Docket: 2019-2529(EI)

BETWEEN:

MED EXPRESS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on October 8 and 9, 2020 at Quebec City, Quebec.

Written submissions filed by the appellant on October 28, 2020 and November 20, 2020 and by the respondent on November 13, 2020

Before: The Honourable Justice Dominique Lafleur

Appearances:

Counsel for the appellant:	Guy Dussault Véronique Aubé
Counsel for the Respondent:	Renaud Fioramore-Beaulieu

JUDGMENT

In accordance with the attached reasons for judgment, the appeal under the *Employment Insurance Act* (the "Act") is allowed, without costs, and the decision of the Minister of National Revenue dated April 2, 2019 is amended, given that Mr. Le was not employed in insurable employment under paragraph 5(1)(a) of the Act during the period of January 1, 2017 to January 17, 2018.

Signed at Ottawa, Canada, this 22nd day of February 2021.

"Dominique Lafleur"

Lafleur J.

Citation: 2021 TCC 8
Date: 20210222
Docket: 2019-2529(EI)

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MED EXPRESS INC.,

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REASONS FOR JUDGMENT

Lafleur J.

I - BACKGROUND

[1] Med Express Inc. (the appellant) is appealing the Minister of National Revenue's (the Minister) decision dated April 2, 2019, according to which Mr. Kim was an employee of the appellant. Consequently, for the period of January 1, 2017 to January 17, 2018 (the period), Mr. Kim was employed in insurable employment by the appellant within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act).

[2] The appellant is a company that provides courier services. Since 1992, the company primarily specializes in medical transportation (transportation of blood samples, narcotics, food carts, drugs for pharmacies, and transportation between hospitals, medical clinics and CHSLDs (residential and long-term care facilities)). It also provides mail management, warehousing and logistics services. The appellant is a federal business that operates under the *Canada Labour Code* (R.S.C. 1985, c. L-2.)

[3] As an owner driver working for the appellant in Quebec City, Mr. Le was a member of Teamsters Québec Local 1999 (F.T.Q.) (the Teamsters) during the period. A collective agreement dated July 23, 2015 signed by the appellant and the

Teamsters (the Collective Agreement) governed Mr. Le's working conditions with the appellant. The Collective Agreement stipulated that Mr. Le was a "dependent contractor" within the meaning of the *Canada Labour Code*. In addition, Mr. Le and the appellant had signed a Courier Outsourcing Service Agreement dated March 24, 2016 (the Courier Agreement). It was in effect during the period and identical to the one attached to the Collective Agreement (Addenda A).

[4] In addition to Mr. Le, Stéphane Boudreau, General Manager of the appellant, testified at the hearing. He started working for the company in 1998, while pursuing his studies. In 2004, he held a full-time position during his university studies to obtain his Chartered Management Accountant designation. He has been working in the appellant's offices since 2004.

[5] Sylvain Lacroix, a Teamsters Union representative since 2016, also testified at the hearing.

[6] In these reasons, I will use the term "self-employed worker" or "independent contractor" interchangeably.

II - ISSUE

[7] The issue is whether Mr. Le was employed in insurable employment by the appellant within the meaning of paragraph 5(1)(a) of the Act during the period.

III - POSITIONS OF THE PARTIES

[8] According to the appellant, during the period, Mr. Le was not employed in insurable employment by the appellant because Mr. Le and the appellant were bound by a contract of service and not by a contract of employment. It is clear that the intention of the parties was to enter into such a contract of service. Furthermore, there was no relationship of legal subordination between them.

[9] According to the respondent, during the period, Mr. Le was employed in insurable employment by the appellant, because Mr. Le and the appellant were bound by a contract of employment. The facts demonstrate real legal subordination between Mr. Le and the appellant. For example, Mr. Le could not decline a request by the appellant. Mr. Le had to obtain authorization from the appellant before he could leave for the day or take a vacation. Also, the appellant's took disciplinary measures against Mr. Le. Because it did not matter to Mr. Le how the type of

relationship he had with the appellant was characterized, it is not possible to establish the common intention of the parties.

IV - LEGAL FRAMEWORK

[10] Section 5 of the Act explicitly states what insurable employment is. The definition of this term includes employment performed under a contract of service or apprenticeship:

5(1) Types of insurable employment — Subject to subsection (2), insurable employment is	**5(1) Sens de *emploi assurable* —** Sous réserve du paragraphe (2), est un emploi assurable :
(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;	a) l'emploi exercé au Canada pour un ou plusieurs employeurs, aux termes d'un contrat de louage de services ou d'apprentissage exprès ou tacite, écrit ou verbal, que l'employé reçoive sa rémunération de l'employeur ou d'une autre personne et que la rémunération soit calculée soit au temps ou aux pièces, soit en partie au temps et en partie aux pièces, soit de toute autre manière;
	[…]

. . .

[Emphasis added.]

A "contract of service" is not defined anywhere in the Act.

[11] Because the events in this case took place in Quebec, we must review the relationship between Mr. Le and the appellant with respect to private law applicable in Quebec.

[12] Thus, the criteria set out in the *Civil Code of Québec* (the C.C.Q.) must be applied to determine whether we are dealing with a contract of service (or contract of employment) or a contract of enterprise or for services. Justice Desjardins stated the following regarding this matter in *NCJ Educational Services Limited v. Canada (National Revenue)*, 2009 FCA 131:

> [49] Since paragraph 5(1)(*a*) [of] the *Employment Insurance Act* does not provide the definition of a contract of services, one must refer to the principle of

> complementarity reflected in section 8.1 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which teaches us that the criteria set out in the *Civil Code of Québec* must be applied to determine whether a specific set of facts gives rise to a contract of employment. . . .

[13] The fact that Mr. Le is considered a "dependent contractor" within the meaning of the *Canada Labour Code* and that the appellant is a federal business to which the *Canada Labour Code* applies does not alter this conclusion. I must determine whether this dependent contractor within the meaning of the *Canada Labour Code* is bound to the appellant under a contract of employment or a contract of service within the meaning of the C.C.Q.

