

Docket: 2007-3422(EI)

BETWEEN:

LES ÉQUIPEMENTS WOODY INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 25, 2008 at Québec, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Jérôme Carrier

Counsel for the Respondent: Alain Gareau

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed in part only, on the basis that Jérôme and Sébastien Labbé performed their work under an insurable contract of service, but only for the period from January 1 to March 31, 2005; the work performed from April 1, 2005 to February 16, 2006 must be excluded from insurable employment. The decision of the Minister of National Revenue is therefore vacated in part in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 21st day of April 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 19th day of June 2008.
Stefan Winfield, Revisor

Citation: 2008TCC140
Date: 20080421
Docket: 2007-3422(EI)

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LES ÉQUIPEMENTS WOODY INC.,

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision finding that Jérôme Labbé and Sébastien Labbé ("the workers") held insurable employment with Les Équipements Woody inc. from January 1, 2005 to February 16, 2006.

[2] In determining that Sébastien and Jérôme Labbé were employed under a contract of service, the Minister of National Revenue ("the Minister") relied on the following assumptions of fact:

[TRANSLATION]

5. . . .

- (a) the Appellant, which was incorporated on March 26, 2003, operates an agricultural and forestry machinery manufacturing business; **(admitted)**
- (b) the Appellant has annual sales of between \$1,249,587 and \$1,500,000; **(admitted)**

- (c) during the period at issue, Sébastien Labbé provided services to the payer as the operator of a digital laser cutting machine (for steel); **(denied)**
- (d) during the same period, Jérôme Labbé was the Appellant's general manager; he was responsible for purchases and sales and for finding new distributors; **(denied)**
- (e) the workers, who were shareholders in the Appellant company, made decisions on the Appellant's behalf jointly with the third shareholder; **(denied)**
- (f) the security for the Appellant's loans and line of credit was signed by the Appellant's three shareholders; **(denied)**
- (g) the workers provided their respective services at the Appellant's place of business; **(denied)**
- (h) they worked under the Appellant's supervision; **(denied)**
- (i) the workers did not record their hours of work and worked between 40 and 60 hours a week; **(denied)**
- (j) despite their variable work schedule, the workers received fixed weekly earnings; **(denied)**
- (k) they were paid by direct deposit every two weeks. **(admitted)**

6. . . .

- (a) during the period at issue, the Appellant's voting shares were equally divided among the workers and Ghislain Maheu (1/3 each); **(admitted)**
- (b) the workers are brothers; **(admitted)**
- (c) Mr. Maheu is not related to the workers; **(admitted)**
- (d) the workers were related to a group that controlled the payer. **(admitted)**

7. . . .

- (a) although their earnings during the period at issue varied, going from \$300 to \$1,000 and \$600 a week, the workers had annual earnings of \$36,600 in 2005, as did the third, unrelated shareholder; **(denied)**
- (b) before leaving the Appellant, the third, unrelated shareholder had the same earnings as the workers; **(denied)**

- (c) although they worked from 40 to 60 hours a week, it cannot be concluded that this term of employment was unreasonable given that the workers are shareholders in the Appellant; **(denied)**
- (d) the workers provided services to the Appellant year-round based on the Appellant's needs; **(admitted)**
- (e) the services provided by the workers were essential to the proper functioning of the Appellant company. **(admitted)**

[3] The Minister determined that the Appellant's workers were deemed to deal with each other at arm's length in the context of this employment because he was satisfied that it was reasonable to infer that the workers and the Appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] Testimony was given by Sylvie Drouin, the mother of Jérôme and Sébastien Labbé. She explained that she had made her career in a credit union in the field of business financing.

[5] She explained that she had done the Appellant's accounting work for free and that, at the end of the year, her work had been sent to an accounting firm so the financial statements could be prepared.

[6] She also explained that she had been paid for a one-year period for a very specific reason, which was described in greater detail by her son Jérôme.

[7] She explained that she had worked for the company in which her two sons had each initially owned one third of the capital stock. She explained that Ghislain Maheu had owned the remaining one third of the shares.

[8] Jérôme Labbé testified next. He explained that he and his brother had qualifications and skills in welding and hydraulics. At one point, they decided to start up a welding business.

[9] To get their project off the ground faster, they met with Ghislain Maheu, who was already running a business in that field. Following a discussion, they agreed to create the Appellant company, Les Équipements Woody inc.

[10] In mid-March 2005, Jérôme Labbé received a telephone call from Ghislain Maheu asking him to read a letter dropped off in his mailbox so they could discuss its content the following Monday.

