

Docket: 2009-982(EI)

BETWEEN:

JEANNINE CROISETIÈRE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

GMO ASPHALTES INC.,

Intervenor.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard on February 8, 2010, at Trois-Rivières, Quebec.

Before: The Honourable Justice Gaston Jorré

Appearances:

For the appellant: The appellant herself

Counsel for the respondent: Alain Gareau

Agent for the intervenor: Gabriel Gervais

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is dismissed and the decision of the Minister of National Revenue dated March 26, 2009, made under the *Employment Insurance Act* is confirmed.

Signed at Ottawa, Canada, this 27th day of September 2011.

“Gaston Jorré”

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Jorré J.

Translation certified true  
on this 14th day of November 2011.  
Daniela Possamai, Translator

Citation: 2011 TCC 454  
Date: 20110927  
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### **REASONS FOR JUDGMENT**

#### **Jorré J.**

[1] The appellant, Jeannine Croisetière, is appealing from a decision of the Minister of National Revenue (Minister) dated March 26, 2009, in which he found that the appellant did not hold insurable employment during the period from June 23 to October 3, 2008.

[2] The appellant and the payor, GMO Asphaltes Inc., are not dealing with each other at arm's length, and accordingly, paragraph 5(2)(i) of the *Employment Insurance Act* (EIA) applies. The Minister arrived at the conclusion "that a substantially similar contract of employment would not have been entered into if the employee and the employer had been dealing with each other at arm's length" with the consequence that the employment was not insurable.

[3] The relevant provisions are paragraph 5(2)(i) and subsection 5(3) of the EIA:

(2) Insurable employment does not include

...

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

(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*; and

(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] The existence of a non-arm's length relationship is not being challenged. The appellant is married to the payor's sole shareholder, Gabriel Gervais.

[5] The appellant and the intervenor are, however, contesting the decision as to the application of subsection 5(3) of the EIA.

[6] The payor operated a seasonal asphalt paving, sealing and excavation business. The business was active from mid-April to mid-November. During that period, the payor hired two employees.

[7] The payor used the family residence as an office.

[8] Prior to being entered into the payroll journal in June 2008, the appellant testified that she began carrying out her duties for the payor as of April 2008.

[9] She volunteered some 20 hours per week prior to being hired. She did the accounting, including the bookkeeping, payments, invoicing and deposits. She would also meet with the accountant, especially in the beginning, because since she had not done any accounting in years, she needed to get back up to speed.

[10] The appellant was hired on June 23, 2008, as a billing clerk. In addition to the bookkeeping, she sought out contracts door to door and sometimes did manual work.

[11] She and her husband stated that her change in status was caused by the addition of new duties.

[12] Her remuneration was set at \$600 per week, that is, \$15 per hour, and was paid to her on a weekly basis by cheque. It is the appellant's husband who decided on the appellant's remuneration.

[13] She entered 40 hours of work per week in the payroll journal. Although the appellant worked overtime, she did not enter and was not compensated for her overtime.

[14] The appellant testified that she spent approximately 20 hours per week, mainly in the morning, doing accounting work. Toward the end of the day, she would go from door to door to seek out work for two or three hours. Finally, she on occasion did manual work involving sealing: cleaning, the repair of cracks and the application of sealer.

[15] She was dismissed on October 3, 2008, for lack of work.

[16] After her layoff the appellant continued to perform services for the payor, albeit less frequently; *inter alia*, the appellant testified that she continued to be in charge of the payor's bookkeeping for about two to five hours per week.

[17] The appellant's husband, Mr. Gervais, submitted that the appellant only helped him in April and May. Subsequently, according to Mr. Gervais, owing to the inclement weather conditions, he had to go back to doing sealing work. It was at that moment when his wife proposed to work for the company.

