[OFFICIAL ENGLISH TRANSLATION]

Docket: 2002-731(EI)

BETWEEN:

ÉRIC BISSONNETTE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

2840-4366 QUÉBEC INC.,

Intervener.

Appeal heard on February 3, 2003, at Sherbrooke, Quebec

Before: The Honourable Judge François Angers

Appearances:

Appellant's Agent:	Richard Benoit
Counsel for the Respondent:	Marie-Aimée Cantin
Intervener's Agent:	Jacques Bissonnette

JUDGMENT

The appeal from the determination of the Minister of National Revenue for the period from October 22 to November 3, 2001, is dismissed, and the Minister's decision in confirmed.

Signed at Ottawa, Canada, this 14th day of April 2003.

"François Angers"

J.T.C.C.

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Citation: 2003TCC270
Date: 20030414
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REASONS FOR JUDGMENT

Angers, J.T.C.C.

[1] This is an appeal from a decision in which the Minister of National Revenue (the "**Minister**") declared that the appellant's employment with the payer, 2840-4366 Québec Inc. (hereinafter "2840"), during the period from October 20 to November 3, 2001, was not insurable because the employment did not meet the requirements of a contract of service. There was no employer-employee

relationship between the payer and the appellant, and the appellant and the payer would not have entered into such a contract if they had been dealing with each other at arm's length during the period. It was the Minister's view that the terms and conditions of the employment were not consistent with the provisions of the *Employment Insurance Act* (the "*Act*").

[2] In making his decision, the Minister relied on the following assumptions of fact, all of which but the last two were admitted by the appellant and the intervener:

> [TRANSLATION]
>
> (a) The payer, which was incorporated on September 18, 1998, operated a bulk hauling business and did excavation.
>
> (b) Jacques Bissonnette, the appellant's father, was the sole shareholder of the payer.
>
> (c) In 2001, the appellant worked for the payer as a bulldozer operator from May 14 to October 12.

(d) During that period, he worked 40 hours a week at $12 an hour; he was laid off because of a shortage of work.

(e) On October 18, 2001, the appellant received a record of employment from the payer stating that he had accumulated 797.5 hours of work and total insurable earnings of $9,570 during the period from May 14 to October 12, 2001.

(f) On October 24, 2001, the appellant filed an employment insurance claim by completing a questionnaire stating that he was unemployed as of October 24, 2001.

(g) On October 30, 2001, Human Resources Development Canada (HRDC) informed the appellant that he needed 112 hours of work to qualify for employment insurance benefits.

(h) On November 7, 2001, the appellant filed a second claim for benefit with a second record of employment from the payer.

(i) The second record of employment, dated November 1, 2001, showed 112 hours of work and insurable earnings of $1,344 for the period from October 22 to November 3, 2001 (period at issue).

(j) The appellant had allegedly been called back by the payer to check and repair a newly acquired loader, whereas he had stated on October 24, 2001, that he was unemployed.

(k) The appellant claims that he generally worked alone at the payer's garage, that he was entirely free to work his hours as he wished and that he had worked two 56-hour weeks without his time being accounted for by the payer.

(l) During his alleged two weeks of work, the appellant was apparently paid in cash and accumulated exactly 112 hours of work, the precise number of hours required to qualify for employment insurance benefits.

(m) On November 22, 2001, in an interview between the CCRA officer and Gisèle Couture, the appellant's mother, the latter said: "Had it not been for the fact that the appellant needed hours for his employment insurance, he would probably not have worked."

[3] Jacques Bissonnette is the sole owner of two businesses, including 2840. In 2001, he employed his son Éric, the appellant, until October 12. He was laid off on that date on the ground that there was a shortage of work.

[4] On October 16, 2001, the payer signed a contract to purchase a used loader. The contract was subject to the payer being able to obtain financing to pay for the purchase. Having bought the loader "as is", the payer knew that it required repairs. He took possession of it two or three days later, at which time Jacques Bissonnette informed his son that he could repair it and, at the same time, make repairs to a trailer and change the engine in a pick-up truck. According to Jacques Bissonnette, there was no system for verifying his employees' hours of work, and he relied on them to calculate their hours. The same was true for his son. He acknowledged that his son had no mechanic's certificate of competency, but he said that he had some knowledge in the field. If his son had not done the work, he would have hired a mechanic.

[5] Jacques Bissonnette said that his son already had half the necessary hours of work when he learned that he was lacking 112. The Minister's letter was sent on October 30 and received on November 1, and his son stopped working on November 3.

[6] In cross-examination, Mr. Bissonnette maintained that he did not know what work he should give his son, despite the fact that he had bought the loader on October 16 and signed a financing contract on October 19. He said he had taken

possession of the loader on October 25 and that his son was rehired on October 22. When these irregularities were put to him, he said he had not been certain of the dates, when, for example, he testified that his son had stopped working on October 18, whereas the record of employment shows October 12.

[7] The appellant's mother also testified. She does the accounting for her spouse's two companies. She testified that she had not told the investigating officer, André Laroche, that her spouse and she had decided to employ their son for the hours of work he would need to qualify for benefits. She contended that her son started working before he knew he did not have enough hours to qualify for benefits. She acknowledged that there was a mistake in her son's record of employment: the record shows that the first day of work was October 22, whereas it was in fact October 23. She also admitted that she had made errors in the payroll, which she had corrected with correcting fluid and which were due to the fact that her son had come back to work.

