

[OFFICIAL ENGLISH TRANSLATION]

Docket: 2004-782(EI)

BETWEEN:

RÉMY DUBÉ,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on August 31, 2004, at Matane, Quebec

Before: The Honourable Judge Alain Tardif

Appearances:

For the Appellant:

The Appellant himself

Counsel for the Respondent:

Marie-Claude Landry

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed, and the decision by the Minister of National Revenue is varied on the basis that the work performed by the Appellant for 9109-0522 Québec Inc. from October 1, 2001, to April 30, 2003, met all the requirements for it to be determined as work performed pursuant to a genuine contract of service, in accordance with the attached Reasons for Judgment.

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

"Alain Tardif"

Tardif J.

Certified true translation
Colette Dupuis-Beaulne

[OFFICIAL ENGLISH TRANSLATION]

Citation: 2004TCC601

Date: 20040913

Docket: 2004-782(EI)

BETWEEN:

RÉMY DUBÉ,

Appellant,

And

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a determination dated January 27, 2004, covering the period from October 1, 2001, to April 30, 2003. The Respondent determined that the work performed by the Appellant did not constitute work done under a genuine contract of service.

[2] To explain and justify the merits of the determination, the Respondent made the following assumptions of fact:

[TRANSLATION]

- (a) 9109-0522 Québec Inc. was incorporated on October 11, 2001;
- (b) Simon Blais and Alexandre Harvey are the Payer's directors;
- (c) the Payer wished to acquire income properties in whole or in part;
- (d) prior to June 2001, the Appellant was a real estate agent specializing in commercial properties;
- (e) during the period in issue, the Appellant received a mandate from the Payer to find properties to acquire;

- (f) he also cooperated with the Payer's shareholders in the activities, studies and analyses conducted in the context of the project to purchase a shopping centre in Chicoutimi;
- (g) he was to receive one percent of the price of the properties purchased by the Payer;
- (h) the Payer did not provide an office to the Appellant, who worked from his residence or his hotel room;
- (i) the Appellant had no work schedule to meet; he determined his own hours of work;
- (j) the Appellant resides in Sainte-Luce;
- (k) the Appellant made various trips, to Chicoutimi, Montréal and Québec, as part of his mandate;
- (l) when the Appellant was travelling, Mr. Harvey reimbursed him for his accommodation expenses and meals;
- (m) from October 1, 2001, to the end of May 2002, the Appellant travelled the equivalent of three months;
- (n) from June 2002 to January 2003, the Appellant spent two to three weeks in Montréal and the equivalent of one week a month in Chicoutimi;
- (o) during the period in issue, the Payer purchased no properties;
- (p) during the period in issue, the Payer paid the Appellant no remuneration;
- (q) the Appellant subsequently filed a complaint for unpaid wages against the Payer with the Commission des normes du travail.

[3] The Appellant admitted most of the facts assumed to be true, in particular paragraphs (a), (b), (c), (e), (f), (j), (k), (o), (p) and (q) and denied subparagraphs (d), (g), (h), (l), (m) and (n). The Appellant explained that he had not renewed his licence enabling him to work as a real estate agent. At one point, he met Alexandre Harvey and Simon Blais, who wanted to start up a real estate business and retained the Appellant's services as an expert or as a person with considerable real estate experience.

[4] The work performed is not in issue. The Appellant in fact worked very actively for Alexandre Harvey and Simon Blais and the corporation they controlled in order to carry out a real estate project.

[5] The work he performed in that connection consisted in meeting all the potential stakeholders in the implementation of an eventual project and discussing the matter with them. In particular, these included salespersons, financiers, contractors and municipalities. The Appellant identified owner-vendors and organized various meetings for the purpose of enabling the corporation directed by Messrs. Harvey and Blais subsequently to acquire properties.

[6] All his travelling expenses were reimbursed. The trips were generally authorized by Alexandre Harvey and Simon Blais.

[7] Despite all his efforts, none of the projects on which the Appellant worked was carried out, for various reasons for which he was not considered responsible.

[8] The issue essentially concerns the nature of the contract between the Appellant and 9109-0522 Québec Inc., which was directed and controlled at the time by Messrs. Harvey and Blais.

[9] The Appellant contended that the contract was a contract of service, even though he had never received any remuneration, which he claims was established at the start of the period at \$700 net per week.

[10] The Respondent claims that there was no such contract and that the only agreement that existed essentially provided for the payment of \$700 a week, plus a percentage, one percent, of the acquisition price of a property, solely in the event that the project was started.

