Docket: 2005-423(EI)

BETWEEN:

HONG NHAT NGUYEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 29, 2005, at Montréal, Quebec

Before: The Honourable Justice Pierre R. Dussault

Appearances:

Agent for the Appellant:	Claude C.G. Gagné
Agent for the Respondent:	Catherine Gagnon (student-at-law)

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of December 2005.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 2nd day of May 2008.

Brian McCordick, Translator

Citation: 2005TCC773
Date: 20051206
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HONG NHAT NGUYEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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REASONS FOR JUDGMENT

Dussault J.

[1] This is an appeal from a decision of the Minister of National Revenue ("the Minister") finding that the appellant did not hold insurable employment during the period from November 2, 2003 to May 29, 2004, when she worked for Duc-Chung Nguyen and Thi-Hanh Nguyen, who operate the Pho Chieu Tim restaurant ("the Payor").

[2] The basis for the decision is set out in paragraphs 5 and 6 of the Reply to the Notice of Appeal. Those paragraphs read as follows:

> [TRANSLATION]
>
> 5. The Appellant and the Payor are related persons within the meaning of the *Income Tax Act*, since:
>
> (a) Duc-Chung Nguyen and Thi-Hanh Nguyen are co-owners of the restaurant;

(b) the Appellant is the daughter of Duc-Chung Nguyen and Thi-Hanh Nguyen.

6. The Minister determined that the Appellant and the Payor were not dealing with each other at arm's length in the context of this employment. The Minister was satisfied that it was not reasonable to conclude that the Appellant and the Payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, having regard to the following circumstances:

(a) the Payor had been operating a 50-seat restaurant for about eight years;

(b) during the period in issue, the restaurant employed four persons: the two partners, the Appellant and a manager;

(c) the Payor's restaurant was open seven days a week from 10:00 a.m. to 9:00 p.m.;

(d) during the period in issue, the Appellant worked in the kitchen and was responsible mainly for making spring rolls; she also prepared vegetables, meats and salads;

(e) the Appellant has variously stated that she worked 10 hours a day on Monday, Tuesday, Thursday and Friday, that she worked from 10:00 a.m. to 4:00 p.m. Monday to Friday with a 30-minute meal break and that she worked 40 hours a week with a schedule that varied daily;

(f) the Appellant claims that she worked 40 hours a week even though she previously said that she worked only 27.5 hours a week;

(g) the Appellant was paid a fixed amount of $400 a week;

(h) the Appellant was pregnant when she began working at the restaurant on November 2, 2003;

(i) on May 29, 2004, the Appellant stopped working because of her pregnancy;

(j) the Appellant had previously worked for the Payor from 1998 to June 2000;

(k) she stopped working in June 2000 because she was pregnant;

(l) the Appellant claimed that she did not resume working at the restaurant until November 2, 2003 because she had not found a caregiver, but her first child was in daycare full time as of January 2003;

(m) after the Appellant left, the Payor did not hire anyone to replace her.

[3] The following persons testified: the Appellant, insurability officer Danielle Lacoste and appeals officer Mireille Lapierre.

[4] The Appellant explained that she started working at her parents' restaurant in 1997 as a server and left in 2000 because she was pregnant. She did not resume working at the restaurant until November 2, 2003 at her parents' request, this time as a cook. According to her, her mother was overloaded with work and could not stand it any longer, and it was a daycare problem that prevented her from starting to work sooner. Working in the kitchen gave her a more flexible schedule, which helped her follow her child's daycare schedule. However, if the restaurant was very busy, she sometimes worked as a server and looked after the cash register. She explained that her schedule varied each week, that it was established by her mother and that her working hours were recorded on paper. In her testimony, she initially stated that she worked four days a week from 10:00 a.m. to 4:00 or 4:30 p.m., depending on her spouse's schedule, and that she had a 30-minute lunch break. On Monday, Tuesday and Thursday, she had to prepare some dishes in advance, including the rolls, salads and meats. She stated that she started working at 8:00 a.m. on those days and also finished later some days and even closed the restaurant at 9:00 p.m. occasionally. She later said that she worked five days a week, usually from 10:00 a.m. to 4:00 p.m., but that she started at 8:00 a.m. three days a week. She then said that it was difficult to record her working hours from one week to the next because her schedule varied with the restaurant's activities. However, she stated several times that she had always worked 40 hours a week and had always been paid $10 an hour for that number of hours.