[14] Even if a dependent contractor, such as Mr. Le, is considered an employee within the meaning of the *Canada Labour Code* (subsection 3(1)), this does not necessarily mean that he will be considered an employee within the meaning of the C.C.Q. *(DHL Express (Canada) Ltd v. M.N.R.*, 2005 CCI 178, paragraph 32). The provisions of the *Canada Labour Code* allow dependent contractors to organize and be governed by a collective agreement, such as the Collective Agreement applicable in this case.

[15] Also, the *Canada Labour Code*'s definition of the term "dependent contractor" includes "any other person who, whether or not employed under a contract of employment, performs work or services for another person on such terms and conditions that they are, in relation to that other person, in a position of economic dependence on, and under an obligation to perform duties for, that other person" (paragraph 3(1)(c) - definition of "dependent contractor"). Thus the *Canada Labour Code* provides that a collective agreement may govern relations between dependent contractors and a company that has hired them under a contract of service within the meaning of the C.C.Q. (*Dynamex Canada Corp. v. the M.N.R.*, 2008 TCC 71, at paragraph 12).

[16] The relevant provisions of the C.C.Q. are contained in articles 2085 and 2086 regarding a contract of employment and in articles 2098, 2099 and 2101 regarding a contract of enterprise or for services:

> **2085**. A contract of employment is a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer.
>
> **2085**. Le contrat de travail est celui par lequel une personne, le salarié, s'oblige, pour un temps limité et moyennant rémunération, à effectuer un travail sous la direction ou le

2086. A contract of employment is for a fixed term or an indeterminate term.

. . .

2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him.

2099. The contractor or the provider of services is free to choose the means of performing the contract and, with respect to such performance, no relationship of subordination exists between the contractor or the provider of services and the client.

. . .

2101. Unless a contract has been entered into in view of his personal qualities or unless the very nature of the contract prevents it, the contractor or the provider of services may obtain the assistance of a third person to perform the contract, but its performance remains under his supervision and responsibility.

contrôle d'une autre personne, l'employeur.

2086. Le contrat de travail est à durée déterminée ou indéterminée.

[…]

2098. Le contrat d'entreprise ou de service est celui par lequel une personne, selon le cas l'entrepreneur ou le prestataire de services, s'engage envers une autre personne, le client, à réaliser un ouvrage matériel ou intellectuel ou à fournir un service moyennant un prix que le client s'oblige à lui payer.

2099. L'entrepreneur ou le prestataire de services a le libre choix des moyens d'exécution du contrat et il n'existe entre lui et le client aucun lien de subordination quant à son exécution.

[…]

2101. À moins que le contrat n'ait été conclu en considération de ses qualités personnelles ou que cela ne soit incompatible avec la nature même du contrat, l'entrepreneur ou le prestataire de services peut s'adjoindre un tiers pour l'exécuter; il conserve néanmoins la direction et la responsabilité de l'exécution.

[Emphasis added.]

[17] Thus, for a contract of service to exist within the meaning of the Act (or contract of employment within the meaning of the C.C.Q.), the following three constituent elements are required (*9041-6868 Québec Inc. v. Canada (Minister of National Revenue)*, 2005 FCA 334, paragraph 11):

i. Performance of work;
ii. Remuneration; and
iii. A relationship of subordination.

[18] The relationship of subordination (or the criterion of direction or control) is the determining factor that distinguishes a contract of employment from a contract of service under Quebec law.

[19] In the requisite analysis, articles 1425 and 1426 of the C.C.Q. must be considered. They stipulate that the common intention of the parties must be sought:

1425. The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.	**1425**. Dans l'interprétation du contrat, on doit rechercher quelle a été la commune intention des parties plutôt que de s'arrêter au sens littéral des termes utilisés.
1426. In interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account.	**1426**. On tient compte, dans l'interprétation du contrat, de sa nature, des circonstances dans lesquelles il a été conclu, de l'interprétation que les parties lui ont déjà donnée ou qu'il peut avoir reçue, ainsi que des usages.

[20] In *Grimard v. Canada*, 2009 FCA 47, [2009] 4 FCR 592 [*Grimard*] (paragraph 43) the Federal Court of Appeal stated that a court does not err in taking into consideration criteria used under the common law in analyzing the legal nature of a work relationship (i.e. ownership of tools, the chance of profit, the risk of loss, and integration into the business) in order to determine the existence of a relationship of subordination, regardless of the fact that the ruling must be made under Quebec civil law: When examined in isolation, these criteria are not necessarily determinative. They are only indicia to be considered in order to determine whether such a relationship exists (paragraph 42).

[21] Thus, in Quebec law, the criterion of direction and control remains the determining element (*9041-6868 Québec*, paragraph 12). In this judgment, Justice Décary referred to what was said by Robert P. Gagnon in *Le droit du travail du Québec*, Éditions Yvon Blais, 2003, 5th edition, at pages 66 and 67):

> [TRANSLATION] In practice, one looks for a certain number of indicia of the ability to control (and these indicia can vary depending on the context): mandatory presence at a workplace; a somewhat regular assignment of work; the imposition of rules of conduct or behaviour; an obligation to provide activity reports; control over the quantity or quality of the services, etc. (paragraph 11)

[22] In *Dicom Express inc. c. Claude Paiement*, 2009 QCCA 611 [*Paiement*], the Appeal Court of Québec indicated that the concept of legal subordination is difficult to define and [TRANSLATION] . . . "contains the idea of hierarchical dependence, which includes the power to give orders and directives, to control the performance of work and to penalize breaches" (at paragraphs 16 and 17).

[23] In this decision, the Appeal Court of Québec also indicated that legal subordination should not be confused with economic dependence, and it added:

> 16 [TRANSLATION] . . . Being bound to a sole client that imposes certain duties and obligations in terms of standards of quality of service, sets the price of the product or dictates certain advertising standards does not necessarily mean the existence of legal subordination. Conversely, legal subordination includes economic dependence.

