

Docket: 2002-3531(EI)

BETWEEN:

JEAN-MATHIEU ROY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 8, 2003, at Québec, Quebec

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

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

Signed at Ottawa, Canada, this 25th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator

Citation: 2003TCC401
Date: 20030625
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REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard at Québec, Quebec, on May 8, 2003.

[2] The appellant institutes an appeal from the decision of the Minister of National Revenue (the "Minister") according to which the employment held with 9099-4047 Québec Inc., the payer, during the period in issue, from January 1 to July 21, 2001, was not insurable because it did not meet the requirements of a contract of service; there was no employer-employee relationship between the appellant and the payer.

[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 burden of proof is on the appellant. He has to show on a preponderance of proof that the Minister's decision is unfounded in fact and in law. Each case stands on its own merits.

[5] In making his decision, the Minister relied on the following assumptions of fact, which were admitted or denied by the appellant:

[TRANSLATION]

- (a) the payer was incorporated on January 1, 2001; (admitted)
- (b) the payer operated a Web site creation business; (denied)
- (c) the payer operated a business under the trade name "Mindlink Interactif"; (admitted)
- (d) the shareholders of the payer were: (admitted)
 - Julien Saradet 1 voting share,
 - Hugues Naud 1 voting share,
 - the appellant 1 voting share;
- (e) the shareholders paid nothing for their shares and made no financial investment in the payer; (denied)
- (f) no meeting of shareholders or directors was entered in the payer's records; (denied)
- (g) the payer's monthly income was as follows: (admitted)

January 2001	\$15,451.33
February 2001	\$5,154.98
March 2001	\$13,816.45
April 2001	\$10,221.70
May 2001	\$13,244.92
June 2001	\$7,368.10
July 2001	\$7,451.17
August 2001	\$6,554.77
September 2001	\$6,857.15

October 2001	\$10,961.84
November 2001	\$13,467.06
December 2001	\$5,324.92
January 2002	\$5,293.18
February 2002	\$2,435.56
March 2002	\$4,067.89

- (h) the three shareholders were the payer's only employees; (admitted)
- (i) the appellant was responsible for marketing; (denied)
- (j) the appellant's duties were to sell advertising for the sites once they were created; (denied)
- (k) Hugues Naud was the Web page creator; (denied)
- (l) Hugues Naud does not appear in the payer's payroll journal before June 2001; (admitted)
- (m) Julien Saradet was also an advertising salesman; (denied)
- (n) each of the shareholders worked at home with his own personal computer; (admitted)
- (o) the appellant had an uncontrolled, variable schedule; (denied)
- (p) according to the payer's payroll journal, only the appellant worked in January 2001, for a total of only five hours; (admitted)
- (q) according to the payroll journal, there were no employees in August 2001; (admitted)
- (r) on May 16, 2002, Hugues Naud stated in a declaration to an agent of the respondent that each of the three shareholders had volunteered time in the business; (denied)
- (s) on August 9, 2001, the payer issued a record of employment to the appellant for the period starting on January 1 and ending on July 21, 2001, which showed 1,072.30 insurable hours and total insurable earnings of \$29,662.00; (admitted)
- (t) the record of employment is not consistent with the actual situation with regard to the hours and periods actually worked by the appellant. (denied)

[6] The appellant alone testified in support of his appeal. The payer was incorporated on January 1, 2001, and operated what the appellant called a Web site creation business; 25 percent of the time was devoted to creation and 75 percent to marketing.

[7] Three to six months before the business was incorporated, the principals operated under the name "Mindlink Interactif". Upon incorporation of the payer, the shareholders were Julien Saradet, Hugues Naud and the appellant, each holding one voting share.

[8] The appellant admitted that the shareholders had made no financial investment in the business, but that the investment was made instead in time, which, he said, had been considerable.

[9] The appellant explained that he had held a number of shareholder meetings, one or two a week, which were not entered in the payer's records.

[10] The three shareholders were the payer's only employees. Their efforts generated monthly income as indicated in subparagraph 5(g) of the Reply to the Notice of Appeal.

[11] The appellant mentioned that he was responsible for marketing and creation and that he was also a programmer. The appellant planned future projects and shareholder meetings. He stated that there was no advertising, but that he had started up the sites created.

[12] Hugues Naud was a graphics designer and the appellant was a programmer together with Julien Saradet. Hugues Naud does not appear in the payer's payroll journal prior to June 2001. Each of the shareholders worked from his home with his own computer.

[13] The appellant testified that his hours of work had varied based on his computer engineering courses, which were given in the afternoons; he mainly worked in the mornings and evenings. He added that he had been controlled by Julien Saradet since they had worked together.