[5] After her employment ended on May 29, 2004, the Appellant was not replaced until January 2005. She explained that it was not easy to find a cook for a Vietnamese restaurant, since cooks were in short supply.

[6] Danielle Lacoste contacted the Appellant's father, who co-owns the restaurant. According to Ms. Lacoste, the Appellant's father initially stated that the

Appellant worked from 10:00 a.m. to 3:00 p.m. Monday to Friday with a 30-minute lunch break. When confronted with the fact that this added up to only 22.5 hours a week, he then stated instead that she finished at 4:30 p.m. When Ms. Lacoste pointed out that this still did not add up to 40 hours a week, he added that the Appellant also worked on Saturday. When Ms. Lacoste told him that this still did not add up, he went further and said that she started earlier if there was more work.

[7] Ms. Lacoste testified that the Appellant had told her that she usually worked from 10:00 a.m. to 4:00 p.m. and sometimes arrived earlier if there was more work but also finished earlier sometimes and occasionally worked on Saturday.

[8] Ms. Lacoste acknowledged that the Appellant had received employment insurance benefits following her first pregnancy.

[9] Appeals officer Mireille Lapierre contacted the Appellant's father by telephone. He told her that the Appellant's working hours were not monitored [TRANSLATION] "in writing" but that he had been able to monitor her attendance and that her mother did her work after the Appellant stopped working.

[10] Ms. Lapierre also met with the Appellant, who explained that she worked 40 hours a week with a variable schedule, which meant that it was difficult for her to verify the actual number of hours she worked per week. The Appellant also told her that she had to leave work at 4:00 p.m. to pick up her child at daycare.

[11] Ms. Lapierre filed in evidence a document obtained from the Payor, which shows that another restaurant employee described as a cook's helper, who worked from May 19, 2001 to August 23, 2003, was paid an hourly rate of $7, $7.20 and finally $7.30 from February 2003 until he stopped working at the restaurant (Exhibit I-1).

[12] That document does not cover the Appellant's complete period of work, which began on November 2, 2003; it covers only the pay periods from the beginning of January 2004 until she stopped working on May 29, 2004. It indicates that she was a cook and was paid $10 an hour. However, it also shows that she did not work 80 hours during 11 regular two-week pay periods. Rather, she worked 64 hours during two pay periods and 72 hours during another pay period. Yet she was paid the same amount as during the periods when she worked 80 hours.

[13] Relying on paragraph 5(2)(*i*) of the *Employment Insurance Act* ("the Act"), the agent for the Respondent submitted that the evidence shows that the conditions of the Appellant's employment were not the same as those of the other employees. She noted that the Appellant's remuneration was very high, $10 an hour, whereas Exhibit I-1 shows that another employee was paid between $7 and $7.30 an hour, depending on the period involved.

[14] With regard to the duration of the employment, the agent for the Respondent noted that the Appellant worked for only seven months beginning in November 2003 on the pretext that she did not have a caregiver, but the filed receipts show that she had had a caregiver since at least August 2003. The agent for the Appellant also pointed out that no one else was hired before the start of the Appellant's period of employment and that the Appellant was not replaced when she stopped working in May 2004 either. As a result, it can be asked whether her employment really corresponded to the employer's needs and whether those needs justified employment for 40 hours a week.

[15] Moreover, the agent for the Respondent submitted that the Appellant has not shown that she actually worked 40 hours a week during her period of employment, which means that she was in fact paid more than $10 an hour.

[16] In support of her arguments, the agent for the Respondent referred to the decisions of the Federal Court of Appeal in *Légaré v. Canada* (*Minister of National Revenue – M.N.R.*), No. A-392-98, May 28, 1990, [1999] F.C.J. No. 878, and *Pérusse v. Canada* (*Minister of National Revenue – M.N.R.*), No. A-722-97, March 10, 2000, [2000] F.C.J. No. 310.

[17] The agent for the Respondent also relied on the decision of the Federal Court of Appeal in *Canada (Attorney General) v. Jencan Ltd.*, [1998] 1 F.C. 187, [1997] F.C.J. No. 876, in arguing that the Minister's decision must be upheld if there are sufficient facts to support it, even if some of the Minister's assumptions are rejected.

[18] With regard to the hourly wage, the agent for the Appellant noted that a distinction must be drawn between the work done by the Appellant as a cook and the work previously done by another employee who was only a cook's helper.

