

Dockets: 2005-2844(EI)
2005-2845(EI)

BETWEEN:

LOUISE DUCHESNE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on March 27, 2006, at Québec, Quebec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

Counsel for the Appellant: The Appellant herself

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeals are dismissed and the decisions of the Minister are confirmed in accordance with the attached Reasons for Judgment.

Signed at Grand-Barachois, New Brunswick), this 30th day of June 2006.

"S.J. Savoie"

Savoie D.J.

Translation certified true

on this 30th day of November.

Daniela Possamai, Translator

Citation: 2006TCC351
Date: 20060630
Docket: 2005-2844(EI)
2005-2845(EI)

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REASONS FOR JUDGMENT

Deputy Judge Savoie

[1] These appeals were heard on common evidence at Québec, Quebec, on March 27, 2006.

[2] The insurability of the Appellant's employment is not at issue. The issue is to determine the Appellant's insurable hours and her insurable earnings.

[3] In his letter of April 21, 2005, the Minister of National Revenue (the "Minister") informed the Appellant of his decision that for the period from January 31 to September 17, 1998, her insurable earnings totalled \$5,172.25 during the last 28 weeks of the period and, that for the period from September 21, 1998, to May 30, 1999, she accumulated 563 insurable hours and insurable earnings totalling \$3,408.75 during the last 28 weeks of the period while employed with the Entreprises Dysco du Québec Inc. (the "Payor").

[4] Moreover, in his letter, of the same date, the Minister informed the Appellant of his decision that for the period from June 8 to November 11, 1999, she accumulated 795 insurable hours and insurable earnings totalling \$7,945.50

and that from June 20 to November 4, 2000, she accumulated 145 insurable hours and insurable earnings totalling \$1,442.50 while employed with the Restaurant Coeur de Loup Inc. (the "Payor").

[5] The Minister based his decisions regarding the Appellant's earnings and insurable hours on the following presumptions of fact:

(Docket 2005-2844(EI))

- (a) the Payor was incorporated on August 13, 1987;
- (b) the Payor operated a restaurant;
- (c) during the periods at issue, the allocation of the voting shares in the Payor's business read as follows [translation]:
 - Donald Duchesne, the Appellant's brother, with 67% of the shares;
 - the Appellant with 28% of the shares;
 - Josée Duchesne, Appellant's sister, with 5% of the shares;
- (d) the Appellant worked at the restaurant mainly during the summer and occasionally during the winter;
- (e) the Appellant helped in the kitchen, waited tables, ensured floor management and acted as a hostess;
- (f) the Payor submitted that the Appellant punched in, by period, whereas the Appellant stated that she did not keep track of her working hours and that she did not know whether the Payor did so;
- (g) on September 8, 1998, the Payor issued a Record of Employment (ROE) in the Appellant's name, for the period from October 27, 1995, to September 6, 1998, detailing 560 insurable hours and insurable earnings totalling \$6,580 for the last 28 weeks of the period at issue;
- (h) on June 2, 1999, the Payor issued a ROE in the Appellant's name, for the period from October 19, 1998, to May 30, 1999, detailing 285 insurable hours and insurable earnings totalling \$3,646.76.
- (i) the ROE issued by the Payor in 1998 does not accurately reflect the insurable earnings earned by the Appellant during the period at issue;

- (j) the ROE issued by the Payor in 1999 does not accurately reflect either the insurable hours accumulated by the Appellant or the insurable earnings earned by the Appellant during the period at issue;
- (k) following a search of the Payor's premises, documents containing time cards in the name of the Payor's employees, including the Appellant, were seized;
- (l) the time cards in the Appellant's name are proof of the hours actually worked by the Appellant and were used as a basis of calculation in the Minister's notification;
- (m) for the period from January 31 to September 17, 1998, and more specifically for the period from March 8 to September 17, 1998, that is, during the last 28 weeks of the period at issue, the Minister determined that the Appellant's insurable earnings totalled \$5,172.25;
- (n) for the period from September 21, 1998, to May 30, 1999, the Minister determined that the Appellant accumulated 563 hours of insurable employment and, from November 15, 1998, to May 30, 1999, that is during the last 28 weeks of the period at issue, insurable earnings totalling \$3,408.75 (127.75 hours at \$5.00 and 277 hours at \$10.00).