[24] Also, as the Federal Court of Appeal stated in *Grimard* (paragraph 67), a judge who has to determine a worker's status must ". . . determine the legal nature of the overall relationship between the parties in a constantly changing working world . . ."

[25] In *Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec*, 2019 SCC 28 (paragraphs 36, 37, 44 and 57), the Supreme Court of Canada recently indicated that in order for a person to have independent contractor status, that person must have assumed the business risk, that is, the person must be able to organize his or her business venture in order to make a profit. A contextual and fact-specific inquiry must be conducted for each case; it is important to look behind the contract binding the parties to ascertain the true nature of the relationship of the parties.

[26] The first step is to determine the subjective intention of each party to the relationship. The Court must therefore seek the common intention of the parties, where applicable, and in interpreting the contract, the circumstances in which the contract was formed and usage must be taken into account (article 1426 C.C.Q.).

[27] Subsequently, the Court must determine whether objective reality confirms this subjective intention to enter into either a contract of employment or a contract of enterprise or for services. Case law has repeatedly indicated that the characterization of the relationship between the parties is not necessarily determinative with respect to the nature of the contract between them (*D&J Driveway Inc. v. M.N.R.*, 2003 FCA 453, paragraph 2, *Grimard*, paragraph 33). For example, if the behaviour of the parties is inconsistent with the contract purporting to create an independent contractor relationship, or if the evidence demonstrates the existence of a relationship of subordination between the parties, the relationship would actually be an employer-employee relationship. At this stage, the Court must determine whether there is a relationship of legal subordination between the parties to the relationship.

V – ANALYSIS

[28] In this case, the parties do not dispute the fact that Mr. Le performed work and received compensation. These first two essential elements of a contract of employment are therefore not at issue. However, the third and final constituent element of a contract of employment—the existence of a relationship of subordination (criterion of direction and control)—is at issue.

[29] Before performing this analysis, the Court must assess the circumstances in which the relationship between the parties was created and developed, as well as usage.

[30] The assessment must take into account the *Canada Labour Code*, which considers a dependent contractor to be an employee. Also, the assessment must consider that the appellant has entered into contracts with its own clients to provide courier services. The evidence has shown that the clients who receive courier services are not Mr. Le's clients in this relationship. They are the appellant's clients. The appellant has contracted to fulfill its specific obligations to its own clients and is therefore responsible for customer service.

[31] The appellant's clients are primarily institutional clients in the medical field. Contracts in this area are awarded to the appellant through tenders. According to Mr. Boudreau, the tender specifications detail the obligations that the appellant must fulfill. They include complying with the requirements of circulating in the facilities, transportation and deadlines, wearing the uniform and an identity card, etc. The appellant must also provide services in the evening and at night, given the medical services required by clients such as Héma-Québec. The appellant also has clients in the industrial commercial sector. The appellant receives approximately 2,000 service calls during normal working hours during the day, approximately 30 to 35 calls in the evening, and between two and five calls at night.

[32] In 2017-2018, the appellant had approximately 200 owner-drivers who provided their own vehicles in the three branches based in Quebec City, Trois-Rivières and Laval. The appellant has approximately 30 to 35 owner-drivers at the Quebec City branch. The Quebec City branch requires approximately 25 owner-drivers to meet the daily needs of the appellant's clients. The appellant also employs some office workers, including dispatchers and customer service agents, as well as seven to eight drivers. These employee-drivers use the appellant's vehicles and incur no expenses in the course of their work. In addition, there is an employee manual for employee-drivers, which is not the case for owner-drivers. The appellant determines the tasks to be performed by the employee-drivers.

[33] Some contracts that the appellant has entered into stipulate that owner-drivers must be present during specific times of the day, i.e., on "dedicated routes". The Centre hospitalier universitaire de Québec (CHU de Québec) has approximately seven to eight dedicated routes. The appellant assigns these dedicated routes to the owner-drivers. Mr. Le obtained one of the CHU de Québec's dedicated routes, among others.

[34] Other contracts stipulate that the appellant must provide service on demand, i.e., "quick service". Owner-drivers provide quick service to many of the appellant's clients, depending on their ad hoc needs. During the day, the appellant's dispatchers ensure that the calls are assigned to the various owner-drivers based on their availability and location. A smartphone mobile app provided by the appellant and rented by the owner drivers is used to send the service calls to the owner-drivers (Exhibit A-1(9)).

[35] This phone does not have a function to locate the owner-drivers. Mr. Boudreau compared this app to the bill of lading that was formerly the contract of carriage between the shipper and the courier company. The owner-driver must

accept an assignment by clicking on an icon. Also, the owner-driver must click on another icon to confirm pick-up and delivery to ensure pick-up and delivery times are recorded.

[36] However, there are no dispatchers on duty during the evening and at night. During these times, an external call centre forwards service calls to an owner-driver, who acts as both as the dispatcher and driver. If that driver is unable to respond to a request, he must contact another owner-driver whose name is on a list provided in advance by the appellant to respond to the service request.

[37] Owner drivers are paid on a weekly basis. The work week begins on Saturday and ends the following Friday. The appellant prepares a commission report which is sent to the owner-driver at the beginning of the following week. The owner-driver is paid the amounts due on the Tuesday after the commission report has been sent. The remuneration paid to the owner-driver is equal to the percentage of commissions established in the Collective Agreement or in the Courier Agreement. This is equal to a percentage of the price that the client pays the appellant. It ranges between 50% and 70% of this amount from which union dues, telephone rent and cargo insurance premiums are deducted. The owner-driver does not issue invoices to the appellant.

