Docket: 2003-4459(EI)

BETWEEN:

MELITA F. BURSEY-MONGER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of Camille Monger (2003-4461(EI)) on June 3, 2004, at Sept-Îles, Quebec.

Before: The Honourable Justice B. Paris

Appearances:

Counsel for the Appellant: Daniel Jouis

Counsel for the Respondent: Emmanuelle Faulkner

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 29th day of October 2004.

"B. Paris"

Paris J.

Translation certified true
on this 29th day of December 2004.

Jacques Deschênes, Translator

Citation: 2004TCC673
Date: 20041029
Docket: 2003-4459(EI)

BETWEEN:

MELITA F. BURSEY-MONGER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Paris J.

[1] The appellant has appealed a decision of the Minister of National Revenue that her employment at Scierie Mécatina Inc. ("the payor") from August 30, 1999, to November 20, 1999, November 13, 2000, to December 9, 2000, and August 5, 2002 to November 9, 2002, was not insurable employment under paragraph 5(2)(*i*) of the Employment *Insurance Act* ("the Act") because she was not dealing with the payor at arm's length. The appellant was Marcel Monger's spouse. Marcel Monger, his brother Camille and his sister Mélanie were the payor's only shareholders.

[2] When an employer and a worker are not dealing with each other at arm's length, the Minister must determine, under paragraph 5(3)(*b*) of the Act, whether, having regard to all the circumstances of the employment, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. In the case at bar, the Minister was not satisfied that it was reasonable to do so.

[3] The only question that the Court must decide in the instant case is whether the Minister's determination was reasonable. In order to do so, I must "verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so . . . decide whether the conclusion with which the Minister was "satisfied" still seems reasonable."[1]

[4] If I find that the conclusion is not reasonable, I must reassess all the circumstances of the employment and render the decision that the Minister should have rendered pursuant to paragraph 5(3)(*b*).

[5] The appeal was heard on common evidence with the appeal of Camille Monger.

[6] The facts on which the Minister relied are set out in paragraph 6 of the Reply to the Notice of Appeal. I propose to reproduce the statements of fact and examine the evidence regarding each such statement.

> [TRANSLATION]
>
> (a) The payor operates a sawmill, cuts timber and maintains snowmobile trails;

[7] This fact was not contested. The evidence showed that, in the fall of 1998, the payor obtained two contracts from the Ministère du Transport for the maintenance of roughly 400 km of snowmobile trials connecting several small villages in the area of Tête-à-la-Baleine, where the appellant lived. Both contracts were performed simultaneously over three winters. The payor bid on the same work for the subsequent period, which began in 2001, but its bid was not considered because of an error with respect to the deposit that was to accompany it.

> [TRANSLATION]
>
> (b) timber cutting and trail maintenance are only done in the wintertime and the sawmill functions only intermittently based on demand;

[8] These facts were not contested, except in relation to the sawmill's operations. It appears that two employees operated the sawmill for 14 continuous

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[1] According to Mr. Justice Marceau of the Federal Court of Appeal in *Légaré v. Canada (Minister of National Revenue)*, [1999] F.C.J. No. 878 (QL), at paragraph 4.

weeks during the winters of 1999-2000 and 2000-2001. Camille Monger operated the sawmill, albeit in a limited fashion, during the winter of 2001-2002.

[TRANSLATION]

(c) the payor owns two sawmills; two Alpin snowmobiles; eight "white track" snowmobiles; and snow-pushers and sledges for transporting logs;

[9] This fact was not contested.

[TRANSLATION]

(d) the payor's place of business was located in Tête-à-la-Baleine at the personal residence of Jules and Nicole Monger, the parents of the payor's three shareholders;

[10] This fact was not contested.

