellant is not a professional welder. The appellant stated that he did only minor welding.

[27] The payer's version is different with respect to certain facts in his statutory declaration and in his testimony at the hearing. The testimony does not reflect the reality. The payer said he ended the appellant's employment because of a lack of work whereas the next day the payer hired another welder. The burden of proof lay with the appellant; no document was adduced to confirm what the payer or the appellant said.

[28] In *Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124, Judge Tardif of this Court, in his decision dated February 25, 1999, wrote:

I nonetheless believe that the work done by Mr. Laverdière during the said period in 1992 was not performed under a genuine contract of service, inter alia for the following reasons. First of all, only a genuine contract of employment can meet the requirements for being characterized as a contract of service; a genuine contract of service must have certain essential components, including the performance of work; that performance must come under the authority of the person paying the remuneration, which remuneration must be based on the quantity and quality of the work done.

Any agreement or arrangement setting out terms for the payment of remuneration based not on the time or the period during which the paid work is performed but on other objectives, such as taking advantage of the Act's provisions, is not in the nature of a contract of service.

This assessment applies to all the periods at issue involving the two appellants. The terms and conditions of a genuine contract of service must centre on the work to be performed, on the existence of a mechanism for controlling the performance of the work and, finally, on the payment of remuneration that basically corresponds to the quality and quantity of the work done.



[...]

This is the case with any agreement or arrangement whose purpose and object is to spread out or accumulate the remuneration owed or that will be owed so as to take advantage of the Act's provisions. There can be no contract of service where there is any planning or agreement that disguises or distorts the facts concerning remuneration in order to derive the greatest possible benefit from the Act.

[29] The evidence showed that there was an arrangement between the appellant and the payer so that the latter could receive the benefits of the *Employment Insurance Act*.

[30] The appellant was not in insurable employment within the meaning of paragraph 5(1)(a) of the *Act* because there was no genuine contract of service.

[31] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 4th day of March 2003.

“J.F. Somers”

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D.J.T.C.C.

RÉFÉRENCE : 2003CCI54

N° DU DOSSIER DE LA COUR : 1999-4721(EI)

INTITULÉ DE LA CAUSE : Jean-Guy Grégoire et M.R.N.

LIEU DE L'AUDIENCE : Sept-Îles (Québec)

DATE DE L'AUDIENCE : Le 20 janvier 2003

MOTIFS DE JUGEMENT PAR : l'honorable juge suppléant J.F. Somers

DATE DU JUGEMENT : le 4 mars 2003

COMPARUTIONS :

Pour the appellant : M<sup>e</sup> Raynald Bernatchez

Pour l'intimé : M<sup>e</sup> Alain Gareau

AVOCAT INSCRIT AU DOSSIER:

Pour the appellant :

Nom : M<sup>e</sup> Raynald Bernatchez

Étude : Sept-Iles (Québec)

Pour l'intimé : Morris Rosenberg  
Sous-procureur général du Canada  
Ottawa, Canada