Docket: 2005-113(EI)

BETWEEN:

LOUISE LEMAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 1, 2006, at Trois-Rivières, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

Counsel for the Appellant: Alexandra Sirois

Counsel for the Respondent: Pierre-Paul Trottier

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* with respect to the Appellant's employment by 3947921 Canada Inc. from December 23, 2002, to July 11, 2003, is dismissed, and the decision of the Minister of National Revenue rendered on January 29, 2004, and bearing the number CE 0336 3125 2374, is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 20th day of July 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 29th day of June 2007.
Brian McCordick, Translator

Citation: 2006TCC384
Date: 20060720
Docket: 2005-113(EI)

BETWEEN:

LOUISE LEMAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a determination by the Respondent dated December 6, 2004, in which the Respondent found that the payor and the Appellant entered into an arrangement intended to make the Appellant eligible for unemployment insurance benefits.

[2] The Respondent filed an Amended Reply to the Notice of Appeal on the day of the hearing with the Appellant's consent. It is helpful to reproduce all the facts admitted by the parties:

> [TRANSLATION]
>
> (a) The payor incorporated on September 21, 2001.
>
> (b) The payor carried on business for 27 months, beginning in October 2001 and ending in December 2003.
>
> (c) Throughout this period of operations, the payor was actually controlled by Maurice Perreault, the father of Mario Perreault, the Appellant's spouse.
>
> (d) The payor operated a women's clothing manufacturing business.
>
> . . .

[3] The evidence disclosed that Maurice Perreault's family has been in the clothing manufacturing business since the 1970s.

[4] The business ceased operations on two occasions due to bankruptcy.

[5] In the early 2000s, Maurice Perreault, having personally made an assignment of his property, continued to do business making clothing thanks to the involvement of a nominee.

[6] After being discharged from his bankruptcy, he took control of a new business, which also manufactured clothing.

[7] Maurice Perreault, his son Mario Perreault, and Mario's spouse, the Appellant in the case at bar, provided their simple account of the facts: During the period in issue — that is to say, from December 23, 2002, to July 11, 2003 — the Appellant essentially did the same work, for which she was paid roughly the same remuneration, as the witness Carmella Maria Di Caprio ("Maria Di Caprio").

[8] In her testimony, Maria Di Caprio described her work and the circumstances surrounding her hire on November 1, 1999, and the termination of her employment on February 17, 2001.

[9] She also stated that she helped train the Appellant. The Court found Ms. Di Caprio's description of her own duties to be specific and thorough.

[10] Since the burden of proof was on the Appellant, it was not sufficient essentially to assert and repeat: "I did the same work in the same way and was paid the same amount." She had to explain and describe the nature of the work for which she received significant remuneration.

[11] The Court noticed certain unusual elements, including the lengthy period between Ms. Di Caprio's departure and the Appellant's arrival.

[12] The work in question, which was described as very important, was allegedly done by the owner himself during that period.

[13] Up to this stage, everything was relatively straightforward and coherent, but things took a turn for the worse when the Respondent sought clarifications and

explanations regarding certain points and facts noted in her file. Those explanations were incoherent and confused. There were inconsistencies, including considerable variations with regard to the number of hours accrued, the expense reimbursements, the reason for the layoff, the job description and so forth.

[14] Clearly, the information in the Appellant's file differed greatly from the straightforward version initially submitted to the Court. When asked to provide clarifications and explanations and, above all, to reconcile several inconsistencies, Maurice Perreault and the Appellant reacted with frustration and impatience even though the questions asked by counsel for the Respondent were very legitimate.

[15] They gave all sorts of frequently vague and imprecise explanations to account for the inconsistencies that they themselves created. Constantly on the defensive, Maurice Perreault and the Appellant sometimes let out their frustrations with respect to questions that were essentially intended to ascertain the facts.

[16] Why was an amount of 39 hours entered on the Record of Employment (ROE) and given again upon submitting the employment insurance benefit claim? The answer was that the in-house computer program was set up based on the parity committee by-laws, but the Appellant was not subject to those by-laws.

[17] Why was the job description given a title that was different from the one stated at the hearing? The computer program, the absence of appropriate information, and the fact that she had already done the work in question were a few of the alternate explanations provided. Yet the ROE that was prepared after Maria Di Caprio left contained the following clear and correct statement: [TRANSLATION] "quality and control." Everything stated on the ROE was completely consistent with the work that she did for the business.

[18] Maurice Perreault emphasized that he was involved in all aspects of the business; he said that this was a very unusual field in which competition is ferocious. He also discussed certain high points and low points, involving both customers and subcontractors, at the core of his organization.

[19] He did not once refer to a document in support of his allegations, and his only explanation with regard to when the periods of work commenced and ended was that he had fewer customers and subcontractors. He was visibly flustered at having to provide explanations even though such explanations were essential to the analysis required to decide the merits of the appeal.

[20] The Appellant and her spouse listed and described the numerous functions she had carried out in the clothing manufacturing business over the course of the many years devoted to Maurice Perreault's businesses. The description of the duties during the period in issue was modelled closely on the explanation provided by Maria Di Caprio.

[21] The duties were described as absolutely essential to the business and were said to warrant 60 to 70 hours of work every week, but they raised certain questions: Why was Maria Di Caprio not replaced when she left, and why was the Appellant herself not replaced upon leaving?

[22] Here was the witnesses' unconvincing reply: Maurice Perreault performed the work from February 17, 2001, which is when Maria Di Caprio left, to December 23, 2002, which is when the Appellant arrived. The Appellant was not replaced after she left on July 11, 2003, because practically all the subcontractors had disappeared by then.

[23] The cross-examination of the Appellant and her witnesses brought out several inconsistencies, and the Appellant's allegations were discredited in several respects. Things deteriorated even more when the people responsible for the investigation and analysis leading up to the determination came forward to testify.

[24] The first such witness was the investigator at the lowest level. He said that he selected the Appellant's file because some of the information in it raised questions. The first of several elements that he noticed was that the salary paid to the Appellant was, in his assessment, much higher than the salary generally paid by businesses of this kind. The second element that attracted his attention was the fact that, each year, or at least in 2001, 2002, and 2003, the Appellant received significant benefits and generally used up all the benefits that she could.

[25] The file was then transferred to Francine Pouliot for a more thorough investigation and analysis. Ms. Pouliot contacted the Appellant. She testified about the telephone conversation.

[26] The answers that were provided with respect to a fundamental aspect of the matter, namely the job description, were utterly inconsistent with the explanations given to the Court.

[27] After providing relatively detailed responses regarding the work performed, the Appellant told Ms. Pouliot that she sometimes travelled. In light of the

ambiguities in the Appellant's evidence, Ms. Pouliot requested copies of certain documents that would enable her to verify the information in order to validate certain information provided by the Appellant.

[28] In response, she received Exhibit I-5, a letter from lawyer William Noonan dated January 28, 2004, which stated:

> [TRANSLATION]
>
> . . .
>
> We represent the interests of 3947921 Canada Inc., which has retained us for the purposes of this matter.
>
> Under the terms of a letter dated January 26, 2004, you requested, from a representative of our client, a statement of monthly gross income for the years 2002 and 2003 from 3947921 Canada Inc. The request is being made under the terms of your investigation of Louise Lemay, who has apparently made a claim for employment insurance benefits.
>
> Our client finds it difficult to understand the relationship between the company's gross revenues and the insurability of one of its employees.
>
> The fact is that Louise Lemay is an employee who reports to the management of the business, works on the road as a representative and supplies her own car without being reimbursed for any expenses whatsoever in consideration of her weekly gross income of $1,150.
>
> Our client finds that your request goes beyond what can reasonably be required in a case such as this, because there is no relationship between the information requested and the subject that you are investigating.
>
> Our client is available to cooperate with you on any written request that you submit, subject only to the requirement that you not get involved in the administrative and financial affairs of the company as part of your investigation into the insurability of Louise Lemay's employment.
>
> Please feel free to contact me for any additional information.
>
> . . .

[29] Based on this, Ms. Pouliot concluded that the Appellant's employment was not insurable. A review of her decision was requested, and the file was transferred

to Denis Hamel. Once again, Mr. Hamel contacted the Appellant, her spouse and Maurice Perreault.

[30] Mr. Hamel asked for several documents that were very relevant and absolutely essential to an adequate analysis. Once again, the information obtained was incoherent, confused, and often implausible. This prompted Mr. Hamel to make a renewed attempt to obtain certain documents, only to be met with a firm refusal from the company's lawyer.

[31] Neither Ms. Pouliot, nor Mr. Hamel, nor the Court was able to examine a single document.

[32] What evidence does the Court have in order to assess the merits of the appeal? It has the accounts given by the Appellant, her spouse and his father, the true owner and/or manager of the business — versions that differ totally from those given to Ms. Pouliot and Mr. Hamel on an aspect as fundamental as the job description.

[33] According to the latest version of the facts submitted to the Court, the Appellant's work was comparable to that of Ms. Di Caprio, and the Appellant's very high salary was clearly higher than the salaries prevalent in the field, but similar to that paid to Ms. Di Caprio. However, these allegations raised several questions that were never answered. I have in mind the following elements, among others:

- If things were as simple as they are claimed to be, why was cooperation completely withheld during the investigation?

- Why were no documents, such as income and expense statements, submitted?

- Why were the investigators not given the same clear and simple version of the facts that was submitted to the Court?

- The work described in the most recent description of the facts was important, and perhaps even absolutely essential. Why was the Appellant not replaced? The answer, an oral explanation that was not validated by any documentary evidence, was that this was due to the lack of subcontractors.

- Who did the work during the period between Maria Di Caprio's departure on February 16, 2001, and the Appellant's arrival?

- Maurice Perreault, the manager of the business, testified that he was generally on the premises of the business and that he carried out the duties that fell outside business hours.

- Yet Maria Di Caprio and the Appellant asserted that the work took 60 to 70 hours per week to perform.

[34] For the years 2001, 2002 and 2003, the Appellant received almost all the employment insurance benefits to which she was entitled.

[35] The Appellant claims that she had the skills to perform all the existing duties, from cleaning to secretarial work, from materials distribution to quality control, and so forth. If so, why was she laid off? The payroll, sales and monthly revenue journals, and the number of suppliers, could have accounted for these layoffs.

[36] The numerous inconsistencies (with respect to the hours of work, the job description, and the title of the position), the contradictions (the gas was paid for but the gas was not paid for), the ambiguities (the vast majority of the subcontractors had apparently disappeared when the Appellant was laid off in July), the total absence of documentary evidence that could easily have validated or confirmed certain allegations, the refusal to cooperate during the investigation and upon the review of the initial decision, and the reactions of Maurice Perreault and the Appellant on cross-examination, all cause me to accord no credibility to the Appellant's submissions.

[37] I do not doubt that the Appellant worked for the family business, nor do I doubt her experience. However, I am convinced that she did indeed enter into an arrangement with Maurice Perreault for the purpose of receiving employment insurance benefits — not just some benefits, but the highest amount available under the EI system.

[38] In order to have found in favour of the Appellant, I would have had to accept evidence which was essentially testimonial, did not hold up to scrutiny, was marred by inconsistencies, and was completely incompatible with the account of the facts that they themselves gave during Ms. Pouliot and Mr. Hamel's investigations.

[39] I would also have had to accept, and perhaps even approve, the refusal to provide the customary documents that would have proven that the Appellant was employed in insurable employment.

[40] A contract of employment consists of three essential elements: work, remuneration, and control by the payor over the person performing the work. While it might initially seem very easy to prove these elements, there must actually be genuine work and genuine remuneration as part of a relationship in which one party has the power to control the other.

[41] Two people can agree on work to be performed for remuneration. In a normal context, a genuine employment contract can exist even though the remuneration is considerably lower or higher than the usual salary for similar work. The important, perhaps even essential, element is the informed intention of the parties to the employment contract.

[42] In addition, the work must be genuine, especially if the contract of employment is subject to the provisions of the *Employment Insurance Act* ("the Act").

[43] Indeed, the parties to an agreement governing the performance of work for remuneration must honour that agreement to the letter. However, upon examining the contract's compliance with the provisions of the Act, the Court may conclude that it is, in essence, merely an arrangement between the parties to render the purported employee eligible to receive employment insurance benefits.

[44] A burden of proof can only be met through plausible evidence, and such plausibility generally depends on reliable, coherent explanations. The evidence may leave some doubts due to the passage of time. Hence, the requisite level of proof is proof on a balance of probabilities, not certainty beyond any doubt.

[45] In the case at bar, the Appellant has not made her case on a balance of probabilities. Rather, the evidence adduced contained numerous inconsistencies. On balance, the evidence tends to show that during the periods in issue, the Appellant and her employer made an arrangement one of the fundamental objectives of which was to secure the maximum amount of employment insurance benefits for the Appellant, as opposed to paying the Appellant fair value for her work.

[46] For all these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 20th day of July 2006.

"Alain Tardif"

Tardif J.

Translation certified true
on this 29th day of June 2007.

Brian McCordick, Translator

CITATION:	2006TCC384
COURT FILE NO.:	2005-113(EI)
STYLE OF CAUSE:	LOUISE LEMAY and M.N.R.
PLACE OF HEARING:	Trois-Rivières, Quebec
DATES -	
Hearing:	February 1, 2006
Respondent's written submissions:	April 3, 2006
Appellant's written reply:	April 13, 2006
REASONS FOR JUDGMENT:	The Honourable Justice Alain Tardif
DATE OF JUDGMENT:	July 20, 2006

APPEARANCES:

Counsel for the Appellant:	Alexandra Sirois
Counsel for the Respondent:	Pierre-Paul Trottier

COUNSEL OF RECORD:

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