

Docket: 2004-80(EI)

BETWEEN:

MÉLANIE JEAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard with the appeal of *Stéphane Bacon* (2004-107(EI))
on July 21, 2005 at Sept-Îles, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant: Laurent Boucher

Counsel for the Respondent: Martin Lamoureux

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed on the ground that the work performed by the appellant during the period in question is excluded from insurable employment, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of August 2005.

“Alain Tardif”

Tardif J.

Docket: 2004-107(EI)

BETWEEN:

STÉPHANE BACON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard with the appeal of *Mélanie Jean* (2004-80(EI))
on July 20, 2005 at Sept-Îles, Quebec.

Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant: Laurent Boucher

Counsel for the Respondent: Martin Lamoureux

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is allowed and the decision of the Minister of National Revenue dated September 23, 2005 is varied on the ground that the work performed by the appellant during the period in question is insurable, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 26th day of August 2005.

“Alain Tardif”

Tardif J.

Citation: 2005TCC477

Date: 20050826

Docket: 2004-80(EI)

BETWEEN:

MÉLANIE JEAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Docket: 2004-107(EI)

BETWEEN:

STÉPHANE BACON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] These are two appeals from decisions by the Minister of National Revenue (“the Minister”) concerning work performed by the appellants for the Association du hockey amateur de Port-Cartier. The appellant Stéphane Bacon allegedly worked during the period of December 19, 1999 to March 24, 2000, while the appellant Mélanie Jean allegedly worked during the periods of December 10, 2000 to March 17, 2001, December 2, 2001 to March 16, 2002 and December 10, 2002 to March 29, 2003.

[2] Since the payer and the type of work done were the same in both cases, the parties agreed to proceed on common evidence.

[3] The female appellant was absent, as she had recently had a baby.

[4] The appellants' agent made a number of admissions.

[5] In the *Mélanie Jean* case, subparagraphs 6(a), (b), (c), (d), (e), (f), (g), (h), (i), (k), (l), (n), (r) and (s) were admitted, while subparagraphs 6(j), (m), (o), (p), (q), (t) and (u) were denied.

Mélanie Jean (2004-80(EI)):

[TRANSLATION]

- (a) the payer is a non-profit hockey organization; **(admitted)**
- (b) for several years now, the payer has had a mandate from the town of Port-Cartier to prepare and maintain two outdoor ice rinks in a town park and to supervise the premises while the rinks are open; **(admitted)**
- (c) the rinks and the adjacent change house were open seven days a week from 1:00 to 4:00 p.m. and 6:00 to 9:00 p.m., for a total of 42 hours a week, except during periods when the temperature fell below -25 degrees Celsius; **(admitted)**
- (d) to carry out its mandate, the payer engaged one person every year to perform the work; **(admitted)**
- (e) during the periods at issue, the payer entrusted the appellant with the task of preparing, maintaining and supervising both rinks; **(admitted)**
- (f) prior to the periods at issue, the payer had given this work to Stéphane Bacon, the appellant's spouse; **(admitted)**
- (g) in 2000, Mr. Bacon asked the payer to give the work to his spouse, assuring the payer that he would help her do it by personally taking care of preparing and watering the ice; **(admitted)**
- (h) the payer engaged the appellant pursuant to a verbal agreement; **(admitted)**

- (i) the appellant was responsible for making the ice at the start of the season and then watering it once or twice a week, clearing snow off it, opening the change house near the rinks and supervising the premises during opening hours; **(admitted)**
- (j) the payer did not control the appellant's work; **(denied)**
- (k) the payer did not keep track of the appellant's hours of work and was interested only in the final result, that is, having rinks that could be used during their opening hours; **(admitted)**
- (l) the payer provided the appellant with all the equipment she needed; **(admitted)**
- (m) since the work involved in preparing the ice (about two or three weeks at the start of the season) and watering it was too difficult for the appellant, Mr. Bacon did this work; **(denied)**
- (n) during the first few weeks of the season, the payer paid the appellant a wage of \$12 an hour calculated on the basis of the number of hours worked by Mr. Bacon; **(admitted)**
- (o) during all the rest of the period at issue, the appellant received fixed earnings of \$530.40 gross per week, regardless of the hours actually worked by her and Mr. Bacon; **(denied)**
- (p) at the start of the season, Mr. Bacon could work 80 to 90 hours a week preparing the ice, and during the rest of the season he watered the ice two or three times a week, which took from three to six hours each time; **(denied)**
- (q) the appellant or Mr. Bacon often hired friends or people who used the rinks to help with this work; **(denied)**
- (r) the payer always paid the appellant the same amount and was not concerned whether she was getting help or not; if the appellant wanted help, she had to pay the cost; **(admitted)**
- (s) the appellant was paid by cheque every two weeks; **(admitted)**
- (t) the appellant would have been paid for the term of the contract even "if summer had come in January"; **(denied)**