[14] On August 9, 2001, the payer issued a record of employment to the appellant (Exhibit I-2), which was signed by accountant Eric Morin for the period in issue and which showed 1,072.30 insurable hours and total insurable earnings of \$29,662.00.

[15] The appellant explained that, in his opinion, attending shareholder meetings was not real work, but rather volunteer work.

[16] The facts stated above are the evidence brought by the appellant.

[17] In cross-examination, the appellant explained that he had taken 15 to 19 hours of computer engineering courses a week until the end of April 2001. Those courses included team lab periods and five to 10 hours of study in addition to preparation.

[18] He added that the hours he allocated to his work for the payer had affected his studies, as a result of which he had failed his academic year.

[19] The appellant and Julien Saradet lived in the Québec region, whereas Hugues Naud lived in the Montréal area.

[20] The payer created adult Web sites and received a percentage of the contract amounts or a lump sum amount.

[21] Jacques Dubé, an investigator, met the appellant on October 23, 2001, and obtained a statutory declaration (Exhibit I-1). In that declaration, the appellant admitted that his salary varied with the payer's income and that he was paid by cheque every two weeks.

[22] The appellant told the investigator that the salary was determined by the person who obtained the contract with a third party: the income was thus shared with the person who obtained the contract and the person who performed the contract. However, it was the person who obtained the contract who determined how the amounts would be shared.

[23] According to the payroll record, which was filed as Exhibit I-3, no salary was paid for January 2001, whereas the record of employment filed as Exhibit I-2 shows that the appellant's first working day was January 1, 2001. Hours of work were entered in the payroll record for all months except January 2001.

[24] The hours worked, amounts paid and remuneration rate in the payroll record vary. According to the appellant's declaration, some of the amounts entered in that record are not related to salary. He also admitted that no one controlled the hours of work.

[25] Denis Hamel, an appeals officer with the Canada Customs and Revenue Agency, testified at the hearing and filed his report as Exhibit I-4. The officer had had telephone conversations with Eric Morin, Julien Saradet and Hugues Naud.

[26] He stated that the accountant, Eric Morin, had told him that no salary had been paid in January 2001 because there was no income. He said that the shareholders had done some unpaid work. He added that the shareholders' salaries had been determined based on the income generated by the payer.

[27] It should be noted that the appellant's last day of work was July 21, 2001, whereas the payer continued receiving income after that date.

[28] According to the accountant, the income was as stated in subparagraph 5(g) of the Reply to the Notice of Appeal.

[29] The workers, including the appellant, could be absent without permission and worked from their homes. The appellant and Julien Saradet lived in the Québec region, Hugues Naud in the Montréal area; control was more a control of result. The accountant said there were no administrative office records.

[30] The appeals officer spoke to Julien Saradet on May 15, 2002, and the latter told him that the three workers had worked together in 2000.

[31] Julien Saradet declared that he had worked 35 to 40 hours a week and had occasionally worked overtime. A normal working day started at 9:00 or 10:00 a.m. and ended between 5:00 and 6:00 p.m., Monday to Friday. The remuneration was decided upon based on what each person could generate in the way of revenue.

[32] Julien Saradet told the appeals officer that he might have worked on a volunteer basis in early January 2001.

[33] The appeals officer referred Julien Saradet to the appellant's statutory declaration, which stated that the income went to the person who had obtained the contract, whereas he, Julien Saradet, asserted that the appellant "moved things along faster, so his earnings were higher than his".

[34] He noted, among other things, that Hugues Naud had told him in conversation, "It isn't important to know whether a person works from what time to what time. The important thing is to try to start up the company."

[35] Control is an essential test in determining a relationship of subordination. The degree of control varies with the circumstances.

[36] In the case at bar, the head office existed in form alone. There were no administrative office meetings to control the work performed.

[37] The appellant's hours of work were neither determined nor controlled. None of the workers was aware of the hours worked by the others. Furthermore, the salary was determined by the income generated by the payer and therefore varied. The person who obtained the contract with the third party determined how the amounts obtained would be shared with the others.

[38] There was no relationship of subordination; there was more a control of result.

[39] Each of the workers worked from his home, with his own computer; the tools therefore belonged to each worker.

[40] The workers had a chance of profit: more contracts meant more income. Moreover, the evidence showed that the appellant had received more income than the others because he worked more quickly.

[41] As to integration into the company's operations, it appears that each worker acted independently of the others and of the company.

[42] For the aforementioned reasons, the appellant did not hold insurable employment during the period in issue, since that employment did not meet the requirements of a genuine contract of service.

[43] The appeal is dismissed.

Signed at Ottawa, Canada, this 25th day of June 2003.

"J.F. Somers"

D.J.T.C.C.

Translation certified true
on this 3rd day of February 2004.

John March, Translator