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- (a) the Payor was incorporated on December 9, 1997;
- (b) the Payor operated a restaurant;
- (c) during the periods at issue, the allocation of the voting shares in the Payor's business read as follows [translation:
 - Donald Duchesne, the Appellant's brother, with 67% of the shares;
 - Josée Duchesne, Appellant's sister, with 33 % of the shares;
- (d) the Appellant worked at the restaurant mainly during the summer and occasionally during the winter;
- (e) the Appellant helped in the kitchen, waited tables, ensured floor management and acted as a hostess;
- (f) the Payor submitted that the Appellant punched in and out, by period, whereas the Appellant stated that she did not keep track of her working hours and that she did not know whether the Payor did so;

- (g) on November 16, 1999, the Payor issued a Record of Employment (ROE) in the Appellant's name, for the period from June 1 to November 13, 1999, detailing 998 insurable hours and insurable earnings totalling \$13,243.86;
- (h) On September 20, 2000, the Payor issued a ROE in the Appellant's name, for the period from June 26 to September 7, 2000, detailing 424 insurable hours and insurable earnings totalling \$6,857.93;
- (i) the Records of Employment issued by the Payor do not accurately reflect either the insurable hours accumulated by the Appellant nor the insurable earnings earned by the Appellant during the periods at issue;
- (j) following a search of the Payor's premises, documents containing time cards in the name of the Payor's employees, including the Appellant, were seized;
- (k) the time cards in the Appellant's name are proof of the hours actually worked by the Appellant and were used as a basis of calculation in the Minister's notification;
- (l) for the period from June 8 to November 11, 1999, the Minister determined that the Appellant accumulated 795 insurable hours and insurable earnings totalling \$7,945.50 (794.50 hours at \$10.00/hour);
- (m) for the period from June 20, 2000, to September 4, 2000, the Minister determined that the Appellant accumulated 145 insurable hours and insurable earnings totalling \$1,442.50 (144.25 hours at \$10.00/hour).

[6] The Appellant admitted to all of the Minister's factual assumptions, except those involving the fact that the Records of Employment issued by the Payors in the Appellant's name do not accurately reflect her insurable earnings and hours.

[7] Moreover, the Appellant denied the Minister's claim that the time cards in the Appellant's name, seized during the search of the Payors' office, represented the hours she actually worked.

[8] The dockets under review are part of a group that was the subject of an investigation led by a senior investigator with HRDC in Quebec. Upon completion of the investigation, a search was conducted on the premises of the Restaurant Coeur de Loup. During the search, investigators seized employee records and their time cards, as well as various documents possibly containing evidence of offences committed between 1998 and 2002. Following this search, the records of eight workers, employed with the Payors, were submitted to the Quebec

Tax Services Office insurability sector for decision on the determination of the workers' employment periods, hours and insurable earnings between 1998 and 2003. Once that was determined, only three workers, including the Appellant, exercised their right of appeal.

[9] The documents relevant to the dockets under review were used by the Minister in determining the Appellant's insurable hours and earnings. In fact, upon completion of his review of the Appellant's dockets, the Minister concluded that the Records of Employment prepared by the Payors were inaccurate as they contradicted the information gathered during the search which revealed, according to the Minister, specific information he needed to render his decision.

[10] That is also a matter for this Court in making its decision owing to the evidence adduced at the hearing when the Appellant attempted to explain the probative value and relevance of the documents in the review of the dockets.

[11] During the search of the Payors' office, investigators seized documents attesting that there was a system under which hours were banked. At the hearing, Donald Duchesne, the Payors' majority shareholder, adamantly denied that he engaged in such activity with his employees, but did not manage to provide a convincing explanation for the discovery of those documents among those seized during the search.

[12] The Appellant told the investigators that she did not agree to participate with the Payors' in a system under which hours were banked and payments were made, in cash, of a portion of her salary. In her statutory declaration, she indicated that she was paid weekly and that she did not need to punch in and out. At the time of her statutory declaration, time cards bearing her name were shown to her and she stated that she had never seen the documents before.

[13] The Appellant also indicated to the investigators that she did not keep track of the actual hours worked and that she did not know whether the Payor did so. She said that she did not recall whether she used a time clock. When the investigators pointed out to her that there were numerous time cards in her file, she said she was not sure, that may be she punched in and out for a certain time to verify how many hours she actually worked. She was unable to explain why the investigators had in their possession so many time cards in her name and reiterated that she did not recall whether she punched in and out. She added that she was paid weekly, always the same amount, but did not recall the amount.