[19] On the issue of the Appellant's work schedule, he noted that the Appellant testified that she in fact worked 40 hours a week with a variable, flexible schedule that was based on the restaurant's needs, but at least from 10:00 a.m. to 4:00 p.m.

He noted that she testified that she sometimes worked later when her spouse was able to pick up her child at daycare himself.

[20] With regard to the employer's needs, the agent for the Appellant stressed that cooks for Vietnamese restaurants were in short supply and that the Appellant's mother was able to do more work when she could not find someone to help her.

[21] The agent for the Appellant also pointed out that the Appellant's employment had already been considered insurable in the past.

[22] It is important to note at the outset that just because employment has been considered insurable in the past does not necessarily mean that it is insurable during another period. The terms and conditions of the employment during the period in issue are what matter, and nothing else.

[23] Paragraph 5(2)(*i*) of the Act provides that insurable employment does not include "employment if the employer and employee are not dealing with each other at arm's length".

[24] Moreover, subsection 5(3) of the Act provides as follows:

> (3) For the purposes of paragraph (2)(*i*),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and;
>
> (*b*) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, 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.

[25] In *Légaré v. Canada*, *supra*, Marceau J.A. of the Federal Court of Appeal described the role of the Tax Court of Canada in an appeal from the Minister's decision as follows at paragraph 4 of the reasons for judgment:

> 4. The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court 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, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[26] Marceau J.A. reproduced the same analysis in *Pérusse v. Canada*, *supra*. At paragraph 15 of the reasons for judgment, he added the following:

> 15 The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. . . .

[27] More recently, these words were reiterated by Richard C.J. of the Federal Court of Appeal in *Denis v. Canada (Minister of National Revenue – M.N.R.)*, 2004 FCA 26, [2004] F.C.J. No. 400, at paragraph 5 of the reasons for judgment.

[28] The agent for the Respondent argued that the employer's needs did not justify 40 hours of work a week by the Appellant, since no other employee did her work before or after her period of employment. She also submitted that the Appellant's testimony did not establish that she had worked 40 hours a week; her remuneration was therefore not $10 an hour but more, and thus much higher than

that of another employee who had been paid between $7 and $7.30 an hour during his period of employment from May 6, 2001 to August 23, 2003 (Exhibit I-1).

[29] First of all, I will say that the comparison between a wage of $7 to $7.30 an hour for a person considered to be a cook's helper and the $10 an hour the Appellant was paid as a cook is not a meaningful comparison, since it is not based on a characteristic common to both persons. At first glance, the two jobs are different and involve different tasks, and it has never been shown why they are so similar that the same wage should be paid for both.

[30] On the question of the duration of the Appellant's employment and the importance of her work in light of the Payor's needs, I will note that a cook's helper who was hired before the Appellant worked continuously for 40 hours a week from May 6, 2001 to August 23, 2003. The Appellant explained that her mother had asked her to come back to work at the restaurant because she was overloaded with work and that she had agreed to do so as of November 2, 2003. The fact that the Appellant's mother was overloaded with work after the cook's helper left and that she therefore asked the Appellant to come back to work at the restaurant seems to me a perfectly logical and consistent explanation in the circumstances, since the Appellant's mother was alone working in the kitchen.

[31] As for the fact that the Appellant was not replaced after she left on May 29, 2004, the explanation that it was difficult to replace her because of the shortage of cooks for Vietnamese restaurants strikes me as entirely plausible.

[32] On the other hand, I must acknowledge that the explanations given by the Appellant about her work schedule and the assertion that she worked 40 hours a week throughout her period of employment are not as persuasive.

[33] Moreover, Exhibit I-1 obtained from the employer clearly shows that the Appellant was always paid the same amount for the 11 regular two-week pay periods from January to May 2003 but that she worked less than 80 hours during three of those periods (64 during two periods and 72 during another period). Thus, this document confirms that the Appellant did not always work 40 hours a week and that she was paid for hours she had not worked during more than 27 percent of the periods covered by this document. In my opinion, this is not a condition that a Payor would grant to a worker with whom it was dealing at arm's length.

[34] This in itself is important enough to conclude that the Minister's decision still seems reasonable in the circumstances.

[35] Accordingly, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 6th day of December 2005.

"P. R. Dussault"

Dussault J.

Translation certified true
on this 2nd day of May 2008.

Brian McCordick, Translator

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APPEARANCES:

Agent for the Appellant:	Claude C.G. Gagné
Agent for the Respondent:	Catherine Gagnon (student-at-law)

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

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