Docket: 2012-1641(EI)

BETWEEN:

ROUGUIATOU HANN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 22, 2013, at Montréal, Québec.

Before: The Honourable Justice Réal Favreau

Appearances:

Counsel for the appellant:	André Legault
Counsel for the respondent:	Claude Lamoureux
	Diana Leopardi (Student-at-Law)

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue dated January 18, 2012, is confirmed, it being understood that the job practiced by Louiza Valmé for the appellant was insurable employment for the January 18, 2008, to July 20, 2008, and the September 29, 2008, to July 3, 2010, periods, and that there was no employer–employee relationship during the July 21, 2008, to September 28, 2008, period.

Signed at Ottawa, Canada, this 7th day of November 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 17th day of December 2013
Johanna Kratz, Translator

Citation: 2013 TCC 359
Date: 20131107
Docket: 2012-1641(EI)

BETWEEN:

ROUGUIATOU HANN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Favreau J.

[1] This is an appeal from a decision dated January 18, 2012, in which the Minister of National Revenue (the Minister) found that Louiza Valmé (the worker) was engaged in insurable employment within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act* (the EI Act) while she was working for the appellant during the January 18, 2008, to July 20, 2008, and the September 29, 2008, to July 3, 2010, periods, and that there was no employer–employee relationship during the July 21, 2008, to September 28, 2008, period.

[2] The facts relied on by the Minister are set out at paragraph 16 of the Reply to the Notice of Appeal :

[TRANSLATION]

a. The appellant has owned a home daycare since 2000;

b. Over the period at issue, the daycare accommodated six to nine children;

c. The daycare was open between 7:30 a.m. and 5:00 p.m.;

d. The worker's duties entailed supervising and taking care of the children, organizing activities, providing a brief report of the day's events to parents and cleaning the daycare;

e. The worker provided these services in the presence and under the supervision of the appellant;

f. The worker was paid $10.00 an hour;

g. She was paid by cheque every two weeks;

h. The worker started providing these services at the end of 2007;

i. The persons who occupied the worker's position before she arrived and those who replaced here were employees of the appellant.

[3] At issue is whether the worker was engaged in insurable employment while she was working for the appellant during the January 18, 2008, to July 20, 2008, and the September 29, 2008, to July 3, 2010, periods.

[4] The appellant's version of facts differs from that of the worker in several respects, specifically, with regard to the parties' common intention regarding the worker's tax status, the worker's freedom to choose her hours of work and days of leave, the worker's degree of autonomy in organizing educational activities for the daycare, the level of supervision and control practiced by the appellant over the worker and the circumstances surrounding the termination of the contract between the parties.

[5] On the basis of the appellant's testimony at the hearing and the report of the appeals officer, dated December 16, 2011 (Exhibit I-1), which resumes (a) the reasons provided in the letters sent to Appeals and to Labour Standards dated February 7, 2011, signed by the appellant; (b) the reasons provided in the letter of appeal dated September 12, 2011, signed by the appellant's representative; and (c) the facts obtained from the appellant during a telephone interview held on December 9, 2011, the appellant's story is the following:

i. The appellant has owned a home daycare since 2000. The daycare was affiliated with the Coordinating Office, and she was dealing with the worker at arm's length;

ii. The daycare was attended by six to nine children. It was closed on holidays and during other periods depending on the number of children;

iii. The worker provided services at the daycare from late 2007 to 2010;

iv. She had expressed her interest in working as an assistant for the appellant in response to an advertisement the appellant had posted on Kijiji. The Coordinating Office had interviewed the worker before she started at the daycare;

v. The appellant had always treated her workers as employees, be it the woman who worked for her in 2007 or the woman who had replaced the worker in 2010;

vi. She considered the worker to be self-employed because, when she was hired, the worker wanted to be treated as such;

vii. The parties initially concluded an oral agreement. The written agreement between the parties, dated June 30, 2010, was signed following a call from an officer of the Canada Revenue Agency, who asked whether the parties had signed a written contract;

viii. The worker's duties consisted exclusively of developing educational programs for the children of the daycare, be it games or crafts, and taking the children on outings. The worker did not cook as the appellant took care of this;

ix. The worker had a free hand to design educational programs and games. Consequently, she did not supervise her, even if she was present on occasion and asked the children what they had been doing;

x. The daycare was open from 7 a.m. to 5 p.m., Monday to Friday, and the worker's hours varied according to her needs; however, the appellant recorded the worker's hours of work;

xi. The worker was free to take time off as and when she wished. On pedagogical professional development days, the worker often decided to stay with her children;

xii. If the worker did not come to work and the daycare had taken in nine children, she would ask her two daughters, one of whom was 21 years old and not attending school because she lacked status in Canada, to help out;

xiii. The worker gave written or oral reports to the parents of the children, who had journals that had to be completed;

xiv. The worker looked after all the children and she was not exclusively assigned to one or more children;

xv. She had set the worker's wages at $10 an hour, based on her daycare's financial resources;

xvi. The worker received her wages by cheque every two weeks. She converted her cheques into cash at a cheque cashing service;

xvii. The worker wanted to be paid in cash, but the appellant had refused;