[TRANSLATION]

(e) during the 1999 and 2000 periods, the appellant was responsible for some of the accounting, took orders, did pick-ups at the mill and answered the telephone;

[11] These facts are true of the appellant's period of employment in 1999, when she also designed a logo for the payor, created an advertising flyer and had 3,000 copies of that flyer distributed in the neighbouring villages. She said she was not involved in accounting in 2000. She explained that when she received an order for lumber, she went from the town to the mill (roughly 16 km), loaded the lumber onto the truck and transported it to the town's wharf, where it was shipped to the customer by boat. She also cleaned the sawmill and transported refuse to the depot during her periods of employment in 1999 and 2000.

[TRANSLATION]

(f) during the 2002 period, the appellant mostly worked on preparing a legal claim against a credit union and occasionally answered the telephone;

[12] The appellant stated that she had duties other than those mentioned above, specifically, keeping the payor's books and receiving and fulfilling orders for lumber. The claim against the credit union was related to the loss of the

snowmobile trail maintenance contract. The appellant assembled the information and documents required for the proceedings and photocopied the files that were in the payor's possession.

[TRANSLATION]

(g) the appellant worked at the payor's place of business and used the payor's equipment;

[13] This was admitted.

[TRANSLATION]

(h) the appellant had no set work schedule and the payor did not record her hours;

[14] The evidence did not indicate that the payor imposed a fixed schedule on the appellant or that her hours of work were recorded anywhere. The appellant stated that she worked from Monday to Saturday and started at 8:00 a.m.

[TRANSLATION]

(i) during the periods when she was listed in the payor's payroll journal, the appellant was the payor's only employee;

[15] No evidence was adduced to the contrary.

[TRANSLATION]

(j) the appellant claims that the payor hired her when the accounting workload increased due to the award of snowmobile trail snow removal contracts, and yet the appellant was not at work during the winter months;

[16] At the hearing, the appellant was not questioned about this statement regarding an increase in workload caused by the snowmobile trail maintenance contract. The evidence disclosed that the work on these contracts began only after the appellant was laid off in 1999 and 2000.

[TRANSLATION]

(k) the appellant claims that she worked 50 hours a week during the periods when she was listed on the payor's payroll journal, but the payor did not record her hours;

[17] In addition to the evidence discussed in relation to paragraph (h) above there is the testimony of the appellant, who said that she worked 50 hours a week for the payor.

[TRANSLATION]

(l) the appellant claims that there was usually someone else with her at the office, and yet, for each of the periods in question, she was the only person listed in the payor's payroll journal;

[18] Although the appellant made such a claim to the appeals officer, it is not known whether she was referring to another of the payor's workers being at the office, or a member of the Monger family being there. In any event, it is clear that no other worker was listed in the payor's payroll journal while the appellant was working.

[TRANSLATION]

(m) in 1999, the appellant was paid $700 per week, supposedly for 50 hours; in 2000, she was paid $600, and in 2002, she was paid $725, and all of this was without regard to the hours actually worked;

[19] The appellant has acknowledged that she was paid these amounts. As stated above, she said that she worked 50 hours a week for those wages.

[TRANSLATION]

(n) the appellant was listed in the payor's payroll journal only for the number of hours necessary to be eligible for unemployment benefits;

[20] This was shown to be true in relation to the 1999 and 2002 periods of employment. In 2000, the appellant first worked for another employer for 10 weeks and then worked for the payor for four weeks. Thanks to the weeks she worked for the payor, the appellant had exactly the number of hours required to be entitled to employment insurance benefits.

[TRANSLATION]

> (o) the appellant's periods of employment and the number of hours she supposedly worked do not coincide with the needs of the payor's business but rather, with the appellant's need to qualify for employment insurance benefits.

[21] The appellant tendered no evidence concerning the relationship between her periods of employment and the payor's business activities, and no one representing the payor was called as a witness.

[22] The appeals officer testified that she obtained the payor's sales figure from its 1999-2002 quarterly GST returns. The amounts are found in her report, which she tendered as Exhibit R-3. However, she admitted that she did not know when the payor invoiced for lumber sales, which meant that there was no way to establish a correlation between the sales reported for GST purposes and the payor's true business activities.

