

Docket: 2010-2212(EI)

BETWEEN:

RAYNALD BOUCHARD AUTOMOBILE INC.,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of
Guylaine Plourde 2010-2213(EI)
on January 11, 2011, at Québec, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the appellant: Frédéric St-Jean

Counsel for the respondent: Marie-France Dompierre

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue dated June 9, 2010, is varied to recognize that Guylaine Plourde held insurable employment from January 15, 2007 to December 14, 2007, from February 3, 2008, to December 13, 2008, and from May 3, 2009, to November 27, 2009.

Signed at Ottawa, Canada, this 16th day of February 2011.

"Brent Paris"

Paris J.

Translation certified true
on this 30th day of March 2011
Margarita Gorbounova, Translator

Docket: 2010-2213(EI)

BETWEEN:

GUYLAINE PLOURDE,

Appellant,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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2210-2213(EI)

BETWEEN:

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GUYLAINE PLOURDE,

Appellants,

and

MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Paris, J.

[1] The appellants are appealing from the respondent's decision that the employment of the appellant Guylaine Plourde with the appellant Raynald Bouchard Automobile Inc. (the payer) did not constitute insurable employment for the purposes of the *Employment Insurance Act* (the Act). The Minister decided that her employment was excluded under paragraph 5(2)(i) of the Act for the following periods: January 15 to December 14, 2007, February 3 to December 13, 2008, and May 3 to November 27, 2009.

[2] Paragraph 5(2)(i) of the Act states that employment is not insurable employment "if the employer and employee are not dealing with each other at arm's length". It is not disputed that the appellant and the payer were not dealing with each other at arm's length. Raynald Bouchard, Ms. Pourde's spouse, held all of the payer's shares.

[3] However, when applying paragraph 5(2)(i), the Minister may take into account the exception in paragraph 5(3)(b) of the Act, which reads as follows:

5(3) For the purposes of paragraph (2)(i),

...

- (b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] In this case, the Minister decided that it was not reasonable to conclude that the appellant and the payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[5] The only issue before the Court in this case is whether the Minister's conclusion was reasonable. To decide on this, I must "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".¹

[6] In making his decision, the respondent based himself on the following facts stated in paragraph 6 of the two Replies to the Notice of Appeal:

[TRANSLATION]

(6) The Minister determined that [Ms. Plourde] and the payer were not dealing with each other at arm's length in the employment. The Minister was satisfied that it was not reasonable to conclude that [Ms. Plourde] and the payer would have entered into a substantially similar contract if they had been dealing with each other at arm's length, having regard to the following circumstances:

- (a) The payer was incorporated on February 7, 1990.
- (b) The payer operated a car repair and maintenance garage.

¹ Per Justice Marceau of the Federal Court of Appeal in *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878 (QL), paragraph 4.

- (c) The payer sold tires, inspected air conditioners, repaired Duro-Vitre glass and offered a towing service with a response time of 30 minutes or less in the west of the valley.
- (d) The payer's garage has three doors and can take up to three vehicles at a time.
- (e) The payer's only shareholder is Raynald Bouchard.
- (f) The payer is active year-round but is busiest from mid-October to the end of November because of switching tires.
- (g) The payer's hours of operation are Monday to Friday, 8 a.m. to 5 p.m., and Saturday, 8 a.m. to noon.
- (h) In addition to the shareholder, the payer employs two mechanics and [Ms. Plourde].
- (i) Only one signature is needed for the payer's cheques.
- (j) The payer's cheques were most often signed by the shareholder, who also prepared the employees' paycheques, completed invoices and submissions to the clients, dealt exclusively with part inventory as well as with the towing service.
- (k) If the shareholder was absent for towing, the payer's calls were forwarded to his cell phone during the garage's hours of operation and to his home phone if the garage was closed.
- (l) A person outside the payer, named Brigitte Roy, did the payer's bookkeeping.
- (m) Ms. Roy visited the payer 4 to 5 days per month to do the bookkeeping.
- (n) The payer paid Ms. Roy \$12 per hour.
- (o) [Ms. Plourde] has worked for the payer for about 18 years.
- (p) [Ms. Plourde] is authorized to sign the payer's cheques.
- (q) [Ms. Plourde's] tasks were to answer the telephone; enter suppliers' invoices, namely, the account telephone number and the amount before tax into the computer; arrange invoices in alphabetical order; cash clients' payments; fold statements of account; and enter inventory, namely, the supplier's name and quantity. Occasionally, she went to pick up parts, took personal and business mail to the post office, did some cleaning such as dusting the counter and made appointments for the clients.
- (r) While varied, [Ms. Plourde's] work is minimal and often casual.

(s) Although the payer stated that [Ms. Plourde's] work was accumulated to provide a full week's worth of work, it appears that the majority of her tasks were required every day.

(t) The parties agree that [Ms. Plourde's] periods of employment were distributed as follows throughout the year:

- From January to April: 1 week every two months;
- From May to September: 1 week per month, except for a period of 2 or 3 consecutive weeks at the end of the summer; and
- From October to December: full time because it is a peak period.

(u) The 2007 and 2009 payroll journals show that this was not so, as [Ms. Plourde] worked 1 week per month from January to May in 2007 and not at all for the same period in 2009 because the shareholder could handle the work alone.

(v) In 2009, [Ms. Plourde] worked fewer weeks even though the sole shareholder was sick in the summer of 2009.

(w) [Ms. Plourde] received a weekly gross salary of \$390 + 4% during the periods at issue, that is, \$11.15 per hour.

(x) The payer's mechanic is paid \$12 per hour; the mechanic in training is paid \$10.50 per hour, and the bookkeeper is paid \$12 per hour.

(y) Given her non-specialization, the payer explains [Ms. Plourde's] high salary by the fact that she is more than just a receptionist, but a versatile and trustworthy employee.