[14] However, as for Donald Duchesne, he stated that the Appellant punched in and out, by period, and that there was no system under which hours were banked in his company. Contrary to that statement, investigators traced, for example, written sheets to the payroll register for the year 2000 showing that the Payors had a system under which hours were banked in 1999 and 2000.

[15] At the hearing, the Appellant stated and repeated that she was always paid weekly. When questioned about the time cards, she admitted that they were prepared not sporadically but on a continuous basis. However, she stated that the time cards had no bearing on her working hours. She also claimed that the cards were prepared to establish the relevance of a position.

[16] Speaking on behalf of the Payors, Donald Duchesne testified that the Appellant had to punch in and out and that it was standard practice for some employees, even those who were paid weekly. That practice, he said, allowed him to gather practical information needed to develop a database that would be of use to him in the future. He said it was an internal document that allowed him to plan. He indicated that the documents were prepared by someone in his office, but did not know who exactly.

[17] The evidence revealed that for one of the periods of employment, that of 2000, the Appellant was short 420 hours in order to be eligible for employment insurance benefits. One of the Appellant's time sheets, produced together as Exhibit I-1, contains a handwritten note which states as follows [translation]: "If short of 420 hours call." Donald Duchesne stated at the hearing that he did not develop that document, without further explanation. This is the same witness who said that he did not recognize Exhibit I-4 entitled [translation] "Banked Hours, 1999." This document indicates the number of hours worked, hours paid, hours banked and hours accumulated for the following employees: Sylvianne Audet, Stéphane Bouchard, Nicolas Lavoie, Magali Gilbert, Enrico Simard, Germain Tremblay, Alain Jacob, Martin Veilleux, Gaëtan Tremblay, Luc Beaudry, Julie Gilbert and Claudine Tremblay. At the hearing, Donald Duchesne stated that he did not recognize this document. However, it is one of the documents that were on the premises of his businesses.

[18] The Appellant and Donald Duchesne stated that the Appellant always worked 40 hours per week and that she was always paid for 40 hours of work per week at \$10.00 an hour, but then how does one explain the reference in Exhibit I-3 to a total of 67.5 hours paid at \$5.00 an hour for the period from September 21 to

October 4, 1998? No satisfactory explanation was provided to the Court at the hearing.

[19] Given these circumstances, the Minister concluded that he could not accept the Appellant's version or that of Donald Duchesne. He therefore established that the documents in the dockets were evidence of the exact number of hours worked by the Appellant. Such information was supplied to him through the Appellant's regular time cards. He therefore determined the number of hours and the insurable earnings for each of the periods at issue based on those documents.

[20] In my opinion, the Minister could not have done otherwise in these circumstances. The Appellant is asking this Court to reverse the Minister's decisions, but neither the Payor nor the Appellant succeeded in demonstrating that the Minister had misconstrued the scope of the documents seized during the search or that he erred in using them to carry out the job entrusted to him.

[21] All this suggests that the Appellant and the Payors are asking this Court to resolve these issues by determining the Appellant's hours and insurable earnings based on the Records of Employment issued by the Payors in spite of the fact that they are contradicted by the documents seized during the search of the Payors' premises.

[22] However, the Payors did not provide investigators, as they were asked, with the documents seized during the search, and now that these documents have been produced to the Court after having been seized, they are asking the Court not to take them into account. The Appellant is doing the same.

[23] Reference should be made to an excerpt from the *Employment Insurance Regulations*, particularly sections 9.1 and 10 and section 2 of the *Insurable Earnings and Collection of Premiums Regulations*:

Employment Insurance Regulations

9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.

10. (1) Where a person's earnings are not paid on an hourly basis but the employer provides evidence of the number of hours that the person actually worked in the period of employment and for which the person was remunerated, the person is deemed to have worked that number of hours in insurable employment.

(2) Except where subsection (1) and section 9.1 apply, if the employer cannot establish with certainty the actual number of hours of work performed by a worker or by a group of workers and for which they were remunerated, the employer and the worker or group of workers may, subject to subsection (3) and as is reasonable in the circumstances, agree on the number of hours of work that would normally be required to gain the earnings referred to in subsection (1), and, where they do so, each worker is deemed to have worked that number of hours in insurable employment.