xviii. Children's absences or parents not paying for daycare services for their children did not affect the worker's wages;

xix. As the owner of the daycare, the appellant had provided and maintained all the tools the worker needed for her work, and the worker did not have to pay to use the material;

xx. The worker did not incur any expenses for her work, apart from the purchase of magazines such as Éducatout for her educational program. She was not reimbursed for these expenses;

xxi. The worker could not choose or pay assistants or replacements as this was the appellant's prerogative;

xxii. The worker had not taken out liability insurance, but the daycare had such a policy;

xxiii. The worker had never provided services without being paid; the appellant would give the worker an advance if she requested it;

xxiv. The daycare owner gave the parents of the daycare receipts at the end of the year;

xxv. The parents of the children of the daycare paid her directly, never the worker. She paid the worker for overtime when parents arrived late at the end of the day;

xxvi. The worker did not have her own clients at the daycare. Her own child attended the daycare, and she paid the fees for this, namely, $140 for a four-week month and $175 for a five-week month. These fees were deducted from her wages on a weekly basis;

xxvii. The worker unilaterally terminated the agreement between the parties by breaching her duties and by wrongfully and unreasonably terminating the agreement.

[6] On the basis of the worker's testimony at the hearing and the report of the appeals officer referred to in the previous paragraph, which resumes the facts obtained from the worker in a telephone interview held on December 15, 2011, the worker's story is as follows:

i. The worker considered herself to be an employee during the period at issue, but she cannot explain why she reported her income as business income in 2009;

ii. She did not have another job during the period at issue and worked full-time for the appellant's daycare;

iii. She never asked to be considered to be self-employed or to be paid in cash when she was hired: she had been providing her services as a daycare assistant since 1999 and had never been treated as or considered to be a self-employed worker;

iv. In addition to the educational games she created for the daycare, she changed the children's diapers three times a day, cleaned the daycare carpets every Friday and disinfected the toys and toilets;

v. She also went out with the children and completed their journals and the attendance sheet;

vi. She was only allowed to call the parents if there was an emergency or if the appellant authorized her to do so to ask them to bring diapers or a change of clothes for their children;

vii. The appellant supervised her because she asked her to play educational games or take the children on outings when she failed to do so. The worker would go out with six children, and the appellant would stay with the three other children, or, if everyone went out, the appellant came with her;

viii. The worker did not have the option of changing her work schedule. When she needed leave or had an appointment, the appellant would authorize this;

ix. The appellant sometimes refused to allow her to be away for half a day, preferring her to take the whole day off and choosing and paying someone else to replace her;

x. She only ceased working for about a month and a half in 2008 when she went to Haiti, for two weeks in March 2010 when her husband arrived and for March break holidays to spend time with her children;

xi. She was not paid an hourly rate but a fixed amount of $50 a day, that is, $500 every two weeks. The appellant had determined this amount, as well as how often and how she was paid;

xii. The worker did not always receive $500 because the appellant sometimes paid her an advance or deducted the daycare fees for her child;

xiii. She did not incur any expenses from her work, except for the decorations she had made at the daycare for Easter, worth about $10, for which she had not been reimbursed;

xiv. She did not have a company account nor was she in business. She is currently working at another daycare and is considered to be and treated as an employee;

xv. It was after the person auditing the appellant's trust account called to announce he was visiting the daycare to carry out an audit that the appellant had her sign the contract dated June 30, 2010;

xvi. Before the auditor came to the daycare to perform his audit, the appellant dismissed her by calling her at the weekend, telling her that she no longer needed her services.

Analysis

[7] At issue is whether Ms. Valmé was engaged in insurable employment for the purposes of the EI Act. The relevant provision here is paragraph 5(1)(*a*) of the EI Act, which stipulates as follows:

> 5. (1) Subject to subsection (2), insurable employment is
>
> (*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;

[8] This article defines insurable employment as including employment engaged in under a contract of service. The EI Act does not say what such a contract consists of.

[9] Section 8.1 of the *Interpretation Act* provides the following for such circumstances:

Property and Civil Rights

8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.

[10] The relevant provisions for determining whether there is a contract of employment in Quebec and for distinguishing such a contract from a contract for services are found at articles 2085, 2086, 2098 and 2099 of the *Civil Code of Québec* (Civil Code).

Contract of employment

2085 A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

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

Contract of enterprise or for services

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 carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

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

[11] Under the Civil Code, the main distinction between a contract of employment and a contract for services is whether or not a relationship of subordination exists between the client and the contractor. Article 2099 of the Civil Code provides that "the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between . . . the provider of services and the client in respect of such performance".

[12] In the case at bar, I find it very difficult to believe that the worker could have provided services as an assistant in the premises of the appellant's home daycare without a relationship of subordination existing between the appellant and the worker regarding the worker's services.

[13] The worker's work consisted of providing services related to the day-to-day activities of the daycare, namely, following the children's educational program, organizing games (crafts and drawing), going out with the children, updating the children's journals and the attendance sheet, changing diapers, cleaning the daycare's carpets every Friday, and cleaning the toys and the toilets.

[14] Contrary to the appellant's claim that the worker enjoyed complete autonomy in terms of outings and educational activities, I believe that the worker was supervised in carrying out her duties, given the appellant's responsibilities with respect to the requirements of the Coordinating Office and the contracts binding the appellant to the parents. Moreover, the worker's work was not limited to outings and educational activities, as indicated in the previous paragraph.

[15] The worker was remunerated for the services she provided as part of her work for the daycare during the periods at issue. The worker actually received her pay every two weeks by cheque, based on the hours she worked. However, it was the appellant who determined the hourly rate and the method and frequency of remitting the worker her pay. In the circumstances, the appellant exercised total control over the worker's pay.

[16] The wages the appellant paid the worker, that is, $500 every two weeks, represented only $6.50 an hour. As this pay was lower than the minimum wage in effect at the time, the worker filed a complaint with the Commission des normes du travail. As a result of her complaint, a settlement was reached, under which the appellant had to pay the worker a lump sum.

[17] The worker's pay was fixed and did not depend on the number of children attending the daycare or the ages of these children.

[18] The worker's schedule was based on the daycare's operating hours, namely, Monday to Friday from 7:30 a.m. to 5 p.m. The parties clearly indicated that the worker could not choose a replacement as she had to provide the services personally. The appellant was responsible for hiring and paying a replacement as needed.

[19] The worker was not able to modify her working hours without the appellant's prior permission. The appellant kept a record of the worker's working hours.

[20] All the material the worker needed to carry out her work was made available to her free of charge. The worker did not incur any expenses in carrying out her work, except for the purchase of magazines such as Éducatout, for which she was not reimbursed.

[21] The worker did not invest in her work for the appellant nor did she hold any other jobs or provide services to anyone else during the periods at issue. She did not take out liability insurance for her work or register with any government authorities as someone operating a business. In her income tax returns for the 2007, 2008 and 2010 taxation years, the worker reported her income as income from employment, but for 2009, she reported it as business income without, however, claiming any expenses incurred to earn this income.

[22] According to her testimony, the worker has been working as a daycare assistant since 1999, and she has always been considered as being employed. Following her dismissal, the worker continued working in a daycare and she is considered to be an employee.

[23] In her testimony, the appellant confirmed that the assistant who worked at the daycare before the worker was paid as an employee and that the same applied to the assistant who replaced the worker after she left. The appellant issued T4 slips to her assistants in 2007 and 2010, but did not issue T4 slips to the worker for the 2008 and 2009 taxation years. The appellant issued these T4 slips to the worker on March 30, 2011, after the Minister's decision that the worker's employment was insurable.

[24] Given the absence of T4 slips and of source deductions, it seems that the appellant's intention was indeed to treat the worker's services as a contract of enterprise. However, the worker denied requesting that she be treated as self-employed when she was hired.

[25] When the worker started working at the appellant's daycare, no written agreement had been signed by the parties. It was only when the auditor of the daycare's trust account called the appellant to carry out an audit that the appellant had her sign the document dated June 30, 2010, in which the worker recognized that she was paid as a self-employed worker, as she had requested, that she was

paid in the form of fees and that the daycare fees for her daughter were deducted, at her request, from the cheques the appellant paid her for her fees. This agreement can hardly be characterized as a contract of employment. It is merely recognition of what was done in the previous years.

[26] The worker signed the document in question but she was nonetheless dismissed without notice by the appellant in a telephone call on the weekend preceding the auditor's visit on the ground that the appellant no longer needed her services.

[27] Regardless of what the parties' intention might have been at the beginning of their business relationship, it seems quite obvious that their relationship, as reflected in objective reality, was one of employer–employee rather than of client–independent contractor.

[28] The appellant exercised a high degree of supervision and of control over the worker (dismissal) and her work given the nature of the work carried out by the worker; the worker did not provide her own work tools; the worker could not hire assistants; she did not take any financial risks, and she had no occasion to make a profit.

[29] Given the type of position occupied by the worker and in light of the information provided by the parties, the worker's version of the facts seems more credible and plausible than that of the appellant. The conditions of employment referred to by the worker are more similar to the conditions of employment of other workers working for other payers carrying out similar tasks.

[30] During the July 21 to September 28, 2008, period, the worker did not provide services to the daycare and received no pay for this period. Consequently, this employment was not insurable employment as it was not engaged in under a contract of service.

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

Signed at Ottawa, Canada, this 7th day of November 2013.

"Réal Favreau"

Favreau J.

Translation certified true
on this 17th day of December 2013
Johanna Kratz, Translator

CITATION:	2013 TCC 359
COURT FILE NO.:	2012-1641(EI)
STYLE OF CAUSE:	ROUGUIATOU HANN v M.N.R.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 22, 2013
REASONS FOR JUDGMENT BY:	The Honourable Justice Réal Favreau
DATE OF JUDGMENT:	November 7, 2013

APPEARANCES:

Counsel for the appellant:	André Legault
Counsel for the respondent:	Claude Lamoureux Diana Leopardi (Student-at-Law)

COUNSEL OF RECORD:

For the appellant:

Name:	André Legault
Firm:	Alarie Legault Montréal, Quebec

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