[23] The respondent sought to adduce conversations between the appeals officer and Mélanie Monger (who was representing the payor at that stage) but that evidence was determined inadmissible because it was hearsay.

Additional facts

[24] I must also take into account any additional fact that was not considered by the Minister and would establish whether or not the conclusion he reached with respect to the appellant's employment was reasonable.

[25] The respondent also made the following allegation in the Reply to the Notice of Appeal:

> [TRANSLATION]
>
> The appellant claims that she devoted 25 hours a week to accounting, but the payor had no economic activity during the periods in question.

[26] This new fact is combined with the facts that the Minister assumed to be true when he made his decision, so it is up to the respondent to prove it. As I have said, no evidence of the payor's level of business during a given period was adduced in this Court. Consequently, I find that this new fact has not been proven.

[27] The appellant also testified that she worked during the periods in question in 1999 because nobody else spoke English. Since the residents of most of the villages surrounding Tête-à-la-Baleine are English-speaking, the payor had to offer services in English to customers from those villages.

[28] The appellant also said that she was laid off in 1999 and 2000 because she was pregnant. She gave birth to her first son on June 16, 2000, and to her second son on August 14, 2001.

Analysis

[29] Counsel for the appellant submitted that the Minister failed to take account of certain relevant facts concerning the appellant's employment with the payor. In his submission, the Minister did not recognize that the payor needed an English-speaking worker to look after orders from neighbouring villages and to produce advertising flyers in English. He also said that the Minister did not take account of the fact that the appellant had to leave her employment with the payor in 1999 and 2000 because she was pregnant (and not simply because she had worked enough hours to receive benefits). Lastly, he argued that the evidence regarding the GST returns filed by the appellant did not necessarily support the assertion that the payor's business slowed down during the period when the appellant worked.

[30] I certainly agree that the first two factors invoked by counsel for the appellant were not taken into account by the Minister when he made his decision, and that the information related to the GST was not interpreted correctly. However, these defects do not render the ultimate decision unreasonable.

[31] In deciding whether persons dealing with each other at arm's length would have entered into an employment contract substantially similar to the one that this appellant and this payor entered into, the question whether the employment meets a real economic need of the payor must be given a good deal of importance. Here, the Minister specifically assumed that the appellant's employment did not coincide with the payor's needs. The burden is therefore on the appellant to show that the Minister erred in relying on this fact or that this fact was not true. The appellant has not discharged this burden.

[32] The evidence in this case actually tends to support the respondent's position. It shows that the appellant only worked when the payor had no other employees,

and that the payor did not consider it necessary to hire someone to replace her even though its business activities were continuing without interruption. Thus, the payor was able to operate most of the time from 1999 to 2002 without an English-speaking worker, and, in 2001, it was able to operate without any worker to perform the duties that were assigned to the appellant during the other years.

[33] The fact that the payor did not replace the appellant was not explained, but it is clearly unrelated to the seasonal nature of its business. The appellant's employment never coincided with the periods of greatest activity for the payor. These factors strongly suggest that the main purpose of the appellant's employment was to qualify for employment insurance benefits, not to meet the true needs of the payor's business. I have no doubt that the appellant actually worked for the payor, but I find it reasonable to conclude that the payor would not have remunerated a person with whom it was dealing at arm's length to perform the same work as the appellant under the same conditions.

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

Signed at Ottawa, Canada, this 29th day of October 2004.

"B. Paris"

Paris J.

Translation certified true
on this 29th day of December 2004.

Jacques Deschênes, Translator

CITATION:	2004TCC673
COURT FILE NO.:	2003-4459(EI)
STYLE OF CAUSE:	Melita F. Bursey-Monger and M.N.R.
PLACE OF HEARING:	Sept-Îles, Quebec
DATE OF HEARING:	June 3, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT :	October 29, 2004

APPEARANCES:

For the Appellant:	Daniel Jouis
For the Respondent:	Emmanuelle Faulkner

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