5.1 First step: seeking the common intention and interpreting the contract

[38] In interpreting the contract binding Mr. Le and the appellant, the common intention of the parties must be sought. As noted above, during the period, the Collective Agreement governed the working conditions of owner-drivers at the Quebec City branch. Also, Mr. Le and the appellant had entered into the Courier Agreement. During this first step, the actual behaviour of the parties must be analyzed.

[39] For the following reasons, I find that, on a preponderance of evidence, the subjective intention of Mr. Le and the appellant was to enter into a contract of service, and not a contract of employment. The Collective Agreement and the Courier Agreement specifically provide that this was the intention of the parties.

[40] The Collective Agreement covers the remuneration and other hiring conditions of owner-drivers, such as Mr. Le. The Collective Agreement stipulates that owner-drivers are dependent contractors and owners and/or lessees of a vehicle (section 2.01). Section 4.02 of the Collective Agreement specifically states that the owner drivers are not employees of the appellant:

> [TRANSLATION] "The Company and owner-drivers regard their relationship as an owner / dependent contractor relationship and not an employer / employee relationship, and nothing in this agreement will be construed as an expression of contrary intent."

[41] Section 13.1 of the Courier Agreement expressly states that courier services are provided by the owner-driver as part of his own business and that he will not be considered an employee of the appellant:

> [TRANSLATION] 13.1 The parties hereto agree that the aforementioned courier services are provided by an owner-driver as part of his own business and that he or any driver or employee or agent will not, at any time, be considered an employee or a partner of the Company.

[42] Other factual elements support my finding that the subjective intention of the parties was to enter into a contract of service.

[43] The appellant prepared T4A slips (Statement of Pension, Retirement, Annuity, and Other Income) showing the self-employment commissions paid by the appellant to Mr. Le during the period (Exhibit A-1(2)). The appellant did not issue a Record of Employment to Mr. Le. The evidence also showed that the appellant made no deductions at source from the commission payments made to Mr. Le.

[44] Mr. Le also testified that when signing the Courier Agreement, the appellant's representative made it clear to him that he would be self-employed, not an employee of the appellant. Mr. Le did not object to this characterization.

5.2 Second step: relationship of legal subordination

[45] For the following reasons, I find, on a preponderance of evidence, that there was in fact no relationship of legal subordination between Mr. Le and the appellant during the period. The evidence showed that the appellant exercised control over the outcome and quality of the services provided by Mr. Le to its clients, but did not control the performance of the services provided by Mr. Le. Thus, during the period, a contract of service bound Mr. Le to the appellant and not a contract of employment within the meaning of the C.C.Q.

a) Credibility of the testimony

[46] The respondent claims that Mr. Boudreau's testimony was not particularly convincing regarding Mr. Le's working conditions, because Mr. Boudreau was never

in direct contact with Mr. Le. Because none of the appellant's representatives who had been in direct contact with Mr. Le came to testify at the hearing, the respondent is asking me to draw a negative inference on this subject in that the testimony of this person would not have favoured the appellant's argument. The respondent also referred to an advertisement posted on the appellant's website that tended to indicate that the owner-driver's job with the appellant was in fact a contract of employment (Exhibit I-1).

[47] For the following reasons, instead, I am of the view that Mr. Boudreau's testimony was credible and reliable. Mr. Boudreau began working for the appellant as a student in 1998 and has worked his way up the ranks over the years, which has given him the opportunity to perform various tasks within the company. More specifically, Mr. Boudreau testified that he acted as a dispatcher. Because he has been the appellant's general manager since 2004, I find it entirely plausible that he is aware of the job descriptions of dispatchers and owner-drivers, such as Mr. Le, and of the organization of work within the appellant's business. Also, the advertisement posted on the appellant's website (Exhibit I-1) does not support the respondent's position, because this advertisement was taken from the appellant's website on October 6, 2020. This was after the period. Mr. Le confirmed that the working conditions described in the advertisement were not exactly the same as his, including the lack of a lunch break. In addition, Mr. Boudreau testified that these conditions did not accurately represent the owner-drivers' working conditions.

[48] I found that Mr. Le's testimony was at times evasive and exaggerated, therefore unreliable and lacking credibility in some respects.

[49] First, Mr. Le overestimated the number of hours spent on courier services for the appellant. He testified that he had worked at least 80 to 110 hours per week in 2017, but admitted that these hours included his night on-call hours, during which there were two to five service calls on average. At the start of his testimony, he indicated that he worked between 80 and 110 hours a week, and worked seven days a week. Also, during his examination, Mr. Le indicated that he had been working 100 hours a week for a year and a half (i.e., during the period and the last 6 months of 2016). However, on cross-examination, he testified that at the start of 2017, he was working between 70 and 85 hours a week, and by the summer of 2016, he was working between 60 and 70 hours.

[50] Mr. Le testified that he was the person who signed and completed the Worker's Questionnaire that was filed in evidence (Exhibit I-4) and sent to the Appeals Division of the Canada Revenue Agency in December 2018. On cross-

examination, he indicated that he did not remember the identity of the person who had completed the form: perhaps one of his two assistants, or his roommate at the time, arguing that he could not recall because the questionnaire had been completed long ago, in December 2018. However, it seems to me that the time elapsed was not long enough to account for this oversight, given how important this document was with respect to the remedies brought by Mr. Le. Furthermore, I find it implausible that Mr. Le does not remember the identity of the person who completed this document. Also, Mr. Le did not remember why he would have indicated in this questionnaire that any changes or amendments had to be approved. Mr. Le also testified that at the time the questionnaire was completed he was taken aback by the appellant's attitude when his relationship with the appellant came to an end. I will come back to this below.

[51] On cross-examination, Mr. Le testified that all of his working hours appeared on the smartphone mobile app. He added that dispatchers could also call his son directly to assign him tasks and that sometimes he was not even aware of the runs his son was completing. Next, Mr. Le testified that the service requests for his son complicated matters because the dispatchers sent all service requests to the app on his smartphone, even those for his son. Mr. Le must have been aware of the requests assigned to his son, because when they came in, he then had to turn off his mobile app. His son then had to turn on the app on his own phone and click on the appropriate icons, which complicated matters.

