Docket: 2009-2492(EI)

BETWEEN:

JEANNE DUCHARME,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 6, 2013, at Baie-Comeau, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 2nd day of July 2013.

"Paul Bédard"

Bédard J.

Translation certified true
on this 16th day of August 2013
Margarita Gorbounova, Translator

Citation: 2013 TCC 214
Date: 20130702
Docket: 2009-2492(EI)

BETWEEN:

JEANNE DUCHARME,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

[1] The appeal before this Court concerns the insurability of work performed during the period from May 19, 2008, to October 25, 2008 (the relevant period).

[2] During the relevant period, the appellant was employed by the business of Angelo Fortin (of which he is the sole owner), who is also the appellant's common-law partner.

[3] At the hearing, only the appellant and Angelo Fortin testified. The appellant and Mr. Fortin admitted almost all of the facts assumed for the purposes of the decision under appeal. The facts assumed are paragraphs and subparagraphs 7(a) to (c) and 8(a) to (ff) of the Reply to the Notice of Appeal.

> [TRANSLATION]
> (7) The appellant and the payer are related persons within the meaning of the *Income Tax Act* because
>
> (a) Angelo Fortin is the sole owner of his business;
>
> (b) Jeanne Ducharme, the appellant, is Angelo Fortin's common-law partner;

(c) The appellant is related as a common-law partner to a person who controls the payer;

(8) The Minister found that the appellant and the payer were not dealing with each other at arm's length in the context of this employment. The Minister was satisfied 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, in light of the following circumstances:

(a) The payer registered a business as a sole proprietorship on April 9, 2002;

(b) The payer operated his sole proprietorship under the name Clôture-O-Max Côte-Nord 2002;

(c) The payer's activity is mainly the installation and repair of fences;

(d) 90% of the payer's contracts is with individuals and the rest with industry;

(e) The payer stated that he had no competitors in the area he served;

(f) The payer's business is seasonal, from thaw to frost;

(g) The payer reported the following business income:

Tax Years	2005	2006	2007
Gross business income	$205,946	$203,598	$251,841
Net business income	$21,722	$39,314	$6,806

(h) The income statement from January 1, 2008, to December 31, 2008, indicates the following numbers:

Gross business income: $224,599
Gross profit: $82,094
Net loss: $22,389

(i) During the period at issue, the payer operated his business from May 2008 to November 2008;

(j) The payer's offices are located in the residence belonging to the appellant;

(k) The payer paid no rent to the appellant for the use of this office space;

(l) The payer's business card indicated the payer's home telephone number, fax number and cell phone number;

(m) The payer usually employed two or three men for the entire season and two others when there was extra work;

(n) From 2002 to 2007, the payer transferred the telephone calls received at home to his cell phone;

(o) Starting on April 1, 2008, the use of a handheld cell phone while driving was prohibited in Quebec.

(p) The payer then decided to hire a receptionist;

(q) Before she was hired by the payer, the appellant worked as a receptionist in a bowling alley and, in the summer, as a salesclerk at a golf pro shop;

(r) The appellant agreed to work for the payer instead of returning to work at the golf club in 2008;

(s) The appellant was the only office employee of the payer;

(t) The appellant's duties were to answer the phone, to take appointments for the payer to make estimates, to do the employees' pay including her own, to print out cheques on the computer and to have the payer sign them, and to go to the payer's warehouse in order to receive merchandise when necessary;

(u) The appellant answered about 20 to 30 calls per day;

(v) In the evenings and on weekends, the payer was present and the answering machine was turned on;

(w) All salaries were based on 40 hours per week and did not vary;

(x) All of these tasks were performed by the payer before the appellant had been hired;

(y) The payer also showed her how to do invoicing on the computer, but in 2008, he did it himself;

(z) The payer's bookkeeping was done by a third party;

(aa) The appellant worked from Monday to Friday, 8 a.m. to 5 p.m.;

(bb) The appellant was paid $9 per hour for 40 hours per week;

(cc) Based on the payroll journal, the appellant received $8,280 from the payer for the period at issue;

(dd) A payer at arm's length would not have hired a person to do this receptionist's work at such a high cost, while he could have continued like in other years at a lower cost, for example, by buying a headset in order to comply with the new traffic law;

(ee) The payer did not risk losing clients because there were no competitors in his area;

(ff) The income generated by the payer's business is the only source of income for the payer's family.

[4] Only the fact stated in subparagraph 8(dd) of the Reply to the Notice of Appeal was denied in the testimony of the appellant and Mr. Fortin.

[5] The basis for the respondent's finding of exclusion is found in paragraph 5(2)(*i*) of the *Employment Insurance Act*, which reads as follows:

> **5(2) Excluded employment** - Insurable employment does not include
>
> . . .
>
> (*i*) employment if the employer and employee are not dealing with each other at arm's length.

[6] In the same section, however, Parliament provided that the exclusion could be set aside if parties dealing with each other at arm's length would have entered into a substantially similar contract of employment.

[7] In other words, Parliament has granted the respondent discretion to assess all the facts relevant to the work at issue, including compensation, duration and conditions, and determine whether or not the employment is insurable. The statutory provisions in question read as follows:

> **5(3) Arm's length dealing** – 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.

[8] The Federal Court of Appeal has in a number of decisions held that a decision resulting from the exercise of discretionary power cannot be set aside by the Court unless it is established on a balance of probabilities that the exercise of the discretionary power was tainted by errors or flaws, or was simply exercised unreasonably, either by failing to take into account relevant elements or by taking into account irrelevant elements.

