

Docket: 2007-3141(EI)

BETWEEN:

MICHAËL DUMONT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on common evidence with the appeal of *Monica Turcotte*  
(2007-3041 (EI)), on December 14, 2010, at Rimouski, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Nancy Lajoie

Counsel for the respondent: Geneviève Lecours

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### JUDGMENT

The appeal from the decision of the Minister of National Revenue pursuant to the *Employment Insurance Act* regarding the insurability of the appellant's employment with Monica Turcotte, operating a business under the name "Bar Le Villageois 2004 Enr." for the period of August 29 to September 9, 2005, is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of August 2011.

"Réal Favreau"

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Favreau J.

Translation certified true  
on this 27th day of October 2011.

Elizabeth Tan, Translator

Docket: 2007-3041(EI)

BETWEEN:

MONICA TURCOTTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on common evidence with the appeal of *Michaël Dumont*  
(2007-3141 (EI)), on December 14, 2010, at Rimouski, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant: Nancy Lajoie

Counsel for the respondent: Geneviève Lecours

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### JUDGMENT

The appeal from the decision of the Minister of National Revenue pursuant to the *Employment Insurance Act* regarding the insurability of Michaël Dumont's employment with the Appellant, operating a business under the name "Bar Le Villageois 2004 Enr." for the period of August 29 to September 9, 2005, is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of August 2011.

"Réal Favreau"

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Favreau J.

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Dockets: 2007-3141(EI)

2007-3041(EI)

BETWEEN:

MICHAËL DUMONT,  
MONICA TURCOTTE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] These appeals heard on common evidence are against the decision by the Minister of National Revenue (the Minister) pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23, as amended (the Act) regarding the insurability of the employment of Michaël Dumont (the worker) with Monica Turcotte, operating a business under the name "Bar Le Villageois 2004 Enr." (the payor) for the period of August 29 to September 9, 2005, (the period).

[2] The worker and the payor are related persons within the meaning of the *Income Tax Act*, R.S.C. (1985) c. 1 (5th suppl.), as amended (the ITA) because during the period, the worker was Monica Turcotte's common-law spouse. Since related persons, pursuant to paragraph 251(1)(a) of the ITA, are considered not to be dealing with each other at arm's length, the worker had a non-arm's length relationship with Monica Turcotte as common-law spouse and sole owner of the business she operated as "Bar Le Villageois 2004 Enr."

[3] In a letter dated March 21, 2007, the Minister informed the worker that his job with the payor during the period was not insurable because the Minister found that it was not 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. In rendering his decision, the Minister relied on sections 5(2)(i) and 5(3) of the Act, taking into consideration the following presumptions of fact at paragraph 6 of the Reply to the Notice of Appeal submitted for Michaël Dumont's appeal:

[TRANSLATION]

- (a) the payor is the owner of a business she registered on August 27, 2004; **(admitted)**
- (b) the payor acquired the business from the trustee following the bankruptcy of the bar's former owner; **(admitted)**
- (c) the payor's business is a bar offering drink and tanning services (tanning bed); **(admitted)**
- (d) the business is located in a 2-storey building; the bar is on the main floor and there are 4 rooms upstairs including one in which a tanning bed was installed; **(admitted, except there were 5 rooms upstairs)**
- (e) from the time the business began operating, the payor did not rent any of the rooms; **(admitted, until renovations in August 2005)**
- (f) the payor took out a loan of \$62,000 to acquire the business, which was endorsed by Gilles Dumont, the appellant's father; **(admitted)**
- (g) in 2004, there were up to 7 employees listed on the payor's record of wages; **(no knowledge)**
- (h) except for the period in question (12 days), the worker was not listed on the payor's record of wages; **(admitted)**
- (i) the worker performed services for another employer and, following the loss of his job, found he did not have enough hours to qualify for unemployment benefits; **(denied as written)**
- (j) the payor claims to have hired the appellant and given him duties so he could accumulate the missing insurable hours; **(denied)**
- (k) according to the payor's version, the appellant performed the following work:

- installed a counter in the kitchen,
  - fixed up and painted the second floor in the rooms, bathroom and tanning room,
  - removed a carpet, brought up cases of beer from the basement, filed old items, put things away in the garage and ran errands;  
**(admitted, with, in addition, the cleaning of a commercial stove)**
- (l) the appellant stated that he did many tasks and noted that he had spent a good 20 hours (of a total of 80) cleaning a propane stove, whereas the payor did not mention it at all; **(admitted)**
- (m) the payor did not offer meals at the bar or rent rooms on the 2nd floor; **(denied)**
- (n) the payor stated that the worker worked around 40 hours a week, whereas the worker stated he worked around 60 hours a week for the 2 weeks of the period in question; **(admitted)**
- (o) all the payor's employees had to record their hours of work but the appellant did not; **(admitted because the worker was not paid hourly)**
- (p) in 2005, the payor paid herself a salary (deduction) of \$450 a week except during the 2 weeks the appellant allegedly worked; **(no knowledge)**
- (q) the payor issued two paycheques in the appellant's name for \$469.25 and \$489.44 that were cancelled and corrected to \$19.25 and \$39.44 after deducting \$450 per week from the initial cheques; **(admitted)**
- (r) the payor claimed to have deducted \$450 per week from the initial cheques in the appellant's name because she gave him two \$450 advances, but there was no evidence to this end; **(admitted)**
- (s) the payor stated that she did not take a salary during those two weeks because she could not afford to pay two \$450 salaries for the two weeks of the period in question; **(no knowledge)**
- (t) the appellant stated that he was not involved in the payor's business, while he guaranteed a leasing agreement for the purchase of the tanning bed and in 2004 and 2005, he signed the majority of the invoices for the payor's suppliers; **(denied as written, not the majority, ex. beer, alcohol from the S.A.Q.)**
- (u) the appellant claims he did not render any unpaid services to the payor either before or after the period in question whereas many documents he signed on behalf of the payor prove the opposite; **(denied)**

- (v) moreover, at least two cheques were issued in the appellant's name for "errands", for \$246.27 on September 23, 2004, and for \$100 on February 21, 2005, but these amounts were not registered in the record of wages; **(denied as written)**
  - (w) the appellant's employment conditions do not truly correspond to the payor's labour needs but rather to the appellant's need to qualify for unemployment benefits; **(denied)**
  - (x) the duties the appellant carried out were not essential to the appellant's operations; they were accessory tasks that the payor would not have entrusted to a worker with an arm's length relationship. **(denied)**
- [4] Subparagraph 6(i) of the Reply to the Notice of Appeal was denied as written because the worker rendered services to another employer in his search for a new job.
- [5] Subparagraph 6(j) was denied because the payor did not have the money needed to get the renovations done on the rooms upstairs to rent out the rooms and the conference room.
- [6] Subparagraph 6(m) was denied because the payor offered fast food.
- [7] Subparagraph 6(t) was admitted for the guarantee of the leasing agreement to purchase the tanning bed but denied because in 2004 and 2005, the worker did not sign most of the invoices from the payor's suppliers. He did it for the purchases of beer and alcohol from the S.A.Q.
- [8] Subparagraph 6(u) was denied without explanation.
- [9] Subparagraph 6(v) was denied as written because these cheques were given to the worker as repayment for expenses; the \$246.27 cheque was for alcohol purchased at the S.A.Q. and the \$100 one was for a poker table he bought.
- [10] Subparagraph 6(w) was denied because the worker was truly looking for another job.
- [11] Subparagraph 6(x) was denied because the duties the worker carried out were for the purpose of being able to rent the rooms, showers and tanning bed.



[12] Michaël Dumont testified at the hearing. He was declared 100% disabled following a motorcycle accident on June 17, 2010, in Gatineau. During the hearing, he was no longer Monica Turcotte's common-law spouse and stated he had sold his share of the family residence to Monica Turcotte in the summer of 2007. According to his testimony, Monica Turcotte acquired the bar in September 2004 without any intervention on his part for either the acquisition or financing. In his opinion, he was not directly involved in the operations of the bar, but he did render services at times, such as making bank deposits, watching the cash while Monica Turcotte had to leave, and purchasing beer from suppliers, alcohol from the S.A.Q. and items from the hardware store. He also admitted he signed acknowledgements of receipt for supplies at the bar. He was not paid for these services.

[13] The worker confirmed that when he prematurely lost his job at Aqua Biochem at the end of August 2005, he worked for the payor for two weeks doing maintenance work. His pay was calculated on a fixed basis of 40 hours a week at \$16 an hour. According to the T-4 issued to the worker by Bar Le Villageois 2004 Enr., he earned \$1,312.46 for 80 hours worked in 2005.