[52] Mr. Le initially testified that when responding to various service requests, he never transferred any to his son. He later changed his mind. He indicated that he had sometimes been able to transfer service requests to his son for the territory on the south shore of Quebec City.

[53] Mr. Le also said he had no choice but to accept service requests as they appeared on the smartphone's mobile app. However, Mr. Boudreau said the mobile app is configured so that the owner-driver must accept assignments by clicking on an icon and is free to decline or accept requests. Mr. Boudreau's version seems the most plausible to me, given that dispatchers need to know whether a service request has been accepted by an owner-driver. Otherwise, dispatchers could not confirm that a request had been accepted until the pickup was made. Therefore, it would take a long time to confirm acceptance if the mobile app worked the way Mr. Le said it did.

[54] With respect to negotiating courier service rates, Mr. Le testified that he had never negotiated rates other than those set out in the Collective Agreement and the Courier Agreement. However, according to Mr. Boudreau, Mr. Le negotiated

different rates for a contract regarding Hôpital Hôtel-Dieu de Lévis, as well as for a request for transportation on the south shore of Quebec City. The Collective Agreement also stipulates that an owner-driver may negotiate different rates. Once again, Mr. Boudreau's version seems more credible and plausible to me.

[55] Mr. Le's credibility as a witness is undermined by his animosity towards the appellant following the termination of the Courier Agreement.

[56] In January 2018, the appellant decided to do without Mr. Le's services after Mr. Le placed a letter (Exhibit A-1(15)) on the windshield of a vehicle parked in a Centre hospitalier de l'Université Laval (CHUL) drop-off lane that he wanted to use. Following a complaint from the CHUL user about this letter, the CHUL demanded that the appellant no longer use Mr. Le's services in its facilities. A few days after Mr. Le had placed the letter on the windshield, the appellant suspended him for two to three days, and the courier agreement was subsequently terminated. Mr. Le filed a grievance, but because it was out of time, the grievance could not be heard. Mr. Le then asked the Union to demand $40,000 of financial compensation from the appellant on his behalf, but was unsuccessful. The appellant offered Mr. Le the opportunity to provide his services to one of its clients, an auto parts manufacturer. Mr. Le refused the offer because he was seeking financial compensation from the appellant. Mr. Le testified that he was taken aback by the appellant's response. Mr. Le subsequently filed a labour standards complaint claiming amounts under Quebec law. The claim was dismissed because the appellant is a federal business.

[57] In addition, Mr. Le sent emails to the appellant in late 2018 and early 2019 (Exhibit A-2). According to Mr. Le, these documents did not contain threats against Mr. Boudreau. The purpose of the document was to prompt Mr. Boudreau to consider how the appellant's business was being operated. I do not agree with Mr. Le. These emails do contain threats to take numerous legal actions against the appellant and mention claims for substantial amounts of compensation.

b) Relationship of legal subordination (direction and control test)

Work schedule

[58] According to the respondent, the work schedule was characteristic of a non-arm's length relationship, because the dispatcher assigned service requests and determined the order in which the services were to be provided. The dispatcher decided when Mr. Le could leave for the day. In addition, the Director of Operations decided whether Mr. Le could get an evening shift and authorized leave.

[59] On a preponderance of evidence, I find that the appellant exercised no direction or control over Mr. Le in this regard that would demonstrate a relationship of legal subordination.

[60] The evidence showed that the appellant did not demand any minimum availability from owner-drivers, but that the parties had to agree on a schedule beforehand. Owner-drivers could sometimes become unavailable during the day and, from that point on, the dispatcher no longer assigned them service requests. However, owner-drivers had to complete the runs that they had agreed to.

[61] As Mr. Boudreau said, the dispatchers ensured that transportation was optimal. The dispatcher checked the owner-drivers' location before sending them service requests. The dispatcher recommended an order of pickups and deliveries, but owner-drivers could select a different order at their discretion provided they complied with the appellant's clients' requirements. Mr. Le even testified that dispatchers contacted him to ask if he could accept further service requests during the day.

[62] Mr. Le testified that in the morning, when he called the dispatcher to tell him that he was available, the dispatcher sent him a list of service requests. According to Mr. Le, he could not refuse to complete a run and had to follow the order indicated by the dispatcher. However, this testimony is not as credible as Mr. Boudreau's. According to Mr. Boudreau, owner-drivers had to accept a request by clicking on an icon on their smartphone's mobile app. The dispatcher needed to confirm as soon as possible whether an owner driver agreed to complete a run. If the request was declined, he could send it to another driver, and he needed to know when the package would actually be picked up and delivered to the recipient.

[63] In addition, during the period, Mr. Le primarily worked evenings and nights, i.e., when there were no dispatchers on duty. He did not work days until early 2017. During evenings and nights, a driver worked as a dispatcher and assigned service requests to drivers whose names were on a list prepared by the appellant. Service requests came directly from an external call centre. Mr. Le testified that he sometimes worked as a dispatcher. He selected the service requests he wanted and assigned the remaining requests to other drivers. Mr. Le testified that he sometimes had to call several drivers before one of them accepted a service request. This shows that owner-drivers did not have to accept service requests and that the appellant did not exercise direction and control over the owner-drivers.

[64] Mr. Le also testified that after a few days he had refused to continue to provide transportation using the appellant's truck, because it was not profitable enough.

[65] The evidence did not show that Mr. Le had to ask the dispatcher for permission to leave at the end of his day shift. Rather, Mr. Le testified that he always received calls towards the end of his shift and that the dispatcher pleaded with him to accept additional service requests. In my opinion, having someone plead with you to provide a service is not the same as having to ask for permission to leave at the end of the workday. If the dispatcher or the appellant had had such authority over Mr. Le, they would not have pleaded with him to accept service requests. An employer does not plead with employees to do the jobs that they have been hired and paid to do. In addition, Mr. Le compared the dispatcher to a team leader, a person who has no administrative authority.

