Federal Court of Appeal  Cour d'appel fédérale

Date: 20201026

Docket: A-438-19

Citation: 2020 FCA 182

[ENGLISH TRANSLATION]

CORAM: **NADON J.A.**
BOIVIN J.A.
LEBLANC J.A.

BETWEEN:

FÉDÉRATION DES CAISSES DESJARDINS DU QUÉBEC

Appellant

and

MINISTER OF NATIONAL REVENUE and SOPHIE PAYETTE

Respondents

Online videoconference hearing organized by the Registry, on October 26, 2020.

Judgment delivered from the Bench at Ottawa, Ontario, on October 26, 2020.

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

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on October 26, 2020.)

LEBLANC J.A.

[1] This is an appeal from a judgment of the Tax Court of Canada (TCC), rendered on October 22, 2019 (2019 TCC 235), which held that the work performed by Sophie Payette (the respondent), on behalf of the appellant, between January 1 and May 17, 2016, was provided under a contract of service, and not a contract for services. As a result, the respondent held

"insurable employment" during this period within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), making her eligible for employment insurance benefits following her dismissal.

[2] The appellant, supported in this by the respondent, the Minister of National Revenue (the Minister), argues that this judgment in error since, according to the appellant, the TCC failed to discuss all the relevant facts revealed by the evidence, on the basis of the applicable legal rules.

[3] Despite the respondent's commendable efforts to persuade us otherwise, we are of the view that it is appropriate to intervene and set aside the decision of the TCC. More specifically, we are of the view that the TCC took the wrong legal approach when it essentially had to determine, under the cumulative application of the Act and the *Civil Code of Québec*, whether, during the period at issue, there was a relationship of legal subordination between the respondent and the appellant (see *Ray-Mont Logistics Montréal Inc. v. Canada (National Revenue)*, 2020 FCA 113, [2020] FCJ No. 751 (QL/Lexis) at paragraph 7; see also *Le Livreur Plus Inc. v. Canada (Minister of National Revenue)*, 2004 FCA 68, 326 N.R. 123 at paragraph 18 (*Le Livreur Plus*) and *Grimard v. Canada*, 2009 FCA 47, [2009] 4 F.C.R. 592 at paragraphs 20-43). This exercise should have been performed according to a global perspective with no particular factor playing a dominant role (*Canada (Attorney General) v. Charbonneau* (1996), 207 N.R. 299, 1996 CanLII 3971 (F.C.A.) at paragraph 3; *1392644 Ontario Inc. (Connor Homes) v. Canada (National Revenue)*, 2013 FCA 85, 358 D.L.R. (4th) 363 at paragraphs 28-29; see also *Dicom Express inc. v. Paiement*, 2009 QCCA 611, [2009] R.J.Q. 924 at paragraph 17 (*Dicom*)).

[4] However, that was not done. On the one hand, the fact that the contract between the respondent and the appellant had not been negotiated between parties of equal standing played a preponderant, even decisive, role in the TCC's determination, as shown in paragraph 65 of its judgment. We agree with the appellant and the Minister that the bargaining power of the parties to the agreement that binds them is irrelevant in determining whether there is a relationship of subordination. Such a distinction is established by analyzing the indicia of supervision showing that the payer exercises control over the service provider. In other words, even if it is taken for granted that the terms of the contract were non-negotiable, that does not demonstrate that, for the purposes of providing her services, the respondent was under the appellant's control. The TCC also cited the obligation of exclusivity arising from the contract as a factor in determining whether there was a relationship of subordination. However, the sole fact of being bound to a single client who requires that certain service quality standards be met, does not mean that there is legal subordination. Legal subordination and economic dependence should not be confused (*Dicom* at paragraph 16).

[5] On the other hand, the TCC gave weight to the fact that work quality and quantity assessment reports were issued periodically. Here again, the TCC confused the applicable concepts because monitoring results is not the same as controlling work performance, which is specific to the contract of service (*Le Livreur Plus* at paragraph 19).

[6] Finally, the TCC had to conduct a comprehensive analysis of the case and consider all the evidence in the light of the applicable tests, which it also failed to do (*Combined Insurance Company of America v. Canada (National Revenue)*, 2007 FCA 60, 359 N.R. 358 at

paragraph 26). In particular, the Court disregarded the fact that the respondent was entitled to the services of an assistant, whom she had hired on her own, and did not discuss the fact that, for tax purposes, the respondent claimed to be self-employed and was registered with the Registraire des entreprises du Québec. Hence, the TCC failed to give all of the evidence of record the legal significance required under the Act, as interpreted by the case law, and the weight that the circumstances of the case demanded.

[7] This provides sufficient grounds for intervening. Like the Minister, we are of the view that the appropriate remedy in these circumstances is to refer the matter back to the TCC for reconsideration by another TCC judge. We also agree that the appeal should be allowed without costs.

"René LeBlanc"

J.A.

Certified true translation
François Brunet, Revisor

FEDERAL COURT OF APPEAL

COUNSEL OF RECORD

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