[11] The Appellant claims that the amount of \$700 net was agreed upon at the outset. According to Alexandre Harvey, that was not mentioned until the stage of the last file concerning the acquisition of the Place du Royaume Shopping Centre in Chicoutimi.

[12] Alexandre Harvey, the Respondent's only witness, whose version of the facts clearly constituted the basis of the determination under appeal, admitted the following facts:

- that there was an oral agreement;

- that it was known that the Appellant did not hold a real estate agent's licence;
- that the Appellant's expertise and competence were recognized;
- that the Appellant performed work;
- that the expenses incurred were authorized and reimbursed;
- that the desire had been expressed to secure exclusivity and confidentiality with respect to the Appellant's work, which would be guaranteed by a contractual agreement proposed in August 2002 (Exhibit I-1).

[13] Alexandre Harvey testified in a halting and somewhat confused manner on certain facts, in particular the following:

- the start and end dates of the period in which the \$700 a week was to be paid;
- the original reason for the exclusivity requirement regarding the Appellant's work.

[14] The burden of proof is on the Appellant. To discharge it, he stated a number of facts which the Respondent's witness, Alexandre Harvey, confirmed as true. I refer in particular to the \$700 net amount of remuneration per week and the fact that the work was clearly done.

[15] The only points at issue are the moment when the amount was payable and whether or not there was a power of control. At the outset, I found it hard to understand, indeed even farfetched, that the Appellant could have been so tolerant and patient before taking steps to demand and obtain what was owed him.

[16] Imprudent and naive, the Appellant undoubtedly assumed that Messrs. Harvey and Blais could rely on very significant financial support in the order of several millions of dollars from the Harvey family, which was active in the real estate market.

[17] Despite Alexandre Harvey's youth (the evidence did not reveal Mr. Blais' age), they became interested in projects of a considerable size relative to their lack of experience, status and young age (at least as regards Alexandre Harvey). The context was a very particular one, which could explain and justify the Appellant's tolerance and patience with regard to payment of the remuneration agreed upon.

[18] Since he was going from one project to another and, most of the time, the business promised substantial benefits for him, it may have been appropriate – and this is at least an understandable explanation – for him to show so much patience; the apparent solvency of Messrs. Harvey and Blais was also an explanation; the two moreover go together.

[19] In August 2002, roughly in the middle of the period in issue, the corporation controlled and directed by Alexandre Harvey and Simon Blais may have feared that it would have to share the Appellant's services with someone else. To avoid competition, they decided to propose a written agreement, which the Appellant never agreed to sign.

[20] That agreement provided as follows (Exhibit I-1):

[TRANSLATION]

SERVICE, EXCLUSIVITY AND CONFIDENTIALITY AGREEMENT

Between: Rémy Dubé, Real Estate Coordinator

And: 9109-0522 Québec Inc., duly represented by
Alexandre Harvey, President, and Simon Blais, Vice-President;

WHEREAS Rémy Dubé is coordinator of all operations for 9109-0522 Québec Inc.;

WHEREAS Rémy Dubé has worked together with the shareholders of 9109-0522 Québec Inc. on the conduct of activities, studies and analyses in the matter of the Place du Royaume project in Chicoutimi;

WHEREAS Rémy Dubé has entered into the strictest confidentiality and exclusivity with 9109-0522 Québec Inc.;

WHEREAS Rémy Dubé has undertaken to work exclusively with the shareholders of 9109-0522 Québec Inc. and always to further the corporation's interests in the matter of the Place du Royaume;

WHEREAS Rémy Dubé undertakes to disclose no information directly or indirectly related to the Place du Royaume acquisition project to anyone or any company whatever without the written authorization duly signed by the two shareholders of 9109-0522 Québec Inc., Alexandre Harvey and Simon Blais;

THE PARTIES HEREBY AGREE:

THAT all the above recitals shall form an integral part of the agreement;

THAT Rémy Dubé has been fully reimbursed for his expenses and costs in all matters in which he has worked with 9109-0522 Québec Inc. prior to the signing of this contract; all expenses and costs related to Rémy Dubé's work following the signing of this agreement shall be substantiated and approved by 9109-0522 Québec Inc.; he shall be reimbursed for all approved expenses and costs by 9109-0522 Québec Inc. for two years following the signing of the said agreement;

THAT, in the event of, and conditional on, the conduct of a transaction (sale in whole or in part) between 9109-0522 Québec Inc. and the owners of Place du Royaume, Rémy Dubé may receive, in respect of salary for all work performed by him, remuneration calculated as follows:

40 weeks at CDN \$700 net per week;

A salary of CDN \$960,000 shall be paid to him upon signing of the deed of sale between 9109-0522 Québec Inc. and the owners of Place du Royaume;

A gross salary of CDN \$100,000 for the first two years following the signing of the deed of sale between 9109-0522 Québec Inc. and the owners of Place du Royaume.