[66] Mr. Le also testified that he was supervised by the Director of Operations who assigned evening shifts, which were the highest paying shifts, as well as weekend shifts. Mr. Le indicated that he had to work the day or night shift in order to be able to work the evening shift. However, scheduling evening shifts and ensuring that there are enough owner-drivers to meet the requirements of the appellant's clients does not mean any direction or control is exercised over the work that a person performs. In addition, the evidence showed that Mr. Le chose to work nights and evenings because it paid more. Similarly, Mr. Le testified that he had to ask the Operations Manager for permission to take a vacation, even though he only took three to four vacation days in 2017 for a fishing trip, which is not determinative.

Subcontracting

[67] The evidence showed that Mr. Le was able to reassign his service requests to other persons, provided these persons had been pre-approved by the appellant, who checked their criminal history and whether they had a valid driver's licence. These conditions were essential for some of the appellant's clients because some of them were penal institutions and, also, courier services could include transporting narcotics. However, except for requiring that the person have a valid driver's license and no criminal record, the appellant did not have any control over whom the owner-driver selected. According to the respondent, the evidence was not compelling enough to show that this test denotes a relationship between a self-employed person and the appellant. Rather, on a preponderance of evidence, I find that this test indicates that Mr. Le was bound to the appellant by a contract of service.

[68] During the period, the evidence showed that Mr. Le assigned some service requests from the appellant to his two sons (Kyle and Kade). The evidence provided by Mr. Le and Mr. Boudreau indicated that Mr. Le sometimes had more than one vehicle making simultaneous deliveries during the period. Mr. Le testified that he made deliveries at the same time as his son Kade. He also assigned him service requests during his evening shifts. In addition, Mr. Le testified that he gave part of his commissions to his son Kade, after they had both reviewed the commission report prepared by the appellant.

[69] The evidence also showed that Kyle worked very little, while Kade worked a great deal during the period. According to the respondent, Mr. Le had to agree to the service requests assigned to his sons being sent to him on his smartphone. However, it was established that Mr. Le did not question this procedure until the termination of the Courier Agreement and that he consented to this work method.

[70] In *Paiement*, the Appeal Court of Québec indicated that, while a person has the right to hire a third party to perform a task, that person cannot be someone's employee other than for the purpose of performing the same task:

> 29 [TRANSLATION] Indeed, in my opinion, there is antimony between the status of employee and that of employer. One cannot both be someone's employee and someone else's employer in relation to the performance of the same work, because the nature of the control involved in a salaried employee's legal subordination to an employer cannot be satisfied through this allocation. A person who is asked to perform a task and who may reassign it to his own employees cannot claim to be bound by a contract of employment with the client. He has in fact entered into a contract of service that may be demanding and leave little room for autonomy, but it is nonetheless a contract of service.

[71] Because the evidence showed that Mr. Le could ask third parties to respond to a service request sent by the appellant and that he did in fact reassign service requests to either of his sons, this principle established by the Appeal Court of Québec in *Paiement* must be applied in this case. Mr. Le therefore cannot be considered an employee of the appellant.

Training

[72] The respondent also argued that there were elements related to training that revealed the existence of an employer-employee relationship. According to the respondent, Mr. Le had to undergo mandatory one-day training with another driver, as well as mandatory transportation of dangerous goods training. The respondent

cited section 23 of the version of the Collective Agreement prior to November 7, 2016, which provided that drivers who did not complete transportation of dangerous goods training would be suspended.

[73] However, the evidence did not show that the one-day training that Mr. Le completed with a driver was mandatory. In my opinion, that day was more like a non-compulsory, unpaid orientation day, and therefore did not reveal the existence of an employer-employee relationship.

[74] With respect to hazardous material training, the evidence showed that it was not mandatory either, and therefore did not reveal the existence of an employer-employee relationship. First of all, Mr. Boudreau testified in this regard and also indicated that, if a driver did not obtain his transportation of dangerous goods certification, the appellant did not assign him dangerous goods transportation work. In addition, section 23 of the Collective Agreement was amended on November 7, 2016 (Exhibit A-1(6)). According to the new version of the section, training was not mandatory. If certification was not obtained, the driver simply did not perform this type of transportation, which Mr. Boudreau's testimony confirmed.

Penalty powers

[75] The respondent argued that, if Mr. Le refused to respond to a service request, the dispatcher could penalize him by not assigning him other more profitable requests. This suggested that the appellant had the power to impose penalties, which supported the argument that there was an employer-employee relationship. Also, according to the respondent, a prime example of this penalty power was that the Director of Operations met with Mr. Le because he had failed to make a delivery on time when he had fallen asleep and, on another occasion, because he had placed a threatening letter on the windshield of a car parked in a CHUL drop-off lane.

[76] Mr. Boudreau testified that the appellant did not take disciplinary action. Customer complaints were handled in two ways: either the client dealt directly with the driver or the client complained to the appellant. The client complained directly to the appellant regarding the CHUL incident. The client also contacted the appellant directly regarding another incident in which Mr. Le was unable to make a timely delivery because he had fallen asleep.

[77] First, the evidence did not show that the appellant imposed a penalty as a result of the incident in which Mr. Le fell asleep. Mr. Le testified that he did meet with the Director of Operations following this incident and allegedly signed a document

regarding this matter. Mr. Le did not indicate that he had been penalized in any way. According to Mr. Le, the document was added to his employee record. However, he could not recall seeing such a record on the Director of Operations' desk.

[78] Regarding the CHUL incident, Mr. Le testified that he complained directly to the CHUL security guards on several occasions when the drop-off lane was used by unauthorized persons. Mr. Le said he went to notify the security guards after placing the threatening letter on the car's windshield. Mr. Le did not complain to the appellant's representatives. Instead, he himself dealt with the problems he encountered in the course of the service provided for the appellant.