- (u) during the periods at issue, the appellant provided services to the payer under a contract for services and not a contract of employment. **(denied)**

[6] In the *Stéphane Bacon* case, subparagraphs 6(a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m), (n) and (p) were admitted, while subparagraphs (h), (o), (q) and (r) were denied.

Stéphane Bacon (2004-107(EI)):

[TRANSLATION]

- (a) the payer is a non-profit hockey organization; **(admitted)**
- (b) for several years now, the payer has had a mandate from the town of Port-Cartier to prepare and maintain two outdoor ice rinks and to supervise the premises while the rinks are open; **(admitted)**
- (c) the rinks were open seven days a week from 1:00 to 4:00 p.m. and 6:00 to 9:00 p.m., or 42 hours a week, except during periods when the temperature fell below -25 degrees Celsius; **(admitted)**
- (d) to carry out its mandate from the town, the payer engaged one person every year to perform the work; **(admitted)**
- (e) during the period at issue, the payer hired the appellant to carry out its mandate; **(admitted)**
- (f) during the period at issue, the payer hired the appellant under a verbal agreement for the third consecutive year; **(admitted)**
- (g) the appellant was responsible for making the ice for the rinks and then maintaining the rinks, watering them once or twice a week, cleaning them and, during opening hours, opening the change house near the rinks and supervising the premises; **(admitted)**
- (h) the payer did not control the appellant's work; **(denied)**
- (i) the payer did not keep track of the appellant's hours of work and was interested only in the final result, that is, having rinks that could be used during their opening hours; **(admitted)**
- (j) the payer provided the appellant with all the equipment he needed; **(admitted)**

- (k) during the first few weeks he worked preparing the ice rinks, the appellant could work more than 80 hours a week; **(admitted)**
- (l) for the pay periods ending on December 25, 1999 and January 1, 2000, he was paid for the number of hours he worked at the rate of \$10 an hour for the first 43 hours in the week and \$15 an hour for overtime; **(admitted)**
- (m) for the pay period ending on January 8, 2000, the appellant worked 82 hours, for all of which he was paid at the rate of \$10 an hour; **(admitted)**
- (n) during all the rest of the period at issue, the appellant received fixed earnings of \$459.89 a week regardless of the number of hours he worked, and he received no overtime pay; **(admitted)**
- (o) the appellant often hired friends or people who used the rinks to help him with his work; **(denied)**
- (p) the payer always paid the appellant the same amount and was not concerned whether he was getting help or not; if the appellant wanted help, he had to pay the cost; **(admitted)**
- (q) the appellant would have been paid for the full term of the contract even “if summer had come in January”; **(denied)**
- (r) during the periods at issue, the appellant provided services to the payer under a contract for services and not a contract of employment. **(denied)**

[7] The evidence is based mainly on the testimony of Laurent Boucher, the president of the Association du hockey amateur de Port-Cartier. He explained that his association had obtained from the municipality a contract for the preparation, management and maintenance of the outdoor public ice rink during all of the periods at issue.

[8] He stated that, when the ice was being made at the start of the season, many more hours of work were required, perhaps even twice as many.

[9] Once the ice was properly set, the work basically involved maintaining it and ensuring that the shelter for users of the rink was accessible.

[10] The maintenance work involved watering the rink after it closed and removing the snow that accumulated while people were skating or as a result of a snowfall.

[11] The cleaning work was done using scrapers and a snowblower. After a very heavy snowfall, the Association du hockey amateur de Port-Cartier used a loader, at its own expense, to remove the snow and speed up the cleaning process.

[12] The routine maintenance work was done using a garden hose, shovels and a mechanical snowblower.

