

[OFFICIAL ENGLISH TRANSLATION]

Citation: 2003TCC481

Date: 20030909

Docket: 97-1978(UI)

BETWEEN:

MICHAEL BOLAND,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Counsel for the Appellant:

François Landry

Counsel for the Respondent:

Pierre-Paul Trottier

REASONS FOR JUDGMENT

(Delivered orally from the bench at the close of proceedings
on May 27, 2003, at Blanc-Sablon, Quebec)

Garon, C.J.T.C.C.

[1] This is an appeal from a decision of the Minister of National Revenue dated August 21, 1997, according to which the appellant's employment during the period from August 30 to September 12, 1992, was not insurable on the ground that there

was no contract of service between the appellant and the payer, J.F.S. Construction Ltée.

[2] The reasons of the Minister of National Revenue in support of his decision of August 21, 1997, are stated in the Reply to the Notice of Appeal. One of those reasons was that "the payer had no control over the appellant's work." That ground was dropped at the hearing of this appeal. The second reason was that the appellant did not work during the period in issue but rendered services to the payer during another period prior to the period in issue, but on the same site and involving the same work.

[3] It appears from the above that the only point at issue following the hearing of this appeal is whether the appellant worked during the two weeks in question. Counsel for the respondent did not contend that the number of hours of work was so small during a given week, for example, that his employment would not have been insurable for the purposes of the old act, that is to say the *Unemployment Insurance Act*.

[4] The various assumptions in support of the Minister's decision in appeal are stated in paragraph 5 of the Reply to the Notice of Appeal. That paragraph reads as follows:

[TRANSLATION]

5. In making his decision, the respondent, the Minister of National Revenue, relied in particular on the following facts:

- (a) the payer was incorporated in 1976 but commenced its operations in 1989;
- (b) the payer operated a construction business;
- (c) Jules Landry was the sole shareholder of the payer;
- (d) the payer's offices were located in Lourdes de Blanc-Sablon;
- (e) the appellant worked at La Tabatière, 200 km from Blanc-Sablon;

- (f) the only means of transportation between the appellant's place of work and the payer's offices were boats and aircraft;
- (g) the payer did not go to the places of work because the economic costs were too high;
- (h) the appellant's duties were to do earthwork, prepare cement and install fence posts;
- (i) the payer had no control over the appellant's work;
- (j) according to the payer's payroll journal, the appellant worked 45 hours from Monday to Saturday in the first week and 48 hours from Monday to Saturday in the second;
- (k) the appellant needed two weeks to qualify for employment insurance benefits;
- (l) the appellant did not work all the days, as indicated in the payroll journal;

- (m) the appellant did not work on the days when the weather was bad;
- (n) over a number of weeks, the appellant banked hours which are recorded in the payroll journal over two weeks;
- (o) the payer's payroll journal does not reflect the days actually worked by the appellant;
- (p) the appellant mentioned that he had worked with Terry Nadeau, Christopher Green and Brian McKinnon;
- (q) Terry Nadeau purportedly worked for the payer from August 3 to 8, 1992, Christopher Green from October 19 to November 14, 1992, and Brian McKinnon purportedly did not work for the payer in 1992;
- (r) in their statutory declarations, Terry Nadeau, Christopher Green and Brian McKinnon did not say they had worked with the appellant;
- (s) the period purportedly worked by the appellant does not coincide with the period actually worked.

[5] Subparagraphs 5(b), (d), (e), (h), (j) and (p) of the Reply were admitted. Subparagraphs (a) and (c) were neither admitted nor denied. Subparagraphs (f), (k), (m), (q) and (r) were denied as drafted, but they were substantially admitted subject to explanations or additional information, as the case might require. The other subparagraphs of paragraph 5 of this pleading were simply denied.