[79] With respect to these two incidents, the evidence showed that the clients contacted the appellant directly to complain about the services rendered. In *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68 [*Le Livreur Plus*], the Federal Court of Appeal specified that it is to be expected that, in a situation similar to the appellant's, the appellant is the one who handles its clients' complaints, because the appellant is responsible for customer service, having entered into a contract with its clients (paragraph 29).

[80] Therefore, the fact that the appellant is in charge of handling complaints does not indicate that an employer-employee relationship existed between the appellant and Mr. Le.

Various indicators

[81] The evidence also showed that: Mr. Le did not have to report to the appellant's office, the appellant did not keep any record of the hours worked, and no performance assessments were conducted. In addition, there was no three-month probationary period. The only three-month waiting period was for membership in the Teamsters union. Potential members had to wait until three months had elapsed after they had signed the Courier Agreement before they could join the union. These elements demonstrate the lack of legal subordination between Mr. Le and the appellant.

[82] The appellant provided drivers with a uniform, i.e., a sweater with the appellant's logo on it, because the appellant's clients required that messengers wear a uniform and possess an identity card in order to circulate in their facilities. Mr. Le also testified that wearing the uniform and displaying the appellant's logo on the car made it easier to complete runs and access clients' parking lots.

[83] The messengers had to wear the uniform and possess an identity card. This may indicate that the appellant exercised some control. However, I am of the opinion that all of the foregoing must be assessed taking into account the particular industry in which the appellant's clients are involved. Also, the Court must consider the fact that it was the appellant, and not Mr. Le, who entered into a contract with its clients. The same also applies to the fact that the appellant performed a visual inspection of its courier service vehicles and required that the appellant's logo be affixed to the vehicles. In short, these elements are not determinative in this analysis of the relationship between the parties.

c) Indicators of supervision

[84] The other indicators of supervision—the chances of profit and the risk of loss as well as the extent of Mr. Le's integration—further support my finding that Mr. Le and the appellant were bound by a contract of employment rather than a contract of service.

Work tools

[85] According to the respondent, ownership of the vehicle does not provide a sufficient basis to conclude that a contract of service exists, because Mr. Le also drove vehicles owned by the appellant.

[86] Instead, I am of the view that the indicator of tool ownership supports the conclusion that Mr. Le was bound to the appellant by a contract of service rather than a contract of employment.

[87] A vehicle is the most important tool used to provide courier services. In the case at bar, this tool was to be provided by Mr. Le, except with respect to certain specific contracts, such as the one with Hôpital Hôtel-Dieu de Lévis. Mr. Le testified that he initially used a vehicle owned by his father and subsequently purchased a Caravan minivan. It was more spacious and allowed him to serve more clients. The evidence also showed that Mr. Le had more than one vehicle making deliveries simultaneously. Mr. Boudreau confirmed this in his testimony, and Mr. Le confirmed that his son made some deliveries for him.

[88] In addition, the evidence showed that Mr. Le seldom used the appellant's vehicles in the performance of his duties. Mr. Le testified that he used an appellant's vehicle for only a few days when performing an unprofitable contract and refused to

continue making deliveries to this client. Mr. Le testified that he primarily used his Caravan and his father's vehicle.

[89] In addition, Mr. Le was required to rent a smartphone from the appellant to enable him to receive service requests and supply all other equipment required to provide courier services.

Chance of profit and risk of loss

[90] According to the respondent, this test is neutral because the appellant guaranteed Mr. Le a minimum daily income ranging from $100 to $150 and provided $50,000 of cargo insurance per vehicle. In addition, the appellant looked after the invoicing.

[91] On a preponderance of evidence, I find that this indicator also supports the finding that Mr. Le was bound to the appellant by a contract of employment and not a contract of service.

[92] I agree with Justice D'Auray who, in *AE Hospitality Ltd. v. Minister of National Revenue*, 2019 TCC 116 (affirmed by the Federal Court of Appeal, 2020 FCA 207), concluded that the test of chance of profit or risk of loss must be interpreted in the entrepreneurial sense (paragraph 149).

[93] First, Mr. Le testified that in 2017 he did not receive the minimum daily amount because he primarily worked night and evening shifts, which paid more. Mr. Le did not receive the commission reports indicating the amounts of commission receivable for the services that he provided to the appellant until the following week. However, most of the time, Mr. Le was aware of the amount of commission receivable, because services were often repetitive. In addition, Mr. Le could easily estimate the commissions to be received during evening shifts, because most service requests were billed at a rate of $13 per run.

[94] Similarly, Mr. Le testified that he preferred to work evenings and nights, because he was paid more for runs on evening and night shifts. When Mr. Le also worked as a dispatcher on evening and night shifts, he often chose the most highly paid runs, and assigned the remaining runs to the other available drivers.

[95] Mr. Le could increase his earnings if he made more deliveries, because he was paid a percentage of the price that the appellant charged his client. According to Mr. Boudreau, Mr. Le could have more than one vehicle making deliveries

simultaneously. Mr. Le testified that in 2017, his son purchased a more fuel-efficient car to complete the appellant's service requests. Mr. Le also indicated that he used it a few times to make runs for the appellant. Also, based on the amount of commissions earned by Mr. Le in 2017 ($90,129 over 12 months) compared to those earned in 2016 ($33,668 over nine months), and given the evidence, I find that several vehicles were used simultaneously at certain times in 2017.

[96] The evidence also showed that the appellant did not pay for any of the vehicle operating expenses, such as gasoline, repairs, maintenance, etc. and did not provide a credit card in Mr. Le's name to cover these expenses. Mr. Le bore the cost of all expenses for the vehicles that he used. Therefore, courier services revenues could increase or decrease depending on the condition of the vehicles, or the type of driving involved. Also, Mr. Le could increase his profits if he purchased insurance at a lower cost (*Le Livreur Plus*, paragraphs 35 and 36).

