Docket: 2006-3151(EI)

BETWEEN:

KAVIAR INTERNATIONAL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ÉDITH GAGNÉ,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 2, 2007, at Montréal, Quebec

Before: The Honourable Justice Réal Favreau

Appearances:

Agent for the Appellant:	Marie-Josée Bourgeois
Counsel for the Respondent:	Christina Ham
For the Intervener:	The Intervener herself

JUDGMENT

The appeal from the decision of the Minister of National Revenue that the Intervener Édith Gagné was employed in insurable employment by the Appellant from September 11, 2004, to August 2, 2005, within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, is dismissed, without costs, in accordance with the attached Reasons for Judgment.

signed at Montréal, Quebec, this 9th day of October 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 1st day of November 2007.

Brian McCordick, Translator

Citation: 2007TCC589
Date: 20071009
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Appellant,

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REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a decision made by the Minister of National Revenue ("the Minister") on September 11, 2006, concerning the insurability of Edith Gagné's employment with the Appellant from September 11, 2004, to August 2, 2005 ("the period in issue").

[2] Specifically, the Minister determined that, during the period in issue, Ms. Gagné was employed by the Appellant in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23, as amended ("the Act").

The facts

[3] The Appellant, which incorporated on September 27, 1995, operated a cat and dog food sales and distribution business, and, for three years, a grooming service.

[4] Manon Davis Bourgeois was the Appellant's sole shareholder from the moment of its incorporation.

[5] From December 2003 to April 2004, prior to being hired by the Appellant, Ms. Gagné successfully completed a grooming course given by the Appellant. This $2,500 course included a clipping and grooming kit, which she obtained on January 8, 2004.

[6] The Appellant hired Ms. Gagné under an oral contract to do the dog and cat grooming, and, occasionally, to give grooming classes. The exact hire date was not specified.

[7] During the period in issue, Ms. Gagné also operated a pet grooming business called Salon de toilettage Beauté Animal. The business's registration number with the Registraire des entreprises was No. 2262483383. Ms. Gagné rendered her services from her home in Sainte-Sabine.

[8] Ms. Gagné also rendered her services at the Appellant's place of business, which was located at 110 Route 104, in Saint-Jean-sur-Richelieu.

[9] Ms. Gagné generally worked Tuesday to Saturday from 10 a.m. to 5:00 or 5:30 p.m., and sometimes stayed at work until 7 p.m. on Thursdays. Her hours of work depended on the appointments set by the Appellant. She told the Appellant when she was available, and the Appellant scheduled the appointments with her customers.

[10] Ms. Gagné had to report for the appointments set up by the Appellant even if there was only one customer to see. She had to notify the Appellant if she was unable to show up for an appointment, in which case the appointment had to be rescheduled or taken care of by someone else. She had to personally perform the services for the Appellant and could not choose someone to replace her.

[11] Occasionally, and this happened mostly on weekends, Ms. Gagné could enlist the help of her spouse in the performance of her work, but he was not paid by the Appellant.

[12] When Ms. Gagné reported for work, the Appellant gave her a card or file with the name of the pet and the instructions concerning the cut or the services to be rendered.

[13] The customers' names were generally not disclosed to Ms. Gagné because the customers were the Appellant's, not Ms. Gagné's.

[14] Ms. Gagné reported orally to the Appellant regarding the behaviour of the pet that she had groomed, but this was apparently not mandatory.

[15] If she made a mistake, Ms. Gagné had to redo the work at her expense, but the Appellant was liable to its customers for mistakes. In fact, on a few occasions, the Appellant had to obtain veterinary care for injuries that Ms. Gagné had caused to a pet. The veterinary bills were paid by the Appellant and were not deducted from the remuneration paid to Ms. Gagné because she was unable to bear those costs.

[16] The Appellant supplied the work premises, table, shampoo and wraps to Ms. Gagné, and Ms. Gagné supplied her personal kit containing her razor, scissors, combs and brush. Occasionally, she used the Appellant's razor, dryer and blades.

[17] Ms. Gagné's remuneration was based on her production; she received 50% of the price that the Appellant billed its customers.

[18] Ms. Gagné was also entitled to $1,000 per student in respect of the grooming courses that she taught on the Appellant's behalf.

[19] The evidence is that Ms. Gagné received fixed remuneration of $400 per week regardless of how much she actually earned by virtue of her production, and this amount even continued to be paid if she was sick for a week. The Appellant kept a computerized record of the cumulative amounts earned by Ms. Gagné.

[20] Ms. Gagné's work was supervised and the quality of her work was controlled by the Appellant in problematic cases in order to safeguard the Appellant's reputation and its customers.

The relevant legislation

[21] Paragraph 5(1)(*a*) of the Act defines the term "insurable employment" 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;

[22] The term "contract of service" used in paragraph 5(1)(*a*) of the Act is outdated because the *Civil Code of Québec*, S.Q. 1991, c. 64 (C.C.Q.) now uses the term "contract of employment" in article 2085 C.C.Q. and "contract of enterprise or for services" in article 2098 C.C.Q. Those provisions read:

> 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.
>
> …
>
> 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.

[23] Article 2099 C.C.Q. is also relevant because it sets out the characteristics of a contractor or provider of services. The article reads:

> 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.

[24] In Quebec civil law, the three constituent elements of a contract of employment are the prestation of work, remuneration, and a relationship of subordination.