[. . .]

This 25th day of August 2003

Rémy Dubé (no signature)

AND

FOR 9109-0522 Québec Inc.

Alexandre Harvey, President (signature)

Simon Blais, Vice-President (signature)

[21] Not all the circumstances in which the written proposal was prepared were established, but Alexandre Harvey and Simon Blais believed that the Appellant would sell his services to other promoters. Were they not themselves responsible for that possibility if they did not pay the Appellant? All that is clear is that the Appellant did not sign, even though its content was consistent with what he himself mentioned.

[22] I noted that the copy in the Respondent's possession was missing one section, the copy filed being that of the Appellant.

[23] In the complete copy, express reference is made to the net amount of \$700. As to the period of time elapsed from the moment the oral agreement began to apply, the proposed agreement provides for a kind of ambiguous release. The draft agreement prepared by Alexandre Harvey and Simon Blais and presented to the Appellant emphasizes the following elements:

- an amount of salary of \$700 net;
- an exclusive service and confidentiality agreement;
- the deletion of a part of the text from the version submitted to the Respondent by Messrs. Harvey and Blais;
- the Appellant's refusal to sign;
- the moment when the draft agreement was presented to the Appellant: August 2002;
- a quite peculiar lack of transparency;
- the existence of a genuine contractual relationship between the corporation and the Appellant.

[24] Unfortunately, since no definite conclusions may be drawn from these elements, the Court must rely on the evidence as a whole, consisting of the testimony of the Appellant and Alexandre Harvey. Mr. Harvey's testimony was scarcely convincing. First, his testimony, which was just as interested as that of the Appellant, did not convincingly demonstrate his basic claim, which is that the Appellant had never been their employee.

[25] In addition to the admissions referred to above in paragraph 12, Mr. Harvey stated that the company that he had incorporated with Simon Blais had sought the Appellant's assistance, advice, and ongoing and continuing participation to enable them to carry out a real estate project, knowing full well that the Appellant had no licence to act as a real estate agent in a context in which it is normally required that there be a mandate, generally a written mandate, and where the rule regarding payment is generally that a pre-established percentage be paid, all related expenses and costs being the mandatary's responsibility.

[26] According to Mr. Harvey, the Appellant was there to "support" them, to tell and show them how to do things. The witness admitted that that "had gone on long

enough". The Appellant's schedule was flexible; he had considerable latitude and freedom of action. Whenever there were new developments, the Appellant informed Messrs. Harvey and Blais of them. Mr. Harvey admitted that the Appellant had made numerous efforts, had acted in their interests and had had to take many pre-authorized trips for which expenses had been reimbursed.

[27] The fact that the corporation, through Messrs. Harvey and Blais, was unable to tell the Appellant what he had to do, when to do it and how to do it has nothing to do with the power of intervention and control. The Appellant knew his job, knew what to do and how and when to do it; the corporation always had the right and power to intervene and could terminate the oral agreement at any time by, for example, refusing to reimburse the Appellant for the expenses he had incurred.

[28] Alexandre Harvey stated that his family was engaged in the real estate field. Although he was young and inexperienced, that was a field in which he was not a complete neophyte. He had some ideas and knowledge and was able to assess the quality of the Appellant's work.

[29] Furthermore, didn't the corporation of which he owned half the capital stock want to define, settle and clarify the terms of the hitherto oral agreement? Although the Appellant refused to sign, the evidence shows that he continued to do what he had previously done before the proposal in writing.

[30] Although no certain conclusion may be drawn from the available evidence, the weight of that evidence tends to demonstrate the merits of the appeal, particularly since, in case of doubt, the Appellant party should be favoured.

[31] For all these reasons, I allow the appeal and determine that the work performed by the Appellant for 9109-0522 Québec Inc. during the period from October 1, 2001, to April 30, 2003, met all the requirements for it to be determined that it was work performed under a genuine contract of service.

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

"Alain Tardif"

Tardif J.

Certified true translation
Colette Dupuis-Beaulne

CITATION: 2004TCC 601

COURT FILE NUMBER: 2004-782(EI)

STYLE OF CAUSE: Rémy Dubé and the Minister of
National Revenue

PLACE OF HEARING: Matane, Quebec

DATE OF HEARING: August 31, 2004

REASONS FOR JUDGMENT BY: The Honourable Judge Alain Tardif

DATE OF JUDGMENT: September 13, 2004

APPEARANCES:

For the Appellant: The Appellant himself

For the Respondent: Marie-Claude Landry

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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