

Docket: 2003-2676(EI)

BETWEEN:

FONDS D'EMPRUNT COMMUNAUTAIRE
DE LA GASPÉSIE ET DES ÎLES

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on May 19, 2004, in New Carlisle, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant: Sonia Gagnon

Counsel for the Respondent: Marie-Claude Landryd

JUDGMENT

The appeal under the *Employment Insurance Act*, from the decision of the Minister of National Revenue dated July 10, 2003, is dismissed and the Minister's decision is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this XX day of June 2004.

Tardif J.

Translation certified true
on this 27th day of September 2004.

Ingrid B. Miranda, Translator

Citation: 2004TCC396

Date: 2004xxxx

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REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision dated July 10, 2003, to the effect that the work performed by Harold Milligan from July 21 to December 31, 2002, for and to the benefit of Fonds d'emprunt communautaire de la Gaspésie et des Îles, does not satisfy the conditions of a true contract of service, primarily because an employer-employee relationship did not exist.

[2] In support of the appealed decision, the Minister of National Revenue (the "Minister") relied on the following presumptions of fact:

[TRANSLATION]

- (a) The Appellant is a non-profit organization registered on July 4, 2002.
- (b) The object of the Appellant is to motivate investors to grant credit and provide guidance to low-income persons who have business plans.
- (c) When the Appellant was registered, the organization was under the direction of a board of five directors, including Sonia Gagnon, common-law spouse of the Worker.
- (d) The business address of the Appellant was 12 A, Perron Boulevard in Caplan.
- (e) This was the Appellant's first year of operation.
- (f) The Worker is a hard-of-hearing person unable to have a telephone conversation or to work on his own.
- (g) The Appellant had hired the Worker to establish links between the English-speaking and the Amerindian communities (Micmac).
- (h) The Worker was hired to recruit new members. However, the Worker rarely participated in the recruitment meetings that were held twice a month.
- (i) The Worker did errands and cleaned the premises of the Appellant.
- (j) The Worker worked with Ms. Gagnon in their residence located at 256 Rang 4 in Richmond.
- (k) Nobody recorded the hours the Appellant worked and it was difficult to ascertain the number of hours he had worked.
- (l) The Worker was the only person who received a salary from the Appellant.
- (m) The Worker was entitled to \$600 per week, for 40 hours of work at \$15 per hour, but in fact, throughout the period at issue, he only received three \$840 cheques from the Appellant, issued by Emploi-Québec.

- (n) Emploi-Québec granted a subsidy to the Appellant, pursuant to a job-creation program for persons with disabilities.
- (o) Emploi-Québec was supposed to contribute to the Worker's salary for a period of one year by paying 35% of the compensation, i.e., \$840 per month.
- (p) Emploi-Québec paid the subsidy to the Appellant on a monthly basis.
- (q) In December 2002, Emploi-Québec stopped paying the subsidy to the Appellant because the Appellant had failed to pay the Worker the stipulated salary. Then Emploi-Québec asked the Appellant to reimburse the amount of \$4,872 that Emploi-Québec had already paid.
- (r) The first time the Worker went to the local employment insurance office, he submitted a Record of Employment showing 800 hours of work. After being informed that his hours were insufficient, he came back the next day with a Record of Employment showing 920 hours of work; he needed 910 hours in order to be eligible for employment insurance benefits.
- (s) There is no evidence that the Worker did 40 hours of work per week during the period at issue.
- (t) The Record of Employment is not accurate with respect to the working hours reported in the document, or with respect to the amount of compensation.

[3] Sonia Gagnon represented the Appellant at the hearing. She admitted subparagraphs (a), (b), (d), (e), (f), (g), (i), (l), (n), (o), (p) and (q) of Paragraph 5 and denied all the remaining subparagraphs.

[4] At the outset, I explained to Ms. Gagnon in detail how she should proceed. I particularly specified what she had to demonstrate for the Appellant to discharge the burden of proof incumbent upon it.

[5] I equally stressed the conditions that had to be satisfied for employment to be characterized as a contract of service. The Court frequently intervened to allow Ms. Gagnon to explain in detail the work accomplished by Harold Milligan for and to the benefit of the Appellant, to no avail; she affirmed repeatedly that the Worker's main duty was that of an accompanying attendant, then she added that he had also done some maintenance and renovation work, delivered pamphlets and greeted people who attended meetings that took place a rather uncertain number of times.

[6] In light of the explanations provided by Ms. Gagnon, it was obvious that the work accomplished by Harold Milligan could not support the claim that he worked 40 hours per week throughout the period at issue.

[7] On the other hand, the type of work he performed did not justify a salary of \$15 per hour, particularly since the most important tasks were accomplished by all

of the other persons involved in the operations of the Appellant, and they did so on a voluntary basis.

[8] The issue of the amount of compensation was not resolved, in spite of the fact that Ms. Gagnon called Diane Allard as a witness: Ms. Allard is in charge of the accounting, and is also closely involved in the operations of the Appellant.