Analysis

[25] Marie-Josée Bourgeois, the Appellant's director of marketing, testified, raising the following points to show that Ms. Gagné was not employed by the Appellant:

(a) the Appellant did not supervise Ms. Gagné's work;

(b) Ms. Gagné operated a similar business from her home and covered her own cell phone, travel and advertising costs;

(c) Ms. Gagné used her clipping equipment to carry out her work;

(d) Ms. Gagné worked irregular hours. She notified the Appellant of her availability in advance and the Appellant set up the appointments with its customers;

(e) Ms. Gagné could turn down work if she was too tired. The Appellant had other people to call upon for pet grooming, including Chantale Florent, who worked part-time, especially weekdays, and Chantal Grimard, a full-time employee who mostly looked after large dogs;

(f) Ms. Gagné sometimes enlisted the help of her spouse; and

(g) no source deductions were made, and Ms. Gagné was entitled to no benefits whatsoever.

[26] A transaction log, tendered as Exhibit A-1, refers to certain agreements with Ms. Gagné. The terms of these agreements are succinctly described in handwritten notes at the beginning of a set of weekly accounting sheets for the period of January 1 to August 2, 2005, countersigned by Ms. Gagné.

[27] Ms. Gagné testified as well. She says that she worked at the Appellant's place of business almost every day and groomed several dogs in a day, as the Appellant's time log confirms. Ms. Gagné says that she worked very little from her home during the period in issue because she had little time, and she says that she registered her business in order to be able to purchase pet grooming products.

[28] Ms. Gagné says that she never refused to groom a pet and that she had to report to work even if there was just one dog to groom.

[29] Ms. Gagné confirms that she had very little contact with the dog owners. The Appellant handed her a work sheet for each dog to be groomed, and, when the job was finished, a representative of the Appellant came to get the dog in order to show him to the owner. If the work was not satisfactory, Ms. Gagné had to make the necessary corrections.

[30] Ms. Gagné claims that the Appellant pressured her to work more quickly.

[31] She says that she was dismissed because she claimed $4,800 from the Appellant for unpaid hours of work. She noted significant discrepancies in the Appellant's time log, making reference to Exhibits I-1 and I-2.

[32] With respect to the documents tendered as Exhibit A-1, Ms. Gagné said that there were no handwritten notes on them when she signed them. She confirmed that she never saw them and that she never discussed them with the Appellant's representatives.

[33] Counsel for the Respondent submits that there was a relationship of subordination between the Appellant and Ms. Gagné, which is the hallmark of a contract of employment. She also refers to the decision of Dussault J. in *Lévesque v. Canada (Minister of National Revenue)*, [2005] T.C.J. No. 183, 2005TCC248, in which the indicia pointing to the existence of a relationship of subordination were examined. Among other things, she relied on the following indicia in support of her submission that there was a relationship of subordination between the Appellant and Ms. Gagné:

(a) Ms. Gagné's hours of work were determined by the Appellant based on the appointments that it set up with its customers. She did not have control over her hours and had to report for work even if there was just one dog to groom.

(b) The Appellant exercised control over Ms. Gagné by pressuring her to work faster and getting her students to work faster; giving her sheets with cutting instructions; checking over her work; showing the customers the results of her work; and sanctioning unsatisfactory work by having her make the necessary corrections.

(c) Ms. Gagné incurred no financial risk because she received fixed remuneration and she was not financially responsible for the mistakes made in her work. The Appellant covered the veterinary bills for the dogs who suffered cuts while being groomed by Ms. Gagné.

[34] In light of the foregoing, I find that there are more indicia or criteria pointing to the existence of a relationship of subordination between the Appellant and Ms. Gagné, and that there was a contract of employment between them.

[35] The fact that the Appellant had to adjust based on Ms. Gagné's availability, the fact that she supplied her own work instruments and the fact that the Appellant did not demand her services on an exclusive basis are not determinative factors based on which it can be concluded that there was not relationship of subordination.

[36] The application of the criteria in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553, that is to say, the ownership of tools, chance of profit, risk of loss and integration into the activities of the business, also confirms that Ms. Gagné held insurable employment with the Appellant. Only the ownership of tools test points to the existence of a contract of enterprise or for services.

[37] In my opinion, Ms. Gagné was not free to choose the method for performing her work. The Appellant determined the time of performance, the workplace was the Appellant's place of business, the Appellant provided the instructions for performing the work, the Appellant controlled the quality and quantity of the work, and it could sanction Ms. Gagné's performance.

[38] As for the parties' intention, the Appellant's conduct suggests that she considered Ms. Gagné self-employed. The absence of source deductions from the remuneration paid to Ms. Gagné and the fact that she did not receive benefits point to that intention. However, I attribute no probative value to the handwritten notes on the first page of the log appended to Exhibit A-1 because the original of the document was not tendered in evidence and because, according to Ms. Gagné's testimony, the notes were added after she signed the document.

[39] In light of the foregoing, I find that Ms. Gagné was employed by the Appellant in insurable employment during the period in issue and that she and the Appellant were bound by a contract of employment, not a contract for services. Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Montréal, Quebec, this 9th day of October 2007.

"Réal Favreau"

Favreau J.

Translation certified true
on this 1st day of November 2007.

Brian McCordick, Translator

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APPEARANCES:

Agent for the Appellant:	Marie-Josée Bourgeois
Counsel for the Respondent:	Christina Ham
For the Intervener:	The Intervener herself

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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