

Docket: 2002-1608(EI)

BETWEEN:

ARTISAN EN TUYAUTERIE ET SPÉCIALITÉS EN PLOMBERIE ATS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Nicole Tremblay*
(2002-1609(EI)) on June 16, 2003, at Jonquière, Quebec

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Agent for the Appellant: Lyne Poirier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal is dismissed and the Minister's decision upheld in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 11th day of September 2003

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Sharon Moren, Translator

Docket: 2002-1609(EI)

BETWEEN:

NICOLE TREMBLAY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Artisan en tuyauterie et spécialités en plomberie ATS inc. (2002-1608(EI))* on June 16, 2003,
at Jonquière, Quebec

Before: The Honourable Deputy Judge J. F. Somers

Appearances:

Agent for the Appellant: Lyne Poirier

Counsel for the Respondent: Marie-Claude Landry

JUDGMENT

The appeal is dismissed and the Minister's decision is upheld in accordance with the attached reasons for judgment.

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers"

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Sharon Moren, Translator

Citation: 2003TCC605

Date: 20030911

Docket: 2002-1608(EI)

BETWEEN:

ARTISAN EN TUYAUTERIE ET SPÉCIALITÉS EN PLOMBERIE ATS INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

NICOLE TREMBLAY,

2002-1609(EI)

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Somers, D.J.

[1] These appeals were heard on common evidence at Jonquière, Quebec, on June 16, 2003.

[2] The Appellants filed an appeal from the decision of the Minister of National Revenue (the "Minister") that the work performed by Nicole Tremblay, the worker, during the periods in dispute, April 6 to June 26, 1998, from September 7 to October 16, 1998, from May 31 to November 5, 1999, from June 5 to October 6,

2000, from October 23 to October 27, 2000, from April 2 to August 10, 2001 and from August 27 to August 31, 2001, at *Artisan en tuyauterie et spécialités en plomberie ATS Inc*, the Payor, is excluded from insurable employment under the *Employment Insurance Act* (the "Act"), on the ground that they were not dealing with each at arm's length.

[3] Subsection 5(1) of the Act reads in part as follows:

Subject to subsection (2), insurable employment is

(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 piece, or partly by time and partly by the piece, or otherwise;

...

[4] Subsections 5(2) and (3) of the Act read in part as follows:

(2) Insurable employment does not include

...

(i) employment if the employer and the employee are not dealing with each other at arm's length.

...

(3) For the purposes of paragraph (2)(i):

(a) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, 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 reasonable to conclude that they would have entered into a substantially similar

contract of employment if they had been dealing with each other at arm's length.

[5] Section 251 of the *Income Tax Act* reads in part as follows:

Section 251: Arm's length

(1) For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length; and

...

Definition of "related persons"

(2) For the purpose of this Act, "related persons", or persons related to each other, are:

(a) individuals connected by blood relationship, marriage or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and

...

[6] The burden of proof is on the Appellants to establish according to the preponderance of evidence that the Minister erred in fact and in law. Each case turns on its own facts.

[7] In making his decision, the Minister relied on the following presumptions of fact which were admitted or denied:

- (a) The Appellant was incorporated on September 1, 1978; (admitted)
- (b) The Appellant operated a plumbing and heating business primarily in the commercial and industrial sectors; (admitted)
- (c) The Appellant employed up to seven employees in his busiest periods; (admitted)
- (d) The Appellant's financial statements show the following information: (admitted)

Fiscal year	Gross income	Net profit
1998	\$439,249	\$45,967
1999	\$158,340	(\$12,996)
2000	\$171,556	(\$6,922)
2001	\$240,175	(\$16,417)

- (e) The Appellant was in operation year round but the Appellant's monthly income could vary considerably for the same month from one year to another; (admitted)
- (f) During the periods at issue, the Appellant's shareholders were (admitted)