[9] It appears from their testimony that, in fact, Harold Milligan only received 35% of the compensation shown on the Record of Employment. The Appellant paid the remaining 65% of the amount entered in the Record of Employment to third parties to finance two loans in connection with the acquisition of two vehicles, one of them in the name of Sonia Gagnon and the Appellant, the other in the name of the Worker, Harold Milligan.

[10] Besides the monthly payments to finance the vehicle loans, it seems that the Appellant also directly paid the expenses incurred by Mr. Milligan. No details were provided and this Court remains sceptical with respect to the persons who really benefited from the reimbursement of expenses.

[11] Thirty-five percent of the compensation showing in the Record of Employment was paid in full through a subsidy issued by Emploi-Québec, pursuant to an undertaking in connection with a work-integration contract.

[12] One of the persons in charge of the program that subsidized the Appellant, Michel Samuel, came to the hearing. He explained that the agency decided to demand reimbursement of the amounts subsidized during the period at issue, after noting several irregularities and breaches of the contract.

[13] In particular, Emploi-Québec criticized the Appellant for failing to keep reliable log books; for being unable to specify the type of work accomplished by Harold Milligan; and, most importantly, for failing to pay the Worker the agreed salary of \$600 per week; and for only paying the Worker 35% of this amount, namely the amount of the subsidy.

[14] In light of the evidence submitted by Sonia Gagnon and Diane Allard—Harold Milligan did not testify—it is clear that there was no real contract of service, just a scheme devised by Ms. Gagnon with the sole purpose of rendering Harold Milligan eligible for employment insurance benefits.

[15] The evidence submitted by the Respondent clarified the image resulting from the testimonies of Ms. Gagnon and Ms. Allard.

[16] First of all, the Respondent demonstrated that the Appellant applied for a grant under a work program promoting the integration of certain persons into the workforce. In the space for the position of the employee, the Appellant, "Le Fonds d'emprunt communautaire de la Gaspésie et des Îles", then represented by Diane Allard, claimed that the position offered to Harold Milligan was that of a coordinator-recruiter.

[17] However, at the time, Harold Milligan, a unilingual Anglophone was significantly hard-of-hearing. Moreover, Lucien Gignac, investigator with Human Resources Development Canada, noticed that besides his auditory problems, Harold Milligan had a serious speech impediment and that it was very difficult to understand him when he spoke.

[18] The Court did not have the opportunity to verify anything in this respect, since Ms. Gagnon, who is obviously responsible for the whole scheme, failed to call Mr. Milligan to testify.

[19] Following the breach of contract by Emploi-Québec, a termination of employment was issued to Harold Milligan, showing that he had worked 800 hours. When Mr. Milligan filed his termination of employment, to obtain employment insurance benefits, Ms. Gagnon accompanied him. They were told then that he needed 920 hours to qualify for employment insurance benefits. A few days later, they both came back with a new Record of Employment, this time showing 920 hours.

[20] Diane Allard, who was the agent for the Appellant when the grant application was made, had indicated that Harold Milligan was to work as a coordinator-recruiter. However, in a letter dated April 2, 2003, she wrote the following to the Canada Customs and Revenue Agency:

[TRANSLATION]

...

This is to challenge the decision issued on March 28, 2003, by Michel Poirier.

We disagree with the points that you have established regarding his remuneration and the choice of the method used to perform his work.

Harold Milligan is a hard-of-hearing, unilingual Anglophone; he could not work on his own. He was always accompanied by a member of our organization who would provide him with all the necessary supervision for the performance of his tasks. Thus he had no choice with respect to the method he used to perform his work.

As to the evidence concerning the payment of his salary, we have already sent you a copy of our general ledger concerning salary transfers, with respect to Harold Milligan's work with Fonds d'emprunt communautaire de la Gaspésie et des Îles. We also include a

statutory enactment that explains that employee benefits are taxable, and therefore linked to the employee's salary.

We sent you a copy of the salary agreement that the Board voted on in July 2002. You will note that the purchase of the vehicle for Mr. Milligan is solely for personal reasons. Mr. Milligan must always be accompanied by a volunteer during work hours and should not have to use his pick-up truck for work purposes.

The Fonds d'emprunt communautaire de la Gaspésie et des Îles has chosen to make payments in connection with the purchase and maintenance of Mr. Milligan's pick-up truck in order to help him manage his income and to ensure that payments are made.

Please find enclosed our 2002 Financial Statements, in which you will note that we have been funded to pay Mr. Milligan's salary.

We hope to receive a favourable answer to our request that Harold Milligan be found eligible for employment insurance.

Sincerely,

Diane Allard

...

(Emphasis added)

[21] A few months later, on July 20, 2003, Sonia Gagnon appealed the decision through a letter that reads as follows:

[TRANSLATION]

...

I would like to appeal the decision that Harold Milligan is not eligible for employment insurance for his work as a coordinator-researcher with our organization, Le Fonds d'emprunt communautaire de la Gaspésie et des Îles, from July 21, 2002 to December 31, 2002.

The decision is dated July 10, 2003, and Sonia Gagnon will represent our organization in defence of the questions concerning the employer-employee relationship, as well as the contract of service.