[8] In cross-examination, she repeated that she had not made the comment on her son's hiring to the investigating officer, André Laroche, because she did not do the hiring. She recognized the invoices for certain purchases made in September

2001, including some signed by the appellant, for materials used in the appellant's work during the period in issue, in particular the wood used to repair the trailer.

[9] The appellant testified that he had finished his job on October 12, 2001. He obtained his record of employment on October 18, was rehired on October 23 and filed his employment insurance claim on October 24. On the claim for benefit (F-5), he answered "no" to question 20, that is to say whether he was working at the time, whereas that was false. He explained that he had made a mistake. He also made another error in the same document, which however he had corrected before submitting his claim.

[10] The appellant testified that he was working when he filed his claim. Since the hours of work were different during the period in issue, he went to the employment insurance office during his hours of work and claimed that a representative had told him he was eligible for employment insurance. He then returned to his work. However, on November 2, he was informed that he did not have enough hours of work. He finished his work the next day, on November 3. He contended that, when he filed his second claim for benefit, he had thought he needed half an hour in order to qualify for benefits.

[11] In cross-examination, he admitted that he had been mistaken about the date when he testified that he had started working on October 23. His statutory declaration and the record of employment show October 22, and he had been working for two days. His employment insurance claim is dated October 24, 2001. The letter he received on November 2 states that he had worked 798 hours, not 797.5 hours.

[12] André Laroche is the investigator who met the appellant, his mother and his father on November 22, 2001. He interviewed them separately, and it was in the interview with his mother that the latter said that the appellant had gone to see her and her spouse to tell him that he did not have enough hours to qualify for benefits. They then decided to have him work those hours. During the same interview, she stated that the appellant had been laid off because of a shortage of work and money to pay him. If her son had needed 112 hours, the duties the appellant performed would have been put off and done by her spouse during the winter.

[13] Louise Savard, an appeals officer with the Agency, testified that she had had telephone conversations with the appellant and his parents. In her conversation with the appellant, the latter mentioned that he had resumed work on October 23, 2001. In her conversation with Jacques Bissonnette, the latter told her that he had

purchased early the materials necessary for the work performed by the appellant during the period in issue: he had needed to order the wood necessary for the repairs in advance because the sawmill that supplied it to him was closed in winter. A check of that fact, Ms. Savard said, had indicated the contrary. She completed her testimony by reviewing the facts that had led her to recommend that the employment be ruled uninsurable, including the two 56-hour weeks, whereas the appellant usually worked 40 hours, and the fact that he had been unable to finish the work on the pick-up truck.

[14] The point at issue is ultimately whether the employment during the period from October 22 to November 3, 2001, comprising 112 hours of work, is insurable in accordance with the *Act*. The burden is on the appellant to show on a balance of probabilities that his contract of employment is insurable and that there was a genuine contract of service.

[15] In the instant case, a series of incidents and circumstances leading to the appellant's new employment readily suggest that the entire matter was organized so that he would qualify for employment insurance benefits. First of all, he was laid off on October 12, 2001, because of a shortage of work. He was rehired on October 22 to repair a pick-up truck and to replace the wooden pieces on the

trailer, which had been purchased nearly one month earlier. That work was to be done at the time he was laid off because the loader had not yet been purchased. On October 24, the appellant completed a claim for employment insurance benefits and declared that he was not working at the time. And yet he had been working since October 22, according to the record of employment. In Court, he testified that he had resumed work on October 23; in his declaration, he said October 22. Furthermore, he did not correct the error in his reply to the question as to whether he was working at the time of the claim for benefit, whereas he took the time to correct another answer.

[16] The payer purchased a loader through the appellant's father on October 16. Although the purchase was made subject to obtaining financing, he knew at the time that the loader needed repairs. And yet he gave his son a record of employment on October 18. He must have known at the time that repairs would have to be made to the loader, and he also knew that there had been repairs to be made to the pick-up truck and the loader since September, because materials such as wood and paint had been purchased.

[17] The second record of employment contains exactly the number of hours required. The work was done without any control by the payer with respect to the

number of hours of work performed by the appellant. Not only did he have a work schedule different from that during his first period of employment (56 hours a week instead of 40), but the work he performed was different because he was now doing the work of a mechanic, whereas he had no certificate of competency. The evidence moreover revealed that he did not complete the mechanical work he had started on the pick-up truck for that reason.

[18] It seems clear to me here that Ms. Couture's spontaneous reply to Mr. Laroche respecting the real reasons for rehiring the appellant, that is to say to enable him to qualify for benefits, is truthful, as was the comment on the fact that the work was work that a mechanic or her spouse would normally have done.

[19] The correction to the payroll is another effort that appears to suggest an attempt to repair damage done. How can it be explained that exactly two 56-hour weeks were required to make repairs to the equipment, and at the same time that that was precisely the number of hours needed to qualify for benefits?

[20] In *Laverdière v. M.N.R.*, [1999] T.C.J. No. 124 (Q.L.), Judge Tardif of this Court stated: "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." The *Act* ensures only genuine contracts of service.

[21] The evidence brought by the appellant and the implausible aspects of the testimony and documents presented lead me to conclude that the contract of employment in issue was purely and simply an arrangement for the purpose of enabling the appellant to qualify for employment insurance benefits and accordingly does not meet the requirements of a true contract of service. For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 14th day of April 2003.

"François Angers"

J.T.C.C.