[13] The appellants' agent argued that the town of Port-Cartier, the amateur hockey association of which he was the president and the appellants had all been honest and in good faith in these cases.

[14] The honesty and good faith of the parties is not in question here. Unfortunately, honesty, good faith and candour cannot in themselves shape or define the nature of a contract of employment or contract of service.

[15] To determine whether a contract of service exists, only the facts, the method, the terms and conditions and the context in which the work was performed must be examined.

[16] Under the *Employment Insurance Act*, a contract of service must meet three very essential conditions: performance of work, earnings and the existence of a relationship of subordination between the worker and the payer.

[17] Here, the respondent determined that the appellants had performed the work under a contract for services. The difference between the two contracts is very difficult to establish or observe in some situations. Everything lies in the relationship of subordination, which is characterized by the power of control exercised by the payer over the person who performs the work.

[18] The appellants' agent submitted several times and in variety of ways that the association of which he was the president had indeed exercised this power of control over the appellants in the performance of the work.

[19] In particular, he stated that he had checked the quality of their work by ensuring that the ice was in good condition. He had made sure that the rink's

opening hours established by the association were respected and that the rink was cleared promptly after it snowed.

[20] When there were heavy snowfalls, the association hired a contractor who operated a power shovel, commonly known as a loader.

[21] Mr. Boucher also stated that, when his association received complaints from people who used the rink, he spoke to the appellants to remedy the situation quickly.

[22] The tools needed to perform the work, such as shovels, scrapers and a snowblower, were provided by the association. When the ice was being prepared at the start of the season, the work was remunerated based on the number of hours worked. There were many such hours, about 80 a week for two weeks.

[23] Once the ice was properly set, the work basically involved maintaining the rink by removing the snow that accumulated during skating or snowfalls and watering the surface.

[24] During periods of very extreme cold, the appellants could refrain from working after obtaining the approval of a representative of the amateur hockey association.

[25] The president of the association, who acted as the appellants' agent, denied that the appellants would have been paid for the entire winter season even if the summer heat had started in January. He clearly stated that the association could terminate its agreement with the appellants at any time.

[26] Surprisingly, the appellants' agent acknowledged the possibility that the appellants' work was done under a contract for services and not a contract of service.

[27] However, he insisted that he did not understand why the appellants' work had been subject to a review with retroactive consequences that had a disastrous impact on their financial situation because of the claims for overpayments.

[28] According to Mr. Boucher, he always wanted everything to be done by the book in the association of which he was the president. He stated and repeated emphatically that, if it turned out, for reasons totally beyond their control, that the appellants were not entitled to employment insurance even though they had

believed in good faith that they were, they should not be required to repay the very large amounts they had received.

[29] Mr. Boucher also stated that, in the wake of this case, the town of Port-Cartier had completely changed its policy on ice rink preparation and maintenance.

[30] Jean Vézina, the appeals officer responsible for the appellants' file, explained the work he had done to reach the conclusion under appeal.

[31] In particular, he reviewed the investigative work done by the insurance officer who had made the first ruling. As part of his work, Mr. Vézina also contacted the appellants, who confirmed the accuracy of the facts gathered by the officer during the investigation, which are set out in the statutory declaration. Finally, Mr. Vézina contacted the treasurer of the amateur hockey association, France Bédard.

[32] Mention was made of the fact that the appellants had obtained help from third parties in performing their work. This is an element that must be assessed in the specific context of an ice rink, since skaters, who are anxious to be able to use the rink, often take part in the cleanup work. This is a widespread practice that must be separated from the facts considered in the analysis seeking to characterize the legal nature of a work agreement.

[33] Most of Mr. Vézina's testimony had to do with the female appellant's case, in which certain basic facts were very different from those in her spouse's case. I am referring in particular to the admission by the female appellant and Ms. Bédard that the work was so physically demanding that the female appellant absolutely could not do it alone.

[34] Moreover, subparagraph (g) of the Reply to the Notice of Appeal in Mélanie Jean's case was admitted. It reads as follows:

[TRANSLATION]

- (g) in 2000, Mr. Bacon asked the payer to give the work to his spouse, assuring the payer that he would help her do it by personally taking care of preparing and watering the ice; **(admitted)**

[35] Subparagraph (r) was also admitted. It reads as follows:

[TRANSLATION]

- (r) the payer always paid the appellant the same amount and was not concerned whether she was getting help or not; if the appellant wanted help, she had to pay the cost; (**admitted**)

[36] There are enough decisive elements to find that the determination in Mélanie Jean's case was correct. Moreover, all the facts gathered during the investigation, the admissions and the evidence adduced are consistent.