(3) Where the number of hours agreed to by the employer and the worker or group of workers under subsection (2) is not reasonable or no agreement can be reached, each worker is deemed to have worked the number of hours in insurable employment established by the Minister of National Revenue, based on an examination of the terms and conditions of the employment and a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.

(4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.

(5) In the absence of evidence indicating that overtime or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.

Insurable Earnings and Collection of Premiums Regulations

2. (1) For the purposes of the definition “insurable earnings” in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is

(a) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, and

(b) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.

(2) For the purposes of this Part, the total amount of earnings that an insured person has from insurable employment includes the portion of any amount of such earnings that remains unpaid because of the employer's bankruptcy, receivership, impending receivership or non-payment of remuneration for which the person has filed a complaint with the federal or provincial labour authorities, except for any unpaid amount that is in respect of overtime or that would have been paid by reason of termination of the employment.

(3) For the purposes of subsections (1) and (2), "earnings" does not include:

(a) any non-cash benefit, other than the value of either or both of any board or lodging enjoyed by a person in a pay period in respect of their employment if cash remuneration is paid to the person by their employer in respect of the pay period;

(a.1) any amount excluded as income under paragraph 6(1)(a) or (b) or subsection 6(6) or (16) of the *Income Tax Act*;

(b) a retiring allowance;

(c) a supplement paid to a person by the person's employer to increase *worker's compensation paid to the person by a provincial authority*;

(d) a supplement paid to a person by the person's employer to increase a wage loss indemnity payment made to the person by a party other than the employer under a wage loss indemnity plan;

(e) a supplemental unemployment benefit payment made under a supplemental unemployment benefit plan as described in subsection 37(2) of the *Employment Insurance Regulations*; and

(f) a payment made to a person by the person's employer

(i) to cover the waiting period referred to in section 13 of the Act,

(ii) to increase the pregnancy, parental or compassionate care benefits payable to the person under section 22, 23 or 23.1 of the Act, to the extent that the payment meets the criteria set out in section 38 of the *Employment Insurance Regulations*.

[24] The Minister determined the number of insurable hours of the Appellant in accordance with the Regulations cited above as follows:

- for the period from January 31 to September 17, 1998, and more specifically for the period from March 8 to September 17, 1998, that is, during the last 23 weeks of the period at issue, the Minister determined that the Appellant's insurable earnings totalled \$5,172.25;
- for the period from September 21, 1998, to May 30, 1999, the Minister determined that the Appellant accumulated 563 hours of insurable employment and, from November 15, 1998, to May 30, 1999, that is during the last 28 weeks of the period at issue, insurable earnings totalling \$3,408.75 (127.75 hours at \$5.00 and 277 hours at \$10.00);
- for the period from June 8 to November 11, 1999, the Minister determined that the Appellant accumulated 795 insurable hours and insurable earnings totalling \$7,945.50 (794.50 hours at \$10.00/hour).

The burden of proof lay with the Appellant. She did not discharge that burden.

[25] Furthermore, this Court must note the lack of transparency of the testimonies of the Appellant and Donald Duchesne, the Payors' representative.

[26] This Court is of the opinion that the Minister properly fulfilled his legislative mandate and that he fulfilled his mandate in accordance with the aforementioned Act and Regulations.

[27] Consequently, this Court sees no basis for interfering in the decision rendered by the Minister.

[28] Accordingly, the appeals are dismissed and the Minister's decisions are confirmed.

Signed at Grand-Barachois, New -Brunswick, this 30th day of June 2006.

"S.J. Savoie"

Savoie D.J.

Translation certified true

on this 30th day of November.

Daniela Possamai, Translator

CITATION: 2006TCC351

COURT FILE NO.: 2005-2844(EI)
2005-2845(EI)

STYLE OF CAUSE: Louise Duchesne and M.N.R.

PLACE OF HEARING: Québec, Quebec

DATE OF HEARING: March 27, 2006

REASONS FOR JUDGMENT BY: The Honourable S.J. Savoie,
Deputy Judge

DATE OF JUDGMENT: June 30, 2006

APPEARANCES:

For the Appellant: The Appellant herself

For the Respondent: Marie-Claude Landry

COUNSEL OF RECORD:

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Firm:

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