[97] Mr. Le was able to negotiate different commission rates for certain services. The Courier Agreement provided for this possibility (section 4.1). Similarly, Mr. Boudreau confirmed that Mr. Le had negotiated special rates for services rendered to Hôpital Hôtel-Dieu de Lévis, and to clients on the south shore of Quebec City.

[98] Mr. Le calculated the volume of the packages himself. This enabled him to calculate the amount that the client would paid the appellant, and therefore, the amount of commission that would be paid to him. In fact, Mr. Boudreau indicated that the packages did not circulate through the appellant's premises and that the owner-drivers therefore had to perform this calculation and transmit the information to the appellant so that it could correctly invoice its clients.

[99] As previously mentioned, the evidence also showed that Mr. Le assigned service requests to his son Kade, and sometimes even to his other son Kyle. This allowed him to increase his income.

Integration

[100] According to the respondent, Mr. Le's integration into the appellant's activities supported the position that there was a relationship of subordination. In support of his argument, the respondent argued that: Mr. Le had to wear a uniform; he attended the Christmas party hosted by the appellant in December 2017; he was offered another contract following the incident at CHUL; the terms of the offer on the appellant's website indicated terms and conditions of employment. Several

provisions of the Collective Agreement were also cited: dedicated routes were to be assigned by seniority; transfers of interest were not allowed, and loyalty was required.

[101] The integration test must be assessed from Mr. Le's point of view and not from the appellant's. The issue is who owns the business. On a preponderance of evidence, I find that Mr. Le himself operated a subcontracted courier business and provided his services to the appellant.

[102] Some of the elements relevant to this analysis have already been reviewed in the context of the examination of the relationship of legal subordination. The evidence showed that: Mr. Le did not report to the appellant's offices; the uniform was worn for security purposes and was required by the clients; the logo to be affixed to the vehicle was intended to facilitate use of the parking lots, and the appellant did not have an employee record for Mr. Le.

[103] The evidence also showed that, since smartphones were introduced in 2014-2015, there was no longer a driver's room on the appellant's premises. The owner driver had access to a small locker at the appellant's office to store relevant documents relating to certain courier services.

[104] The appellant and Mr. Le entered into a "Non-solicitation, non-service and confidentiality agreement" (Exhibit A-1(8) - Appendix C). This agreement provided that, during the term of the courier agreement and 12 months following termination, Mr. Le could not solicit or serve the appellant's clients, and he undertook not to disclose any information of a confidential nature concerning the appellant. Thus, Mr. Le could compete with the appellant, provided he did not solicit its clients. Although the evidence showed that some drivers made deliveries for other people, Mr. Le did not provide his services to other companies during the period.

[105] As mentioned earlier, the evidence also showed that Mr. Le could accept or decline service requests from the appellant.

d) Other submissions

[106] The respondent also cited *Dynamex Canada Corp. v. M.N.R.*, 2010 TCC 17 [*Dynamex*] in which the Court decided that a delivery person working for Dynamex was a Dynamex employee. According to the respondent, given the similarity of the facts in this case, I should come to the same conclusion that Mr. Le was bound to the appellant by a contract of employment. Instead, I find that the evidence produced at the hearing leads me to a different conclusion because the facts are not similar to those revealed by the evidence in *Dynamex*.

[107] According to the respondent, it was proved that, in *Dynamex*, the delivery person, like Mr. Le, owned his vehicle, had to attend mandatory training, was subject to disciplinary action, did not set his own work schedule and was not free to accept or decline deliveries. Also, according to the respondent, as in this case, Dynamex determined the price of deliveries and the delivery person could only increase his income by working more hours. In addition, the delivery person had no clients and was assigned deliveries by Dynamex dispatchers who decided how the work was to be done.

[108] However, the evidence in this case revealed that Mr. Le did not have to complete mandatory training. He was not subject to disciplinary action. He was free to set his own schedule, and he could accept or decline any service request. Furthermore, although the appellant set the prices as in *Dynamex*, I found that Mr. Le could increase his profits not by working more hours, but, among other things, by accepting more service requests.

[109] Finally, contrary to what the evidence revealed in this case, in *Dynamex*, the delivery person never hired a third party to replace him; a delivery person's manual provided a detailed description of how the services were rendered; there was a delivery supervisor; the consequences of declining a request were stipulated; the delivery person was issued a credit card featuring discount prices; and Dynamex provided dental and medical insurance.

VI – CONCLUSION

[110] On a preponderance of evidence, Mr. Le was not employed in insurable employment by the appellant during the period within the meaning of paragraph 5(1)(a) of the Act. Given the lack of direction and control that the appellant exercised over the services that Mr. Le provided to the appellant, there was no relationship of legal subordination between them, such that the requirements of the contract of service were not met.

[111] For all of these reasons, the appeal is allowed, without costs, and the decision rendered by the Minister dated April 2, 2019 is amended given that Mr. Le was not employed in insurable employment pursuant to paragraph 5(1)(a) of the Act while working for the appellant during the period.

Signed at Ottawa, Canada, this 22nd day of February 2021.

"Dominique Lafleur"

Lafleur J.

CITATION:	2021 TCC 8
DOCKET:	2019-2529(EI)
STYLE OF CAUSE:	MED EXPRESS INC. AND THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Quebec City, Quebec
DATE OF HEARING:	October 8 and 9, 2020
DATE OF WRITTEN SUBMISSIONS:	Written submissions filed by the appellant on October 28, 2020 and November 20, 2020 and by the respondent on November 13, 2020
REASONS FOR JUDGMENT BY:	The Honourable Justice Dominique Lafleur
DATE OF JUDGMENT:	February 22, 2021

APPEARANCES:

Counsel for the appellant:	Guy Dussault Véronique Aubé
Counsel for the respondent:	Renaud Fioramore-Beaulieu

COUNSEL OF RECORD:

For the appellant:

Name:	Guy Dussault
Firm:	Cain Lamarre LLP Quebec City, Quebec

For the respondent:	Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Canada