Docket: 2002-3474(EI)

BETWEEN:

ÉMILE VIENNEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on December 19, 2002 at Bathurst, New Brunswick

Before: The Honourable Judge François Angers

Appearances:

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| For the Appellant: | The appellant himself |
| Counsel for the Respondent: | Stéphanie Côté |

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**JUDGMENT**

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

Signed at Edmundston, New Brunswick, this 24th day of February, 2003.

"François Angers "

J.T.C.C.

Citation: 2003TCC57
Date: 20030224
Docket: 2002-3474(EI)

BETWEEN:

ÉMILE VIENNEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

## REASONS FOR JUDGMENT

**Angers, J.T.C.C.**

[1] The appellant has appealed from the decision by the Minister of National Revenue ("the **Minister**") that his employment by Gabriel Haché Limitée ("the **payor corporation**") from July 30 to November 3, 2001 was not insurable since the appellant and the payor corporation were not dealing with each other at arm's length within the meaning of paragraph 5(2)(*i*) of the *Employment Insurance Act* ("the ***Act***").

[2] In reaching his decision, the Minister relied on the following assumptions of fact, each of which the appellant admitted or denied as indicated below:

(a) the payor is a corporation; its sole shareholder is Paul Haché, the appellant's brother-in-law; (admitted)

(b) the payor corporation's business consists of a service station, a car wash, a convenience store, and the delivery of heating oil (fuel oil) and diesel oil; the payor corporation also sells gravel; (denied)

(c) for several years, the appellant has been employed by the payor corporation as a general worker for a few weeks per year; (admitted)

(d) the appellant's duties consist of maintenance and sometimes delivery work; (admitted)

(e) each year, the work accumulates until the appellant returns to work; (admitted)

(f) each year, the start date of the appellant's employment is determined by the end of his employment insurance benefits; (denied)

(g) the end date of the appellant's employment after 14 weeks corresponds to the number of weeks on which Human Resources Development Canada bases employment insurance benefits; (denied)

(h) during the period at issue, the appellant was paid at a rate of $12 per hour and worked 60 hours per week, which entitled him to the maximum employment insurance benefits; (denied)

(i) the appellant's conditions of employment were set according to the appellant's needs for employment insurance, not according to the payor corporation's needs; (denied)

(j) the appellant and the payor corporation are related persons within the meaning of the *Income Tax Act*; (admitted)

(k) the appellant and the payor corporation are not dealing with each other at arm's length; (admitted)

(l) 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 not reasonable to conclude that the appellant and the payor corporation would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. (denied)

[3] The appellant has acknowledged that he is a person related to the payor corporation within the meaning of the *Income Tax Act* and that he and the payor corporation are therefore not dealing with each other at arm's length. At issue, then, is whether, 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 not reasonable to conclude that the appellant and the payor corporation would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, as set out in paragraph 5(3)(*b*) of the *Act*.

[4] This determination must be made in the context established by the case law, particularly the Federal Court of Appeal decision in *Jencan*, to which I shall refer later in my Reasons for Judgment.

[5] The appellant testified that his work for the payor corporation consisted in doing maintenance work at the convenience store and on the delivery trucks, delivering petroleum products, maintaining the car wash, and performing any duties required of him.

[6] The appellant worked for the payor corporation for 17 weeks in 1999, eight weeks in 2000, 20 weeks in 2001, and 10 weeks in 2002. In 2001, there were two work periods: the first from the beginning of January through February 10; and the second, which is the period at issue, from July 30 to November 3. The appellant adduced in evidence an October 11, 2002 letter from Human Resources Development Canada indicating that his most recent benefit application covered the period starting on February 11, 2001 and ending on February 8, 2002, which allowed him to establish that after he was laid off on November 3, 2001 he continued to receive employment insurance benefits earned during the period of employment preceding the period at issue.

[7] The appellant works six days per week, 10 hours per day. He is paid at the rate of $12 per hour. He has been paid at this rate for four years. However, over the years the number of hour of work per week has gradually increased, from 44, to 50, and then to 60 hours per week.

[8] According to the appellant, his weekly wages are not excessive. He adduced as Exhibit A-3 a document from Human Resources Development Canada: a request for information about the conditions of employment, particularly the hourly wages, for positions similar to his. The information provided indicates, for employment of a part-time day worker by a single employer for seven to eight weeks per year, a rate of between $13 and $14 per hour. This document also indicates median wages of $9 per hour for maintenance work. The appellant stated that the payor corporation set his work schedule and number of hours of work.

[9] Under cross-examination, the appellant acknowledged that his main workplace was the payor corporation's convenience store. He also acknowledged that in 2001 he performed work at the home of the payor corporation's sole shareholder but was paid by the payor corporation. He explained that, being a general worker, he did what he was asked to do. He does not know the name of the owner of the house where the payor corporation's sole shareholder lived.

[10] The respondent called Martial McLaughlin, an Investigation and Control Officer, as a witness. Mr. McLaughlin met with the appellant on May 23, 2002. At that time, the appellant told him that he started working for the payor corporation in 1995. His duties were to do general maintenance work, cut the lawn, repair the roof, and look after the car wash. These duties were the same each year. In 1996, the appellant apparently did not work because of back pain. Where wages were concerned, the appellant told Mr. McLaughlin that, instead of increasing his hourly rate, the payor corporation increased his hours of work.

[11] The appellant is the only employee of the payor corporation who works 60 hours per week and does not work all year. His work is to do maintenance work for the payor corporation's business, which is operated year-round. In 2001, he worked for 14 weeks. He spent two weeks digging a ditch in order to install underground cables for the gasoline pumps, and the other 10 weeks performing other duties, such as painting truck bodies and making deliveries. Mr. McLaughlin wondered whether the work was so urgent that the appellant was required to work 60 hours per week, given that working 60 hours per week at the rate of $12 per hour allowed the appellant to receive the maximum employment insurance benefits in 2001.

[12] Barbara Comeau, an Investigation and Control Officer, travelled to the appellant's workplaces and met with Léo Paul Robichaud, who has been the payor corporation's comptroller for 26 years. Ms Comeau reconstituted the appellant's periods of employment and unemployment in chart form (Exhibit I-1). For example, for the year 2000 the appellant's employment began on October 14, 2000 and ended on February 10, 2001. For the year 2001 it began on August 4 and ended on November 3, 2001. Ms Comeau wondered whether the appellant's duties and work corresponded to the needs of the business. She asked the comptroller this question, requesting further clarification of the appellant's period of employment. The comptroller was unable to justify the period of employment, but did explain that when the appellant was not present his work was done by the other employees, or that sometimes the work was not done until the appellant returned to work, as was the case with the spring cleaning, for example. According to Ms Comeau,

usually maintenance and cleaning should be done in April and May, but at those times the appellant was receiving employment insurance benefits. She confirmed that all the weeks of employment insurance benefits to which the appellant was entitled were paid to him.

[13] Under cross-examination, Ms Comeau confirmed that the payor corporation had 19 employees, some of whom earned less than $12 per hour and others more, without specifying amounts. She confirmed that the owner and the comptroller earned more than the appellant, even though they worked 40 hours per week. Jean Victor, who has been employed full-time as a trucker by the payor corporation for 25 years, earns $13.06 per hour and works 44 hours per week.

[14] Louise Gauthier Boudreau is an Appeals Officer for the Canada Customs and Revenue Agency. She adduced as Exhibit I-2 her report, which includes a summary of the facts and the analysis on which the Minister relied in exercising his discretionary authority. The fact that the employment is governed by a contract of service is not at issue. The appellant has admitted that there is a non-arm's length relationship.

[15] Ms Boudreau examined each element of the contract in order to determine whether a similar contract could have been entered into between unrelated persons.

[16] Concerning wages, on the basis of the average wages of $9 per hour for this type of work, Ms Boudreau concluded that the appellant's hourly wages were already higher than average, given that he had worked for the payor corporation only since 1995. Jean Victor, who has been employed by the payor corporation as a trucker for 25 years, is paid at the rate of $13.06 per hour. Nor was the payor corporation able to explain why the appellant was required to work 60 hours per week when he was working, and it was even less able to explain why it did not need a general worker for the rest of the year.

[17] Concerning conditions of employment, the appellant is the only employee who works 60 hours per week. The duration of the employment is questionable. The 14 weeks of work during the period at issue entitled the appellant to the maximum employment insurance benefits. Ms Boudreau's interview with the payor corporation provided no explanation of the duration of the appellant's employment; as well, his duties should have been performed in the spring and early summer, rather than during the period at issue.

[18] Given the nature and the importance of the appellant's duties, Ms Boudreau concluded that the payor corporation would not have employed an unrelated person to perform these duties for the same duration. The payor corporation admitted that it had to let work accumulate for the appellant to do during his period of employment. The appellant and the payor corporation were not in complete agreement concerning the appellant's hours of work, a fact that gives rise to doubt: the appellant described his work schedule as being from 8:00 a.m. to 8:00 p.m., Monday to Friday and sometimes Saturday, while the payor corporation stated that his work schedule was from 8:00 a.m. to 9:00 p.m., Monday to Friday.

[19] Before considering whether the Minister's decision was justified, I must ask myself whether that decision resulted from the proper exercise of the Minister's discretionary authority. Did the Minister act in bad faith or for an improper purpose? Did the Minister fail to take into account all of the relevant circumstances, or did the Minister take into account an irrelevant factor? Unless I find that the Minister exercised his discretionary authority improperly, I have no jurisdiction to determine whether, having regard to all the circumstances, it is reasonable to conclude that the employer and the employee would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length (see *Canada v. Jencan Ltd. (C.A.)*, [1998] 1 F.C. 187).

[20] The onus is on the appellant to adduce evidence that will allow me to move on to the second stage, that of the hearing *de novo*. In this case, the appellant has not discharged this burden of proof. Nothing in the evidence allows me to find that the Minister failed to take into account certain relevant circumstances or took into account an irrelevant factor. The fact that when the appellant was laid off he received employment insurance benefits already earned does nothing to alter the fact that he was entitled to additional benefits. In my view, that fact is not a factor allowing me to find that the Minister exercised his discretionary authority improperly. Since the truth of all the assumptions of fact on which the Minister relied has been established, I am unable to intervene. For these reasons, I have no jurisdiction to vary the Minister's decision, and I must therefore confirm it. Consequently, the appeal is dismissed.

Signed at Edmundston, New Brunswick, this 24th day of February, 2003.

"François Angers"

J.T.C.C.

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| CITATION: | 2003TCC57 |
| COURT FILE NO.: | 2002-3474(EI) |
| STYLE OF CASE: | ÉMILE VIENNEAU<br>and The Minister of National Revenue |
| PLACE OF HEARING: | Bathurst, New Brunswick |
| DATE OF HEARING: | December 19, 2002 |
| REASONS FOR JUDGMENT BY: | The Honourable Judge François Angers |
| DATE OF JUDGMENT: | February 24, 2003 |

APPEARANCES:

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| For the Appellant: | The appellant himself |
| For the Respondent: | Stéphanie Côté |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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| For the Respondent: | Morris Rosenberg<br>Deputy Attorney General of Canada<br>Ottawa, Canada |