[14] Gilles Dumont, Michaël Dumont's father, also testified at the hearing. He stated he had known Monica Turcotte since 1998-1999 when she worked with his daughter in a bar in Trois-Pistoles. She was his daughter's friend and he stated he guaranteed the mortgage loan taken out by Monica Turcotte with the Caisse Populaire Desjardins when she acquired the bar. At the hearing, he introduced himself as a general contractor and the owner of a Days Inn hotel in Ste-Hélène de Bagotville. He confirmed that his son Michaël worked for Monica Turcotte in the summer of 2005 for a few weeks. He said he asked his son to work for him for two to three weeks repainting rooms and changing carpets but his son preferred to work for Monica Turcotte and live with her in Isle Verte. He also confirmed that his wife, Line Boucher, took care of filing the bar's paperwork and preparing the monthly reports and financial statement projects. The income statements and financial statements, on the other hand, were prepared by a chartered accountant. Lastly, Gilles Dumont explained that he provided the payor with used rolls of carpet from the hotel and that is why she could not provide any invoices for carpet purchases.

[15] Monica Turcotte was not present at the hearing and nobody summoned her as a witness. However, since she was also represented by counsel for the appellant, it was agreed that the evidence obtained in the appellant's case could be added to her own file. Her statutory declarations of July 4 and 7, 2006, were

filed as Exhibits I-1 and I-2. In these declarations, the payor confirmed that she did not serve meals at the bar and had hired the worker to help out. On this, she stated:

[TRANSLATION ]

I can tell you that after the termination of his employment, Michaël tried unsuccessfully to find work and we did not have the means to live with only my income, so I hired Michaël so he could have enough insurable hours for employment insurance income...

She qualified the worker's work as occasional maintenance work. In her description of the work carried out by the worker, she did not mention degreasing the stove. She admitted that during the worker's two weeks of work she did not take a salary because she could not pay two \$450 salaries a week. When presented with the changes in the numbers on the cheque stubs and the two \$450 deductions per week on the worker's paycheques, she could no longer recall the terms of the agreement made with the worker about his salary. After consulting her accountant, Line Boucher, she explained that the amounts deducted from the worker's paycheques were advances that had been paid to him. Lastly, she estimated that Michaël spent 5% of his time running errands for the business.

[16] Paul Dessureault, a human resources investigator for Services Canada, testified at the hearing. He became involved in the worker's case because the worker did not attend an interview with an officer while he was on benefits. He told how his first meeting with the worker went, on April 4, 2006. He took the worker's version of the facts before beginning his investigation. The worker's declaration of April 4, 2006, was submitted as Exhibit I-12. The worker declared that his hours were not monitored because he was paid weekly. He stated he worked 60 hours a week, whereas the employment records only indicate 40 hours a week. The worker also confirmed that he worked at Aqua Biochem until the end of October. In 2005, he was prematurely dismissed such that he was missing hours to be admissible for benefits.

[17] During his investigation, the investigator noted that the worker's paycheques (cheque No. 403 for \$669 and cheque No. 408 for \$672) were not produced. The cheque stubs from the bar show that the cheques made out to the worker were changed (cheques No. 415 and No. 416 rather than No. 403 and No. 408). Cheques No. 403 and No. 408 did not correspond to the virtual

statement from the Caisse Populaire Desjardins and cheques No. 415 and No. 416 were cashed the same day. According to the investigator, there are inconsistencies with the cheque numbers and amounts paid.

[18] The investigator did not believe that the worker actually performed the maintenance and renovation work at the bar because, during the period, there were no purchase invoices for materials. The material purchases dated back to more than six months prior to the period. Moreover, the invoices produced showed that the painting work was done in 2004 and the plumbing work was done in February 2005.

[19] Finally, the investigator noted that there were discrepancies in the number of hours worked and discrepancies regarding the nature of the work performed. According to him, the payor never mentioned degreasing the stove and she stated she never served meals at the bar. By his calculations, the worker was short 6.5 hours to be admissible for benefits.

[20] Roger Dufresne, appeals officer at the Canada Revenue Agency, testified at the hearing. His report was produced as Exhibit I -24. He read the statutory declarations and documents provided by the payor and conducted separate phone interviews with the worker and the payor on February 27, 2007. He concluded that the worker's employment with the payor was not insurable employment for the following reasons:

(a) Compensation

- (i) According to the record of wages, the worker received two gross pays of \$639.60 and \$672.86 whereas the record of hours worked do not contain any details about the worker's number of hours of the worker as opposed to the other employees.
- (ii) The numbers of the cheques listed in the payroll did not correspond to the pay given to the worker. A review of the documents shows that the worker received two advances of \$450 each, plus two cheques for \$39.44 and \$19.25. There is no evidence that these advances were actually granted, which leaves doubts as to the true payment of the paycheques listed in the payroll.
- (iii) According to the worker, he spent around 15 to 20 hours cleaning a stove. This work cost more than \$300 in compensation, whereas the payor did not mention it in her declaration and did not need this equipment to operate.
- (iv) In September 2004 and February 2005, the payor issued two cheques in the worker's name, with [TRANSLATION]"errands" written on them. According to the parties, these payments were not wages, which shows that the worker had already rendered services to the payor without compensation.