[18] Mr. Gervais's response was as follows:

[TRANSLATION]

Accumulate your hours and as of the month of June, if I have my contracts, I said, I will hire you again. I will have only one employee, only you as we will take care of the other business together.<sup>1</sup>

[19] Mr. Gervais testified that the appellant worked 70 hours per week and that he could not have hired anyone else to do the same work even if he offered a salary of \$1,000 per week.<sup>2</sup>

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<sup>1</sup> Transcription, pages 50 and 51. As I indicated in paragraph 6, there were two other employees apart from Mr. Gervais, the appellant and Nathalie Gervais, who started and stopped working three weeks after the appellant. The appellant and M. Gervais each worked 600 hours for the payor in 2008 (Exhibit I-2, first and third pages).

[20] The appellant's paycheque of October 9, 2008, was deposited into the company's account and not into the joint account of the appellant and her husband where the appellant's other paycheques were deposited. The cheque of October 9, 2008, was deposited into the company's account probably because the company needed money.<sup>3</sup>

[21] From May to November 2008, there were approximately 250 entries for payments and deposits in the company's books. The number of monthly entries varied from about 45 to a little over 80.

[22] While I accept that the appellant worked beyond the 40 hours per week paid to her, I am not satisfied with the testimony of Mr. Gervais that the appellant worked 70 hours every week; however, I can accept that the appellant worked 70 hours over the course of certain weeks.

[23] Nevertheless, even if I conclude that the appellant probably spent a little more time doing the accounting in the beginning when she had to consult with the accountant more often and get back to speed on accounting, and that therefore the average of 20 hours per week until October 3, 2008, corresponded to a little more than 20 hours toward the beginning of the period and to a little less than 20 hours toward the end, I cannot accept that in October and in November the accounting work only represented two to five hours per week, as the number of entries to be made in October and in November was still greater than half of the number of entries made in the two months where the most entries were made, that is, in August and in September. There is nothing that would allow me to conclude that in October and in November the entries could have been made much sooner than that.

[24] I also accept that Mr. Gervais would not have been able, even if he had paid more, to find another employee to do the same work as the appellant considering the availability and flexibility of the appellant.

[25] Would a substantially similar contract of employment have been entered into if the employee and the payor had been dealing with each other at arm's length?

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<sup>2</sup> *Ibid.*, page 56 [TRANSLATION]: "I paid her forty hours per week on a weekly basis. The hours were divided by a salary of \$15 per hour. But I will tell you one thing, I would never have someone like that for \$1,000 per week, because she put in seventy hours per week."

<sup>3</sup> *Ibid.*, questions 167 to 173.

[26] I must regretfully conclude that a substantially similar contract of employment would not have been entered into had there not been a non-arm's length relationship. I reach this conclusion, *inter alia*, owing to the following elements:

- (a) During the salaried employment period, there were a significant number of unpaid hours of work.
- (b) Mr. Gervais recognized that he could not have hired another person to do the same work as the appellant at the salary that was being paid to her. (This is the factor to which I attribute the greatest importance.)
- (c) On one occasion, when the company lacked funds a shortage of capital, the appellant deposited her paycheque into the company's account. (This is a minor factor.)
- (d) A significant amount of volunteer work was done before and after the employment period.

Overall, such elements are incompatible with a contract that would have been entered into with an unrelated person.

[27] Consequently, the Minister's conclusion is reasonable and the appeal is dismissed.

Signed at Ottawa, Canada, this 27th day of September 2011.

“Gaston Jorré”

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Jorré J.

Translation certified true  
on this 14th day of November 2011.  
Daniela Possamai, Translator

CITATION: 2011 TCC 454

COURT FILE NO.: 2009-982(EI)

STYLE OF CAUSE: JEANNINE CROISETIÈRE v. M.N.R. and  
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PLACE OF HEARING: Trois-Rivières, Quebec

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REASONS FOR JUDGMENT BY: The Honourable Justice Gaston Jorré

DATE OF JUDGMENT: September 27, 2011

APPEARANCES:

For the appellant: The appellant herself

Counsel for the respondent: Alain Gareau

Agent for the intervenor: Gabriel Gervais

COUNSEL OF RECORD:

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Name:

Firm:

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