[6] The appellant stated categorically in his testimony that he had worked the two weeks in question, and he provided details on the nature of his work and the persons who he said had worked with him during that period. The appellant signed a statutory declaration on March 15, 1995, which was substantially consistent with his testimony on most of the questions addressed in it. That statutory declaration, drafted by Louise Pineau, could not be read by the appellant because he did not have a sufficient level of education to read or write.

[7] The payroll record kept by the employer and the pay cheque dated September 19, 1992, show the appellant's work weeks ending respectively on September 5 and 12, 1992. The record of employment states August 30, 1992, as the first work day and September 12, 1992, as the last. That documentation was produced at the hearing.

[8] Jerry Landry, the son of the sole shareholder of the payer, mentioned in particular that, on August 8, 1992, he had left the job site where the appellant was to work later. He said that the appellant had worked two or three weeks later in August. He added that he did not know the appellant very well and that his father, the directing mind of the payer, had never met him; at best, his father might have spoken to the appellant by telephone during the period. He confirmed that it was his father who had prepared the pay record and the record of employment concerning the appellant. It was his father as well who signed the pay cheque made out to the appellant. In Mr. Landry's view, this documentation accurately reflected the actual situation with regard to the appellant's employment during the period in issue.

[9] Lise Chouinard also testified for the respondent. At the relevant time, she worked in investigations at the Department of Human Resources Development. She did not handle the appellant's case in particular, but rather similar cases involving the same payer. She filed various documents, including the statutory declarations of the appellant and Terry Nadeau. The employee of the Human Resources Development Department who conducted the investigation concerning

the appellant was unable to testify, for a valid reason, in the first segment of this hearing.

Analysis

[10] The respondent emphasized certain contradictions between the appellant's statutory declaration and his testimony at the hearing, on the one hand, and between Terry Nadeau's statutory declaration and testimony and certain parts of the evidence, on the other. I note in passing that only the last 14 lines on the second page of Terry Nadeau's statutory declaration concern the work performed in August 1992 on the job site here in question. These contradictions, which in many cases had a neutral effect on the point at issue could nevertheless have an influence on the question of credibility. I am thinking in particular of the testimony concerning the presence of certain other employees of the payer at the time the appellant rendered services to the payer in the context of the work done to build a fence in a certain school yard in La Tabatière. Neither Jerry Landry nor Terry Nadeau contradicted the appellant's testimony that he had worked for the payer from August 30 to September 12, 1992. However, they were unable to say the exact dates of the appellant's period of employment.

[11] Furthermore, the documentary evidence, in the form of the pay record and the record of employment, confirms the appellant's position. The date of the pay cheque, September 19, 1992, and the date on which that cheque was cashed at the La Tabatière Caisse populaire, September 21, 1992, are entirely consistent with the appellant's version. In addition, the president and sole shareholder of the payer had no interest in making special arrangements to favour the appellant. He did not know him or, at best, knew him very little. Furthermore, Jerry Landry, the son of the president of the payer, did not know the appellant very well either, even though it was he who had retained the appellant's services for the payer and was apparently the foreman of the payer's employees who worked on the job site in question over a period of time in 1991 and 1992.

[12] In the final analysis, the issue in this case is the appellant's credibility. I am prepared to accept the appellant's testimony after examining his conduct with a great deal of care. I attribute certain contradictions to lapses in his memory as a result of the passage of time. It should be recalled, for example, that the appellant's statutory declaration of March 15, 1995, was made some two and a half years after the appellant's period of employment. There is also the fact that the appellant went to the job site in question long before his period of employment started, not to

work, but to talk, in particular with his friend, Terry Nadeau, who was employed by the payer on that same site.

[13] Having regard to the above remarks, I conclude that the appellant did in fact work for the payer during the period in issue.

[14] The appeal is accordingly allowed, and the appellant's employment during the period from August 30 to September 12, 1992, is insurable.

Signed at Ottawa, Canada, this 9th day of September 2003.

"Alban Garon"

C.J.T.C.C.