(z) in 2007, cheques were issued by the payer to [Ms. Plourde] for the weeks ending on March 17, April 28 and May 12, while she was not on the payroll.

[7] Most of these facts were not challenged by the appellants.

[8] Concerning paragraph (f), Mr. Bouchard explained that the business's peak period could begin in September depending on the weather. He said that, at the start of the fall, clients would order tires and ask for advice. In addition, tire inventory had to be done.

[9] Mr. Bouchard added, with respect to paragraph (j), that Ms. Plourde helped him inventory the parts at the end of June or beginning of July.

[10] With respect to paragraph (k), Mr. Bouchard specified that, when Ms. Plourde was working, she took messages instead of forwarding the calls to his cell phone.

[11] As for paragraphs (q), (r) and (s), Mr. Bouchard and Ms. Plourde both insisted that Ms. Plourde worked hard during all the weeks that she worked for the payer and that her work was important to it. They showed the Court a list of Ms. Plourde's 22 duties, which they had given to the Canada Revenue Agency's appeals officer at the time of the investigation. In addition to the duties listed in paragraph (q), Ms. Plourde ordered parts on Mr. Bouchard's instructions and informed clients when the parts were in; sorted the parts received from suppliers; prepared simple invoices and started more complicated ones, which Mr. Bouchard finished; made bank deposits; helped with inventory and followed up on client accounts.

[12] They also said that, during the months that Ms. Plourde did not work every week, part of her work, namely, filing documents and data entry, was accumulated by the payer. The rest of her work consisted of daily tasks that Mr. Bouchard would otherwise have to do himself. According to him and Ms. Plourde, he worked 70 to 90 hours per week for the business and needed help during the weeks that she worked in order to free him from certain tasks and enable him to catch up on the administrative work that had accumulated.

[13] Mr. Bouchard acknowledged that Ms. Plourde did not work at all from January to May 2009. He explained that, during that period, his workload was reduced and that he needed no help. Normally, at the beginning of the year, the payer renegotiates contracts with car insurance companies, but, in 2009, the contracts were renewed without changes. The winter of 2009 was milder than usual, which had an impact on the payer's revenue. At the start of 2009, the payer also lost a tire repair contract with a local plant. In addition, because of almost \$13,000 in losses the payer experienced the previous year, it gave Ms. Plourde less work.

[14] With respect to the appellant's hourly rate, Mr. Bouchard testified that the two mechanics in fact earned between \$12.72 and \$13 per hour because, in addition to their hourly rate, they received commission. He said that, according to his research, the current rate for a receptionist was \$12 per hour.

[15] Mr. Bouchard also testified that Ms. Plourde's three paycheques mentioned in paragraph (z) had been omitted from the payroll journal by mistake and that that mistake had been corrected.

Analysis

[16] The appellants' counsel claimed that, in making his decision, the Minister failed to take into account all the relevant facts concerning the nature, importance, duration and terms and conditions of the work performed by Ms. Plourde and the remuneration she received. According to him, the evidence showed that she worked only when the payer needed her. Her salary was lower than that of the other people working for the payer and her hourly rate was reasonable given her experience and her availability to work intermittently for a significant part of the year.

[17] I agree with the appellants' counsel. It seems to me that, in this case, the Minister did not take into account important facts that would enable him to understand Ms. Plourde's role in the payer's business. The Minister acknowledged that the payer needed Ms. Plourde during its peak period in the fall, but concluded that, during the rest of the year, there was not enough work to justify employing her. However, the Minister did not understand that the payer employed Ms. Plourde outside of the peak period not only to file accumulated documents and enter accumulated data but also to help Mr. Bouchard: to free him from having to do everyday tasks for a week at a time in order to give him time to concentrate on running the business. That is what emerged from Mr. Bouchard and Ms. Plourde's testimony, and their credibility was not disputed. I accept that Mr. Bouchard worked very long hours to ensure the business's success. In addition, it seems quite reasonable to me that he would occasionally delegate some of his tasks to a temporary employee. I also acknowledge that it was because of unusual circumstances that the payer did not require Ms. Plourde's services for the period from January to May 2009.

[18] It also seems to me that the Minister did not take into account all of the tasks performed by Ms. Plourde for the payer. In addition to the tasks listed in paragraph (q) of the Reply, Ms. Plourde did invoicing, dealt with ordering and receiving parts and helped with inventory and with collecting accounts receivable. When all of Ms. Plourde's responsibilities are taken into account, they cannot be described as [TRANSLATION] "minimal and casual".

[19] Finally, I find that Ms. Plourde's hourly rate was not excessive in relation to her tasks, responsibilities and experience. The evidence shows that her rate was lower than that which the payer paid the other employees and was within the standard for a receptionist in that area.

[20] For all of these reasons, after reviewing all of the evidence, I am of the opinion that the Minister's conclusion in this case was not reasonable. After examining the

background to Ms. Plourde's employment with the payer, I am satisfied that the appellant and the payer would have entered into a substantially similar contract if they had been dealing with each other at arm's length.

[21] The appeal is allowed.

Signed at Ottawa, Canada, this 16th day of February 2011.

"Brent Paris"

Paris J.

Translation certified true
on this 31st day of March 2011
Margarita Gorbounova, Translator

CITATION: 2011 TCC 104

COURT FILE NOS.: 2010-2212(EI)
2010-2213(EI)

STYLE OF CAUSE: RAYNALD BOUCHARD AUTOMOBILE
INC., GUYLAINE PLOURDE v. M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: January 11, 2011

REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris

DATE OF JUDGMENT: February 16, 2011

APPEARANCES:

Counsel for the appellant: Frédéric St-Jean
Counsel for the respondent: Marie-France Dompierre

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