(b) Employment conditions

The 80 hours of employment written on the employment record were only to qualify the worker for employment-insurance benefits. The employment conditions did not correspond to the payor's true need for labour but to employment conditions based on the non-arm's length relationship between the parties.

(c) Duration of employment

- (i) The duration of the employment does not correspond to reality. Many documents signed by the worker between October 2004

and December 2005 show that the worker was very involved in the bar's operations, contrary to the worker and payor's claims to the contrary.

- (ii) The duration of the employment being reviewed was strictly tied to the non-arm's length relationship because a person with an arm's length relationship would not have rendered services for such a long period of time without receiving wages.
- (d) Nature and importance of the work accomplished
- (i) The worker's duties were not essential to the payor's operations. they were incidental duties carried out to maintain employment in order to obtain employment-insurance benefits.
  - (ii) The worker's signature on the rental contract for the tanning bed clearly shows that the financial link between the parties went far beyond the compensation indicated in the record of wages, which is strictly tied to their non-arm's length relationship.

### Analysis

[21] Subsections 5(2)(i) and 5(3) of the Act state:

#### **5(2)(i) Excluded employment**

(2) Insurable employment does not include

...

- i. employment if the employer and employee are not dealing with each other at arm's length.

#### **Arm's length dealing**

(3) For the purposes of paragraph (2)(i):

- a. the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*;
- 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.

[22] Chief Justice Richard of the Federal Court of Appeal explained, in *Francine Denis v. Canada (Minister of National Revenue—M.N.R.)*, 2004 FCA 26, the role of the Tax Court of Canada judge in an appeal from a determination of the Minister on exclusion provisions contained in subsections 5(2) and (3) of the Act.

[5] The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, March 10, 2000).

[23] In light of the testimonial and documentary evidence regarding, in particular, the compensation paid, the terms of employment and the duration, nature and importance of the work performed during the employment period in question, it seems reasonable to me to find that the Minister's conclusion was reasonable in the circumstances. The presumed facts or those relied on by the Minister were correctly assessed considering the context in which they occurred. There are no significant facts that would change the Minister's decision.

[24] The context of the case is one in which there was an arrangement between the worker and payor for the sole purpose of allowing the worker to draw employment-insurance benefits.

[25] The record of hours worked did not include any details on the number of hours the worker worked, contrary to the other employees.

[26] The cheque numbers listed in the record of wages did not correspond to the paycheques given to the worker. Cheques No. 404 and No. 408 were not submitted to evidence and were replaced by two small cheques to take into consideration two prior advances of \$450 granted to the worker. No evidence regarding these advances was provided. In one of her declarations, the payor admitted she could no longer remember what the agreement was with the worker for payment of his salary.

[27] The parties' declarations and testimony include variations, in particular regarding meal services at the bar, the nature of the work performed by the worker and degreasing the stove. The tasks the worker carried out were not essential to the activities of the business. No invoices for work carried out during the period were presented, except one invoice for light bulbs. The invoices produced were from many months prior to the period and many were related to work carried out from September 2004 to April 2005 (plumbing and painting).

[28] The worker was involved in the operations at the bar and rendered services without compensation. He deposited money at the Caisse Populaire Desjardins, signed invoices for the payor's suppliers and ran errands for the business. He was also involved in the management of the bar as shown by the guarantee for the leasing agreement to purchase the tanning bed.

[29] Considering the above, the worker's conditions of employment would not have been similar if the worker and payor had a non-arm's length relationship.

[30] As a result, the appeals are dismissed and the Minister's decision is affirmed.

Signed at Ottawa, Canada, this 26th day of August 2011.

"Réal Favreau"

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Favreau J.

Translation certified true  
on this 27th day of October 2011.

Elizabeth Tan, Translator

CITATION: 2011 TCC 385

COURT FILE NOS.: 2007-3141(EI) and 2007-3041(EI)

STYLES OF CAUSE: Michaël Dumont v. M.N.R.  
Monica Turcotte v. M.N.R.

PLACE OF HEARING: Rimouski, Québec

DATE OF HEARING: December 14, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: August 26, 2011

APPEARANCES:

    Counsel for the appellants: Nancy Lajoie

    Counsel for the respondent: **Geneviève Lecours**

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