[37] Stéphane Bacon explained that he had requested that the contract of employment be in his spouse's name because otherwise he would not have been able to accept the responsibility offered to him by the amateur hockey association.

[38] Why such a requirement? It was because he had started working as a longshoreman and the time he had available was quite limited as a result.

[39] Having obtained well-paid, insurable employment, he had wanted to find insurable employment for his spouse. To ensure that she got the contract, he guaranteed that she would perform it properly, and the amateur hockey association accepted the conditions he proposed.

[40] The association's ultimate objective was to be assured that the work would be done properly by reliable, responsible persons. Mr. Bacon, the spouse of the appellant Mélanie Jean, provided such a guarantee, which was particularly fitting since he had previously done the same work to the association's satisfaction.

[41] There is no doubt that the person in charge of performing the work was Stéphane Bacon, not Mélanie Jean, although admittedly she did work and was involved in the effective management and maintenance of the outdoor rink.

[42] The person actually responsible for performing the work was Stéphane Bacon, who had done the work in the past to the great satisfaction of the amateur hockey association, which, for this reason, did not hesitate to agree to the new conditions proposed by Mr. Bacon.

[43] What about Mr. Bacon's work during the period of December 19, 1999 to March 24, 2000? This work met the conditions for a contract of service, namely work, earnings and a relationship of subordination.

[44] Since the work done was exactly the same, the respondent quickly concluded that there was a contract for services in both cases. However, although the work and the expectations were the same, there was a very basic, determinative distinction, since the work in the two cases was done under very different terms and conditions. In other words, Mélanie Jean worked, as it were, for or on behalf of her spouse, thus preventing the formation of a genuine contract of service.

[45] When the appellant Stéphane Bacon's availability became so limited that he could no longer do the work, the parties agreed to change the agreement. Until that time, the association had been completely satisfied with the work done by Stéphane Bacon, who had always acted reliably and responsibly.

[46] Since Mr. Bacon guaranteed that his spouse would do the work properly, the association agreed, as it were, to change the work agreement on the basis that the *intuitu personae* relationship would be maintained by the guarantee provided by him.

[47] For the first period at issue, the work done by the male appellant met the requirements for a genuine contract of service. The fact that he may have occasionally sought assistance and rewarded those who helped him do the work does not change the nature of the contract. It must be understood that this work is very distinctive. When young people or even adults are waiting for the ice to be ready, it is normal and common for everyone to join in to speed up the process so they can use the rink more quickly.

[48] For all these reasons, Stéphane Bacon's appeal is allowed and the Minister's decision dated September 25, 2003 is varied on the ground that Mr. Bacon held employment under a genuine contract of service from December 19, 1999 to March 24, 2000.

[49] Mélanie Jean's appeal is dismissed, and the Minister's decision is confirmed on the ground that, from December 10, 2000 to March 17, 2001, December 2, 2001 to March 16, 2002 and December 10, 2002 to March 29, 2003, the work was performed under a contract for services, the contractor being her spouse.

[50] With regard to the request that the overpayments be cancelled, I have neither the authority nor the jurisdiction to do so. However, I assume that the debtor's ability to pay must undoubtedly be taken into account when such a claim is made.

Signed at Ottawa, Canada, this 26th day of August 2005.

“Alain Tardif”

Tardif J.

Translation certified true
on this 7th day of October 2005.

Audra Poirier, Translator

CITATION: 2005TCC477

COURT FILE NOS.: 2004-80(EI) and 2004-107(EI)

STYLE OF CAUSE: Mélanie Jean and Stéphane Bacon and MNR

PLACE OF HEARING: Sept-Îles, Quebec

DATE OF HEARING: July 20, 2005

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: August 26, 2005

APPEARANCES:

Agent for the Appellants: Laurent Boucher

Counsel for the Respondent: Martin Lamoureux

For the Appellants:

For the Respondent: John H. Sims, Q.C., Deputy Minister of Justice and Deputy Attorney General of Canada
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