Docket: 2007-3500(EI)

BETWEEN:

MODELERIE DORVAL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 21, 2008, at Montreal, Quebec.

Before: The Honourable Justice Lucie Lamarre

Appearances:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Nadia Golmier

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* ("*Act*") is allowed, and the May 17, 2007 decision of the Minister of National Revenue with respect to the insurability of Joseph Cassis' employment with the appellant is varied on the basis that, by virtue of paragraphs 5(2)(*i*) and 5(3)(*b*) of the Act, he was not employed in insurable employment with the appellant, as they were not dealing and were not deemed to be dealing with each other at arm's length during the period at issue.

Signed at Ottawa, Canada, this 1st day of May 2008.

"Lucie Lamarre"

Lamarre J.

Citation: 2008TCC277
Date: 20080501
Docket: 2007-3500(EI)

BETWEEN:

MODELERIE DORVAL INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a decision of the Minister of National Revenue ("Minister"), who determined that Joseph Cassis ("Worker") held insurable employment while working for the appellant during the period from January 1, 2003 to December 31, 2005.

[2] In making his determination, the Minister relied upon the assumptions of fact found in paragraph 13 of the Reply to the Notice of Appeal, which reads in part as follows:

> a) the Appellant, incorporated in 1987, operates in the field of industrial design;
>
> b) the Appellant manufactures prototypes and specialized parts (for planes and trains) for companies like Bombardier;
>
> c) the Appellant prepares molds and manufactures castings;
>
> d) the three shareholders, Rui Cassis, Mario Claro and the Worker, had signed the line of credit and sanctioned loans of the Appellant;

e) the shareholders could sign cheques on behalf of the Appellant; two signatures were needed;

f) the opening hours of the Appellant's office were from 7 a.m. to 5 p.m.;

g) the annual level of business activity of the Appellant ranged from $ 1 249 587 to $ 1 500 000;

h) there was no written employment contract between the Appellant and the Worker during the period under review;

i) the Worker was like the general manager of the Appellant and was involved in all aspects of the operation;

j) the Worker was involved in all areas of the operation: the engineering, sales, finance and could do maintenance work;

k) the decisions are taken by the 3 shareholders but Mr. Rui Cassis has the last word;

l) during the period under review, the Worker did not have a regular schedule of work to meet, he could work anywhere between 40 and 60 hours per week;

m) during the period under review, the Worker received a fixed weekly salary of $ 920, or $ 48 000 annually;

n) the Worker's salary was exactly the same as the one paid to M. Mario Claro, shareholder not related to the Appellant;

o) the Worker had the same employment conditions and the same salary as that of Mario Claro; the Appellant treated them the same way.

[3] Counsel for the appellant indicated at the beginning of the hearing that he did not dispute that the Worker was hired under a contract of service within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* ("*Act*"). He argued, however, that the Worker and the appellant were not at arm's length and that they should not be deemed to have been dealing with each other at arm's length within the meaning of paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Act.*

[4] Ms. Camille Ledoux, an appeals officer for the respondent, explained why she was of the opinion that the Worker and the appellant were deemed to be dealing at arm's length within the meaning of paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Act.*

[5] Ms. Ledoux made that decision on the basis that the Worker and the other minority shareholder, Mario Claro, were receiving approximately the same salary during the period at issue.

[6] Joseph Cassis testified that during the years at issue he was managing the business practically on his own. His father was getting older and was not as familiar as Joseph with the new computerized tools now used in the business. His father spent four or five months in Portugal every year. Joseph testified that he consulted his father and Mario Claro on important decisions, but his father was interested mainly in the profitability of the business and delegated its management to his son.

[7] Joseph testified that he worked very hard in the business, that he accepted a low salary because he considered the business as his own, and that he reinvested the profits in it.

[8] Although he received approximately the same salary as Mario Claro, Joseph testified that Mario Claro specialized in the molding of the parts manufactured by the appellant and worked solely at that. The evidence did not disclose that the respondent considered the number of hours worked by Mario Claro and by Joseph Cassis. From the assumptions of fact set out above and considering all the aspects of the business in which Joseph was involved, it would seem that Joseph Cassis was working longer hours than Mario Claro.

[9] Furthermore, the evidence revealed that Joseph Cassis had to go to the work site on weekends for security reasons, and he was the one who would be called if there was any problem on the work site outside of business hours. Ms. Ledoux also admitted in her report (Exhibit R-1), that Joseph's hours of work were not subject to any control.

[10] From all the above, it can be inferred that Joseph was paid the same salary as the other minority shareholder, Mario Claro, but worked longer hours and had more responsibilities.

[11] On that basis, I find that Joseph Cassis did not have the same conditions of employment as Mario Claro, the other shareholder chosen by Ms. Ledoux for the purposes of her comparison.

[12] In *Bélanger v. Canada*, [2003] F.C.J. No. 1774 (QL), the Federal Court of Appeal again stated the role assigned to this Court by the *Act* when it considers

appeals from ministerial determinations under paragraph 5(3)(*b*) of the *Act*, as follows:

> **2** The judge did not assume the role assigned to him by the Employment Insurance Act and redefined in the case law by our Court in Pérusse v. Canada (Minister of National Revenue - M.N.R.), [2002] 261 N.R. 150, application for leave to appeal to the Supreme Court of Canada denied, and Légaré v. Canada (Minister of National Revenue - M.N.R.), [1999] 246 N.R. 176. These judgments were later followed in Valente v. Canada (Minister of National Revenue - M.N.R.), [2003] FCA 132 and Massignani v. Canada (Minister of National Revenue - M.N.R.), [2003] FCA 172.
>
> **3** As this Court stated in Massignani, supra, at paragraph 2, "This role does not allow the judge to substitute his discretion for that of the Minister, but it does encompass the duty to 'verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, ... decide whether the conclusion with which the Minister was "satisfied" still seems reasonable'".

[13] In my opinion, the facts relied on by the Minister were not correctly assessed having regard to the context in which they occurred.

[14] I therefore conclude that the Minister’s decision to consider Joseph Cassis as being deemed to have dealt at arm’s length with the appellant during the period at issue was not appropriate in the circumstances and consequently was not reasonable.

[15] As a result, the appeal is allowed and the Minister's decision is varied on the basis that, by virtue of paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Act*, Joseph Cassis was not employed in insurable employment during the period at issue.

Signed at Ottawa, Canada, this 1st day of May 2008.

“Lucie Lamarre”

Lamarre J.

CITATION:	2008TCC277
COURT FILE NO.:	2007-3500(EI)
STYLE OF CAUSE:	MODELERIE DORVAL INC. V. M.N.R.
PLACE OF HEARING:	Montreal, Quebec
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REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	May 1, 2008

APPEARANCES:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Nadia Golmier

COUNSEL OF RECORD:

For the Appellant:

Name:	Deryk W. Coward
Firm:	D'Arcy & Deacon LLP Winnipeg, Manitoba

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada