

Docket: 1999-4787(EI)

BETWEEN:

SAMUEL PINETTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 20, 2003, at Sept-Îles, Quebec

Before: the Honourable Deputy Judge J.F. Somers

Appearances

For the Appellant: The Appellant himself

Counsel for the Respondent: M^e Alain Gareau

JUDGMENT

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

Signed at Ottawa, Canada, this 4th day of March 2003.

“J.F. Somers”

D.J.T.C.C.

Citation: 2003TCC73
Date: 20030304
Docket: 1999-4787(EI)

BETWEEN:

SAMUEL PINETTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE

Respondent.

REASONS FOR JUDGMENT

Deputy Judge Somers, T.C.C.

[1] This appeal was heard at Sept-Îles, Quebec, on January 20, 2003.

[2] The appellant appeals from the decision of the Minister of National Revenue (the “Minister”) according to which the employment held during the period at issue, namely, from November 4 to 22, 1996, with Julien Régis, the payer, was not insurable on the basis that there was no employer-employee relationship between him and the payer.

[3] Subsection 5(1)(a) of the *Employment Insurance Act* (the “Act”) reads as follows:

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[...]

[4] The burden of proof lies with the appellant. He must establish, on a balance of probabilities, that the Minister's decision is unfounded in fact and in law. Each case must be decided on its own merits.

[5] In reaching his decision, the Minister relied on the following assumptions of fact, which the appellant admitted, denied or had no knowledge of:

[Translation]

- (a) The payer, Julien Régis, was the sole owner of a welding shop that he operated under the name of "Ti-Kay Sikuman"; (admitted)
- (b) the business is operated throughout the year; (admitted)
- (c) business hours were from 8:00 a.m. to 8:00 p.m., 6 to 7 days a week; (admitted)
- (d) there were always one or two welders on site, namely, Julien Régis and Yvan Ambroise; (admitted)
- (e) the appellant claimed he was hired as a day labourer by the payer whereas he did not work for the latter; (denied)
- (f) the payer stated that he had no need of any labourers during the period at issue and claimed he had hired the appellant so that he could qualify for employment insurance benefits; (no knowledge)
- (g) the appellant claimed he had received weekly remuneration of \$560 in cash, whereas he received nothing; (denied)
- (h) on an undetermined date, the payer issued a record of employment in the worker's name indicating that he had worked from November 4 to 22, 1996, and that he had received weekly insurable earnings of \$560; (no knowledge)
- (i) the record of employment is false; (denied)
- (j) the parties entered into an arrangement for the sole purpose of enabling the appellant to qualify for employment insurance benefits. (denied)

[6] The payer was the sole owner of a welding shop that he operated throughout the year under the name of "Ti-Kay Sikuman". Business hours were from 8:00

a.m. to 8:00 p.m., 6 to 7 days a week. There were always one or two welders on site, namely, Julien Régis or Yvan Ambroise.

[7] The appellant asked the payer to hire him because he needed three weeks' work in order to qualify for employment insurance benefits. According to the appellant, he worked as a day labourer from 8:00 a.m. to 5:00 p.m., five days a week, for a period of three weeks. According to him, his duties consisted of cleaning the payer's establishment, helping make a scoop for the tractor, making metal fences for a cemetery and a stairway for the municipal garage.

[8] The appellant was paid \$560 a week for 40 hours' work. The remuneration was paid in cash and no receipt was issued for this salary.

[9] On cross-examination, the appellant admitted that he needed three weeks of work to qualify for employment insurance benefits. At the end of the three weeks, he had accumulated enough weeks, he had had enough and terminated his employment.

[10] In his statutory declaration, dated January 6, 1999, (Exhibit I-1), in reply to questions concerning the appellant's employment, the payer stated, among other things:

[Translation]

Q. For what reasons did you hire Mr. Pinette for a period of three weeks between November 4 and 22, 1996?

A. It was probably because he needed more weeks. At that time, the Council was hiring people, it paid them and I was the one who made them work.

Q. How was he hired?

A. I don't really remember any more, but it was always the same thing, when they don't have enough weeks, they come see me.

Q. Why did you need a day labourer for those weeks while there was no welder?

A. I didn't really need him, but I didn't get a contract for (brush cutting) Yvan must have been mistaken when he said that. I took him on so that he could get his stamps.

Q. When his employment terminated, did Mr. Pinette tell you that he wanted to stop working?

A. I don't remember that he told me that he was going to the wharf but I didn't really need him.

[11] The payer stated that he did not remember whether the appellant had done any welding during his period of employment and added that he had probably done some painting. The payer admitted that he did not keep payroll records; therefore the hours were not recorded.

[12] The payer stated that he did not know whether he paid employment insurance premiums. He did not produce any record books to determine his turnover for 1996 and did not prove that he had the financial ability to hire the appellant just because the latter needed more weeks of employment to qualify for employment insurance benefits.

[13] In another statutory declaration, dated January 6, 1999, (Exhibit I-2), the payer stated, among other things:

[Translation]

...The schedules are also based on the weeks that are missing so they can get their unemployment stamps...

[14] In *Laverdière v. Canada (Minister of National Revenue – M.N.R.)*, [1999] T.C.J. No. 124, Judge Tardif of this Court, in a decision dated February 25, 1999, stated:

I nonetheless believe that the work done by Mr. Laverdière during the said period in 1992 was not performed under a genuine contract of service, inter alia for the following reasons. First of all, only a genuine contract of employment can meet the requirements for being characterized as a contract of service; a genuine contract of service must have certain essential components, including the performance of work; that performance must come under the authority of the person paying the remuneration, which remuneration must be based on the quantity and quality of the work done.

Any agreement or arrangement setting out terms for the payment of remuneration based not on the time or the period during which the paid work is performed but on other objectives, such as

taking advantage of the Act's provisions, is not in the nature of a contract of service.

This assessment applies to all the periods at issue involving the two appellants. The terms and conditions of a genuine contract of service must centre on the work to be performed, on the existence of a mechanism for controlling the performance of the work and, finally, on the payment of remuneration that basically corresponds to the quality and quantity of the work done.

[...]

This is the case with any agreement or arrangement whose purpose and object is to spread out or accumulate the remuneration owed or that will be owed so as to take advantage of the Act's provisions. There can be no contract of service where there is any planning or agreement that disguises or distorts the facts concerning remuneration in order to derive the greatest possible benefit from the Act.

[15] In the case under consideration, the payer did not keep records of the hours worked. He did not produce any documents that could establish his turnover and show his financial ability to hire the appellant whose sole purpose was to obtain additional weeks of insurable employment in order to qualify for employment insurance benefits.

[16] The appellant worked for only three weeks, i.e., the exact number of weeks he needed. Moreover, the appellant worked for the payer only on that occasion. No evidence was adduced concerning the payment of a salary to the appellant; the payer did not even know the number of hours worked by the appellant. The record of employment signed by the payer does not reflect the reality.

[17] Therefore, there was an arrangement between the payer and the appellant so that the latter could enjoy the benefits of the provisions of the *Act*.

[18] For the above reasons, there was no genuine contract of service within the meaning of paragraph 5(1)(a) of the *Act*.

[19] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 4th day of March 2003.

“J.F. Somers”

D.J.T.C.C.

RÉFÉRENCE : 2003CCI73

N° DU DOSSIER DE LA COUR : 1999-4787(EI)

INTITULÉ DE LA CAUSE : Samuel Pinette et M.R.N.

LIEU DE L'AUDIENCE : Sept-Îles (Québec),

DATE DE L'AUDIENCE le 20 janvier 2003

MOTIFS DE JUGEMENT PAR : l'honorable juge suppléant J.F. Somers

DATE DU JUGEMENT : le 4 mars 2003

COMPARUTIONS :

Pour l'appelant : L'appelant lui-même

Pour l'intimé : M^e Alain Gareau

AVOCAT(E) INSCRIT(E) AU DOSSIER:

Pour l'appelant :

Nom :

Étude :

Pour l'intimé : Morris Rosenberg
Sous-procureur général du Canada
Ottawa, Canada