[9] In short, if the Minister properly and reasonably assessed all the relevant facts, this Court cannot set aside his decision, even if the Court could have arrived at a different conclusion.

[10] The analysis must involve not only the work performed but also all the facts shown at trial; contrary to the investigation prior to the determination, the hearing before the court provides a set of generally more complete and nuanced facts; moreover, witnesses are more prepared to present all facts they deem important and relevant while allowing for a better assessment of credibility when all relevant parties are present.

[11] In that respect, the two cases most often cited are *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878, 246 N.R. 176, and *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, 261 N.R. 150. In *Légaré*, the Honourable Justice Marceau wrote the following:

> 4 The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject

to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

. . .

12 I have just said that in our view, these facts by themselves do little to explain and support the response of the Minister or his representative. Under the Unemployment Insurance Act, excepted employment between related persons is clearly based on the idea that it is difficult to rely on the statements of interested parties and that the possibility that jobs may be invented or established with unreal conditions of employment is too great between people who can so easily act together. And the purpose of the 1990 exception was simply to reduce the impact of the presumption of fact by permitting an exception from the penalty (which is only just) in cases in which the fear of abuse is no longer justified. From this perspective, after identifying the true nature of the employment, the importance of the duties and the reasonableness of the compensation, it is difficult in our view to attach the importance the Minister did to the facts he relied on to exclude the application of the exception. It is the essential elements of the employment contract that must be examined to confirm that the fact the contracting parties were not dealing with each other at arm's length did not have undue influence on the determination of the terms and conditions of employment. From this standpoint, the relevance of the facts relied on, even without further detail, seems very questionable. And there is no need to go any further. While the facts relied on might legitimately leave sufficient doubt with respect to an objective basis for the conditions of the applicants' employment contract, placing these facts in the context of the evidence adduced before the Tax Court of Canada - evidence which was almost completely accepted by the Tax Court judge - only serves to highlight the unreasonableness of the Minister's initial conclusion. It was in fact clearly explained and established that the applicants' salary was higher than the minimum wage the other employees received because of the responsibility involved in the duties they performed and that that was the prevailing salary in the industry for similar jobs; it was clearly explained and established that the shareholders had decided to reduce the salary normally due to them to provide for the financial support and development of the business; it was clearly explained and proven that a tornado had destroyed a large number of the buildings of the business in 1994, which led to a period of confusion, and then reconstruction and financial difficulties; last, it was explained and proven that the presence of the children of one of the applicants on the land around the greenhouses was very unlikely to affect the performance of her duties and the provision of the services she agreed to provide.

[12] In *Pérusse*, the Honourable Justice Marceau wrote the following:

> 14 In fact, the judge was acting in the manner apparently prescribed by several previous decisions. However, in a recent judgment this Court undertook to reject that approach, and I take the liberty of citing what I then wrote in this connection in the reasons submitted for the Court:
>
> > The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.
>
> 15 The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[13] The appellant testified that her work had essentially consisted in being available (40 hours per week, Monday to Friday, 8 a.m. to 5 p.m.) to answer calls. Thus, she apparently answered about 20 calls per day during the relevant period. She

also admitted that her other tasks listed in subparagraph 8(t) of the Reply to the Notice of Appeal required 2 to 3 hour of work per week at most during the relevant period. In addition, in cross-examination, the appellant explained that she had also worked as a receptionist at a bowling alley from 1 to 11 p.m. three days per week. When confronted with the fact that she could not have been working for two employers simultaneously, the appellant explained that she had forgotten to say that the bowling alley was closed in the summer. Unless summer starts before June 21 and lasts until October 25 in Baie-Comeau, I conclude that the appellant could not work for Mr. Fortin from 1 to 5 p.m. on three days of the week during several months of the relevant period. For that reason, I attribute little probative value to the appellant's testimony. The appellant simply did not satisfy me that she had really rendered services to Mr. Fortin.

[14] In addition, Mr. Fortin essentially testified that he would have hired another person to complete the tasks listed in subparagraph 8(t) of the Reply to the Notice of Appeal if the appellant had not agreed to work for him. Indeed, based on the only true reason stated by Mr. Fortin to have hired the appellant as a receptionist, as of April 1, 2008, the use of handheld cell phones while driving was prohibited in Quebec, which prevented him from answering his clients' calls while on the road. In addition, Mr. Fortin was unable to explain why he had not used a headset to answer his clients' calls while driving.

Conclusion

[15] In this case, the appellant did not satisfy me that she had really worked for Mr. Fortin during the relevant period. In any case, the Minister's conclusion that an arm's length payer would not have hired a person to do essentially reception work, while he could have continued at a lower cost as in previous years to answer his clients' calls while he was driving his vehicle, appears reasonable to me in light of the evidence. Indeed, Mr. Fortin could have used a headset to answer his clients' calls while driving in compliance with the new traffic law and thus avoided the cost of a receptionist, especially since Mr. Fortin's business was running at a loss in 2008. In other words, the conclusion reached and contested is reasonable and is consistent with all of the facts relevant to the case. There was no abuse by the Minister of his discretionary power.

[16] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 2nd day of July 2013.

"Paul Bédard"

Bédard J.

Translation certified true
on this 16th day of August 2013
Margarita Gorbounova, Translator

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COURT FILE NO:	2009-2492(EI)
STYLE OF CAUSE:	JEANNE DUCHARME AND M.N.R.
PLACE OF HEARING:	Baie-Comeau, Quebec
DATE OF HEARING:	June 6, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	July 2, 2013

APPEARANCES:

For the appellant:	The appellant herself
Counsel for the respondent:	Marie-France Dompierre

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada