Date: 20070611

Docket: A-189-06

Citation: 2007 FCA 227

CORAM: **RICHARD C.J.**
LÉTOURNEAU J.A.
NADON J.A.

BETWEEN:

MICHEL TREMBLAY

Appellant

and

MINISTER OF NATIONAL REVENUE

Respondent

Hearing held at Québec, Quebec, on June 11, 2007.

Judgment delivered from the bench at Québec, Quebec, on June 11, 2007.

REASONS FOR JUDGMENT OF THE COURT BY: LÉTOURNEAU J.A.

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REASONS FOR JUDGMENT OF THE COURT
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LÉTOURNEAU J.A.:

[1] The appellant is appealing from a decision of a judge of the Tax Court of Canada that the appellant's employment was not insurable employment within the meaning of the *Employment Insurance Act*, S.C. 1996, c. 23 (Act).

[2] In doing so, the judge confirmed the following claim of the Minister of National Revenue (Minister): the appellant and the payer were not dealing with each other at arm's length, which is

not being contested, and the Minister was satisfied that it was not reasonable to conclude that they would have entered into a substantially similar employment contract if they had been dealing with each other at arm's length within the meaning of paragraph 5(2)(*i*) and subsection 5(3) of the Act.

[3] There are two grounds of appeal. According to the appellant, the Minister did not conduct an investigation with respect to the appellant and the employer to verify the facts alleged and to allow the parties to refute them. In the appellant's view, this constitutes a breach of the *audi alteram partem* rule.

[4] In addition, the appellant submits that the evidence adduced before the Tax Court of Canada showed that the material facts relied on by the Minister did not survive judicial scrutiny. According to the appellant, they were refuted to such an extent that the Minister's initial assessment and resulting conclusion no longer appear to be reasonable.

[5] We are not convinced that the first ground of appeal affords a basis for our intervention. The appellant was represented by counsel, who authorized the officer responsible for conducting the investigation of the period in issue to base the investigation on the facts and circumstances of the prior periods of employment, which were also being contested by the appellant, in view of their similarities. That is what the officer did.

[6] In addition, the appellant suffered no prejudice since he could bring before the Tax Court of Canada any refutations and clarifications that he wished. In our opinion, there was no breach of the *audi alteram partem* rule.

[7] It remains therefore to determine whether, at the conclusion of the judicial scrutiny, the explanations provided by the appellant were sufficient to deny or refute the allegations on which the Minister based his decision.

[8] The appellant's counsel submitted that the judge was misled at paragraph 32 of his decision when he said that he was of the opinion that the appellant's Record of Employment did not reflect reality. The respondent's counsel acknowledged that the calculation of remuneration and insurable hours ($22,182.74 for 1680 hours) was accurate and in compliance with the Act. This finding of the judge concerning this aspect of the Record of Employment will not be held against the appellant.

[9] The justification for the judge's finding that the appellant and the payer would not have entered in a substantially similar employment contract if they had been dealing with each other at arm's length is found at paragraph 34 of his decision, which reads as follows:

> [34] One cannot disregard the admissions made by the Appellant and by the payer's representative when they acknowledged that the Appellant made sales at a time that he was not being remunerated. Not only did he render services to the payer without being remunerated, but the sales were the basis on which his salary for the following year was determined, which meant that the Appellant lost nothing during his absence. It is during this wintertime absence that the Appellant did snow removal work for his business. However, when he lost a major snow removal contract in 2000, he went to work for the payer. If the payer had needed his services during the

> winter of 2000, why did it not need then during the winters of 1998 and 1999? No explanation was offered. In my opinion, the Appellant went to work for his business during the winters of 1998 and 1999 because the business wanted him, not because the payer had a work shortage. This was obviously a possibility given the fact that he and his employer were not at arm's length. In 2000, when the work diminished, he returned to work for the payer. One cannot disregard the fact that the Appellant used his car to the payer's benefit free of charge. A person at arm's length would not have accepted such terms and conditions of employment.

[10] Despite the praiseworthy efforts of the appellant's counsel, we have not been convinced that the findings of fact and of mixed fact and law at paragraph 34 did not allow the judge to conclude as he did.

[11] For these reasons, the appeal will be dismissed with costs.

"Gilles Létourneau"

J.A.

Certified true translation
Susan Deichert, LLB

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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