[11] The letter in question set out Mr. Maheu's decision to sell his shares because he was dissatisfied with the way things were working; his main objection was that he felt excluded from decisions, and his minority shareholder status was troubling him to the point that he had decided to sell his shares.

[12] With regard to the price requested for his shares, Mr. Maheu said that he preferred to wait for the financial statements so he could determine their fair value.

[13] Initially, it had been agreed that the shareholders would receive a very modest salary to ensure the company's financial health. For the same reason, Sylvie Drouin had agreed to work for free. The Labbé brothers and their mother realized that such a situation would artificially inflate the value of the company, which would be very detrimental to them.

[14] Indeed, modest salaries for the Labbé brothers and no salary for their mother would have the effect of increasing the quality of the balance sheet used to establish the value of Ghislain Maheu's shares.

[15] They therefore decided that the company would pay the Labbé brothers an appropriate salary and give their mother a salary for the work she did. This was to have the effect of reducing the cash surpluses resulting from the company's activities and thus affect the balance sheet used to determine the value of Ghislain Maheu's shares.

[16] The shares were sold on February 17, 2006. Ghislain Maheu's resignation letter is dated September 2, 2005. Jérôme Labbé explained that Mr. Maheu had in fact left the company at the end of March 2005 and started working for another company at that time, thus ending any employment relationship with the Appellant as of that date.

[17] The Appellant also referred to a loan (Exhibit A-1). Fearing that the loan would decrease the economic value of his shares, Mr. Maheu informed the representatives of the financial institution that had granted the loan that he did not agree with it.

[18] These are, broadly speaking, the facts revealed by the evidence.

Analysis

[19] Mr. Maheu was a shareholder in the company until his shares were sold on February 17, 2006. In actual fact, he formally resigned on September 2, 2005 through a letter. The manual labour he did for the company ended on March 30 after two weeks' notice. This fact, which was established unequivocally, was completely overlooked or ignored in the analysis leading to the decision.

[20] The circumstances in which Ghislain Maheu's relationship with the company ended for good were glossed over in the analysis that led to the determination. This is, in itself, a fundamental and even determinative aspect of this case.

[21] The Respondent submits that Mr. Maheu remained a shareholder until the notarial contract attesting to the sale of his shares was signed, with the result that the analysis must be based on the assumption that the Labbé brothers and Ghislain Maheu each legally owned one third of the shares until that time.

[22] To validate his argument, the Respondent further submits that the fact that Mr. Maheu expressed his disagreement to the financial institution that had issued a loan to the company confirms that he still owned one third of the shares during the period in question.

[23] Indeed, there is no doubt that Mr. Maheu was a minority shareholder until the date he transferred his shares. In actual fact, however, it is obvious that the Labbé brothers ran the business as if they each owned half of the shares.

[24] This explains Mr. Maheu's decision to sever his ties with the company. Although formally he was the registered owner of one third of the shares, he had made a clear decision to transfer them, and the Labbé brothers had made the clear decision to acquire them; the transfer was delayed only by the fact that the consideration or the value of the shares was to be determined on the basis of the balance sheet. The fact that Mr. Maheu left his job with notice and started another job is very important in assessing the Labbé brothers' status as workers. Moreover, such facts clearly illustrate the extent to which Mr. Maheu had resigned from the day-to-day affairs of the business. Legally, he was still a shareholder, although he knew that he no longer had the necessary influence or power to change anything, since the other two shareholders (the two Labbé brothers) were calling the shots. The evidence in this regard is quite significant; I am referring in particular to the decision to take out a loan, a decision with which Mr. Maheu disagreed, but also and above all to the decision to substantially increase the Labbé brothers' salary and give their mother a salary.

[25] In light of the evidence, it must be concluded that the Labbé brothers worked under a contract of service until March 31; after Ghislain Maheu left, they became, *de facto*, the persons who ran the Appellant's business on a 50-50 basis.

[26] In the circumstances, I conclude that Jérôme and Sébastien Labbé worked under a contract of service until Mr. Maheu left on March 30, 2005.

[27] After that date, they became shareholders who in fact controlled more than 40 percent of the shares, and their work thereby became excluded from insurable employment.

Signed at Ottawa, Canada, this 21st day of April 2008.

"Alain Tardif"

Tardif J.

Translation certified true
on this 19th day of June 2008.
Stefan Winfield, Revisor

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APPEARANCES:

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