The reasons for our appeal are that Mr. Milligan was hired by an external employment service promoting the return of persons with disabilities to the workplace. We needed a representative of the Anglophone community to help us set up a committee for our organization. Mr. Milligan was always accompanied by a member of our team when he worked for our organization.

...

(Emphasis added)

[22] The persons in charge of the Appellant's operations then submitted a very different task description. At the hearing, Harold Milligan was described as an accompanying attendant, a position that is not consistent with any of the duties previously assigned to him. Not only was he not a contact person, but he also was extremely dependent.

[23] The Appellant had the onus of proof. We never ascertained the true nature of the work accomplished by Harold Milligan. Moreover, given the various inconsistencies in the evidence, I strongly doubt the veracity of the explanations that have been submitted. The fact that Harold Milligan did not appear before the Court did not improve the quality of already very weak evidence.

[24] A true contract of service must result from a clearly defined workload, accomplished for reasonable and appropriate remuneration consistent with the nature of the work, in the context of an employer-employee relationship.

[25] The Worker must be subject to the supervisory power of the Employer. Moreover, the employment must be real, useful and productive, and its parameters must be determined primarily as a function of economic concerns. A real contract of service may arise out of humanistic, community or social concerns; however, efficiency and the accomplishment of actual objectives should not be completely disregarded.

[26] In this case, the employment at issue was not structured as a function of a particular objective, but basically for the purpose of obtaining a grant from Emploi-Québec. The payment of the grant was conditional upon proper compliance with the specific terms stipulated in the contract, particularly those requiring strict supervision and those requiring that all pertinent data on the quality and the quantity of the work be properly recorded.

[27] Moreover, the Worker was to receive actual compensation for his work.

[28] Seeking to obtain grants is in itself a legitimate objective and it may help accomplish beneficial projects and many activities. When an employee is to be hired in the context of such a project, for specific activities, the planned or contemplated work must be well described and well defined theoretically, and the work must be performed in a way that facilitates the assessment of the quality and the quantity of the Worker's accomplishments.

[29] The employment must be compensated with an adequate salary that is actually paid to the Worker and that suits the nature of the tasks to be accomplished and prevailing economic realities.

[30] The performance of useful and necessary work to meet specific expectations must be supervised, permitting the Employer to intervene at any time.

[31] I have no doubt that Harold Milligan did provide some services; however, the services provided by Harold Milligan did not justify the compensation that Ms. Gagnon and Ms. Allard claim to have paid to him. Moreover, the balance of probabilities is inconsistent with the allegations submitted by Ms. Gagnon, since it is clear that Milligan was only paid the equivalent of the grant, or 35% of the alleged salary.

[32] The remaining 65% was used to pay instalments for vehicle purchases, one of which belonging to the Appellant and to Sonia Gagnon, as well as for the reimbursement of various expenses. One thing is certain: Mr. Milligan never did see a large portion of the salary stipulated in the grant contract. Clearly, the Appellant, not Harold Milligan, benefited from a major portion of the 65%.

[33] The latter probably agreed to all these conditions hoping to receive employment insurance benefits based on a salary of \$600 per week, an amount certainly greater than the 35% he received during the alleged period of employment. Mr. Milligan did not testify, and the Court was unable to ascertain whether he was an accomplice or a victim of the scheme.

[34] The task description of the position at issue was basically drafted to comply with the requirements of the grant program, and not with respect to a purpose or objective.

[35] While the position was presented and submitted as that of a coordinator-recruiter, the Worker has, in fact, not performed any duties that pertain

to such employment, for the simple reason that he does not have the skills or the qualifications to do so.

[36] He was supposed to receive a \$15 per hour salary, for 40 hours per week, for a period of one year. According to the facts, he was only paid the subsidized portion of the theoretical salary of \$600 per week, or 35%; the remaining 65% was directly used for the benefit of the Appellant.

[37] In conclusion, the work that was performed was neither significant nor useful; it was imaginary, doctored and moulded to meet the requirements of a grant program. The grant that was supposed to benefit a physically challenged worker within the framework of activities, the purpose of which was to contribute to the betterment of various ethnic communities in the Gaspé, turned out to be a false scheme for the benefit of the Appellant at the Worker's expense.

[38] The Appellant had the onus of proof. Not only did the Appellant fail to establish that the employment at issue was performed pursuant to a true contract of service, but rather it made it clear that the grant was obtained on the basis of false and misleading representations.

[39] The Appellant, clearly directed and controlled by Sonia Gagnon and Diane Allard, has implemented some initiatives among various communities located in the greater Gaspé area. They then enlisted the aid of Harold Milligan, in the capacity of a coordinator initially, and then as an accompanying attendant. In fact, he has probably acted more in the capacity of a chauffeur, since most of the members of the Board of Trustees did not have a vehicle and they needed to travel through several regional municipalities spaced at great distances from each other.

[40] The Appellant did not discharge the burden of proof incumbent upon it. Its appeal is dismissed.

Signed at Ottawa, Canada, this XX day of June 2004.

Tardif J.

Translation certified true
on this 27th day of September 2004.

Ingrid B. Miranda, Translator