Claude Lapointe	9,990 shares
The worker	10 shares

- (g) The worker is Claude Lapointe's wife; (admitted)
- (h) The Appellant's office is located in the home of the worker and Claude Lapointe and also included a garage and work storage area over the garage; (denied)
- (i) The worker was an office clerk; (denied)
- (j) During the periods at issue, records maintenance, keeping the payroll journal, clients' invoices, the monthly reports to the *Commission de Construction du Québec* were done by Claude Lapointe; (admitted)
- (k) The worker's duties were to answer the telephone, receive sales representatives, maintain the premises and the two trucks, paint the

premises, engrave the Appellant's tools; (admitted, subject to amplification)

- (l) In 1998, the worker was paid at the hourly rate of \$13.32; (denied)
- (m) In 1999, the worker was paid at the hourly rate of \$14.42; (denied)
- (n) In 2000, the worker was paid at the hourly rate of \$15.81 (denied)
- (o) In 2001, the worker was paid at the hourly rate of \$16.65; (denied)
- (p) The Worker's salary was unreasonable, considering her duties; (denied)
- (q) Claude Lapointe received no salary during the periods in which the worker was on the payroll; (denied)
- (r) On January 31, 2002, Claude Lapointe acknowledged to an agent of the Respondent that he took no salary when the worker was on the payroll to keep the Appellant's expenses to a minimum; (denied)
- (s) The worker appeared in the payroll journal for 40-hour weeks; (admitted)
- (t) The worker's volume of work could not justify 40 hours of work per week; (denied)
- (u) The worker and the Appellant could not determine actual number of hours worked by the worker; (denied)
- (v) The payroll journal did not reflect the actual situation regarding the hours actually worked by the worker. (denied)

[8] The Payor was incorporated in 1978 and operated a plumbing and heating business primarily in the commercial and industrial sectors.

[9] The shareholders of the business are Claude Lapointe and his wife, the worker, Nicole Tremblay, holding 9,900 shares and 10 shares respectively.

[10] The company employed up to seven employees during the busiest periods and had sub-contractors.

[11] The company's financial statements show the following information:

Fiscal year	Gross income	Net profit
1998	\$439,249	\$45,967
1999	\$158,340	(\$12,996)
2000	\$171,556	(\$6,922)
2001	\$240,175	(\$16,417)

[12] The Company was in operation year round but the Appellant's monthly income could vary considerably from one year to another.

[13] According to Claude Lapointe, the company had Abitibi Consolidated Inc., Alcan and the school board as clients and work was done mainly outside the region.

[14] The Payor's business office was located in the family home and included a garage above which there was a work storage area. Photos showing the residence in 1982 are filed as Exhibit A-1.

[15] The worker was an office clerk during the period at issue and began her employment with the company in 1979.

[16] During the periods at issue, the worker kept the books, the payroll journal and client invoices. The monthly reports to the *Commission de construction du Québec* were completed by Claude Lapointe.

[17] Claude Lapointe stated that he hired his wife as needed especially when he had large bids because she calculated the bids while he was away. She maintained the office, the garage, the workshop and equipment. She also painted the pipes, the premises and engraved identification on the tools, the estimated value of which is roughly \$100,000.00.

[18] A document (Exhibit A-2) prepared by Claude Lapointe shows business income for the years 1993 to 2003.

[19] According to Claude Lapointe, his wife started to work for the company in 1979 according to the needs of the company and the family. Her salary was paid by weekly cheque for 40 hours of work, as indicated by Exhibit A-3. Her salary varied

between \$10.00 and \$15.00 per hour but he adds that she received up to \$18.28 per hour.

[20] Claude Lapointe did not always receive his salary. He was paid according to the company's financial ability. The hourly rate paid to plumbers, including Claude Lapointe, was from \$23.78 to \$27.84, according to decree.

[21] Claude Lapointe explained that his wife could work from two to three days on some bids. Between May and June 2001, there were approximately 20 bids.

[22] The worker had to take inventory before July 31, 2001. Accounting was done manually.

[23] In cross-examination, Claude Lapointe stated that the bids are prepared before the contracts are signed. He added that he is the one who prepared the bids according to the drawings and specifications and that his wife did the calculations and addition of the amounts.

[24] Claude Lapointe acknowledged that he prepared 90% of the invoices filed as Exhibit I-2. On the other hand, he stated that 95% of the handwriting appearing in Exhibit I-4 was the worker's.

[25] The worker testified that she worked for the Payor from 1979 until the end of September 2002 and that she did not work for him since.

[26] She acknowledged that she did not have experience in this field before 1979 and that it was her husband who taught her.

[27] According to her testimony, her duties, in addition to those listed in paragraph 5(k) of the Reply to the Notice of Appeal, consisted of preparing invoices and pay, making the entries in the books and making bank deposits, including those filed as Exhibit A-6 with the exception of three of them. Furthermore, she calculated the bids, prepared the photocopies and the envelopes addressed to the individuals involved.

[28] During the periods at issue, she added that she painted the premises and approximately 3,000 feet of pipes, maintained the company's premises, did inventories, made deliveries and engraved the tools.

[29] In cross-examination, she stated that she did a major cleanup in the interior of the trucks once a year and that she washed the trucks every 15 days and that inventory was done once a year.

[30] Louise Dessureault, appeals officer and witness for the Respondent, stated that she met with Claude Lapointe, the business's accountant, Gabriel Lapointe, and the worker in the appeals office on January 31, 2002.

[31] According to the table prepared by the appeals officer and filed as Exhibit I-7, the Worker worked for the Payor for different periods and continued during the years at issue.

[32] In her appeal report (Exhibit I-6), Louise Dessureault noted, among other things, the following information:

[TRANSLATION]

Remuneration paid

In 1998: the Appellant was paid at the hourly rate of \$13.32 for 40 hours of work.

In 1999: the Appellant's hourly rate rose to \$14.42, an 8.25% increase, despite a drastic decrease in contracts and a \$12,000 loss for the fiscal year. No increase was given to other workers except for one who received a \$0.24 per hour raise.

In 2000: the Appellant's hourly rate rose to \$15.81, an 8.7% increase. The salary increases given to the other workers ranged from 4% to 20% (rates set by the CCQ)

In 2001: despite a decrease in contracts, sales figures and a net loss, the Appellant's salary was raised to \$16.65, a 5.37% increase while the other workers received increases of 2.98% and 3.18%.

The Payor's financial statements report the following information:

FISCAL YEAR ENDED	INCOME FROM CONTRACTS	NET PROFIT
07-31-1997	\$439,670.00	\$27,920.00
07-31-1998	\$439,249.00	\$45,967.00
07-31-1999	\$158,340.00	\$(12,996.00)
07-31-2000	\$171,556.00	\$(6,922.00)

07-31-2001

\$240,175.00

\$(16,417.00)

[33] The Appellant received salary increases for the years 1999, 2000 and 2001 while the Payor sustained losses. The other employees received smaller salary increases than those given to the worker.

[34] From 1998 to 2000 a salary is paid to Claude Lapointe only when the worker does not appear in the payroll journal. In 2001, no salary was paid to Claude Lapointe from January to August. It must be noted that the business is in operation year round.

[35] In her report (Exhibit I-6), the appeals officer prepared the following chart:

[TRANSLATION]

The entries in the Payor's various registers are primarily done by Claude Lapointe, assisted by the Appellant [the worker] during her periods of employment:

Joint responsibilities of Claude Lapointe and Nicole Tremblay:

Month	DOCUMENTS COMPLETED BY	
	CLAUDE LAPOINTE	NICOLE TREMBLAY
	Register of the suppliers' inputs	
	completes	totals the amounts
	GST and QST Reports	
	completes	totals the amounts
	Monthly invoicing to clients (jobs in progress) . . .	
	Completes and totals	during time of employment, finds unit prices for materials in catalogues
	Monthly report of accounts receivable (prepared for the bank) . . .	
2001	January, February, March and September	April 30, May 30, June 30, July 31, August 31, October 31 and December 31
	March and September	
2000	MONTHLY CHEQUE REGISTER . . .	
August	7 entries	46 entries
Sept.	9	41
Oct.	8	35
Nov.	43	14
Dec.	41	0
2001		
Jan.	19	0
Feb.	34	0
March	40	0
April	35	0
May	42	0
June	22	6

July	33	0
Aug.	42	0
Sept.	43	0
Oct.	35	15
Nov.	23	27
Dec.	23	30

[36] This is a matter of comparing the information in Exhibits I-4 and I-6, the entries made in the Payor's various registers and the worker's periods of work.

[37] In cross-examination, the appeals officer explained that Claude Lapointe received cheques (salary) rather than the worker because she was in a period of unemployment. She acknowledged that when Claude Lapointe was not receiving a salary when he was not working.

[38] This witness acknowledged that the salary increases to employees other than the worker were granted by decree, including Claude Lapointe's salary.

[39] According to the audit of the Payor's records, the bids were made when the worker was in a period of unemployment.

[40] According to information provided in a document prepared by the Payor's accountant, the appeals officer described, in her report, the worker's and Claude Lapointe's duties for the year 2001:

[TRANSLATION]

- 1) **General office work:**
 - She answers the telephone, (during period of unemployment, Claude Lapointe uses the answering machine when he is absent);
 - She completes different documents (24 done)
 - She receives various construction materials sales representatives who give her product catalogues;
- 2) **Maintenance of premises,**
 - Major cleaning of the office in May 2001, and upkeep of the filing cabinets
 - Regular cleaning of the office . . .
 - **June 2001, painting** the shop walls and floor and moving and putting stock back . . .

- **July and August**, taking the annual **inventory** of parts and materials (stock), take a count of each case for compilation by Mr. Lapointe: 40 sheets completed by Mr. Lapointe . . .

3) **Wash trucks and stock**

- Wash 2 trucks inside and out, clean the equipment and reclassify them May 2001 . . .
- Jobs specific to 2001: **engraving of all tools and equipment (900 tools)** to reduce the deductible for company insurance (the rider on the company insurance specifies that the reduction of the deductible to \$1,000 **becomes effective on April 3, 2001, following the engraving of the tools, beginning of the Appellant's employment, April 2, 2001.** . . .
- In April 2001, the Appellant painted the tools green (Index Tab Plan 3 and photos)
- It should be noted that in 2000, the Appellant painted 3,000 feet of pipe requiring 70 hours of work.

4) **Assistance in preparing bids**

- In 2001, the Payor made 44 bids, examples provided: February 1, March 1, April 2, May 3, June 2, July 1, August 3, October 4, November 1 . . .
- **The bids can require from 30 to 90 hours of work, and the Appellant's duties are to add up** the surfaces to be covered for piping system jobs in order to determine the material required for each bid. She works with Claude Lapointe who gives her the number of feet to total.
- She makes photocopies and sends the documents by fax in the last week of August 2001, 1 bid required photocopies of 8 files (1 inch thick, 31 chapters, 100 pages);

Some tasks are the sole responsibility of Claude Lapointe:

- The construction workers' salaries follow the standards of the *Commission de Construction du Québec* which dictates the rates and annual increases;
- He determines the amount of the source deductions and makes the majority of entries in the payroll journal;
- He completes the source deduction reports;
- He completes the monthly CCQ reports for his construction workers;

- He hires workers and prepares the records of employment;
- Bank deposits are mostly done by Claude Lapointe;
- He makes purchases: materials, etc.;
- He signs the vast majority of cheques and Nicole Tremblay signs the cheques to suppliers and others when he is absent. . .
- He works on job sites
- He prepares bids according to drawings and specifications.

[41] The Federal Court of Appeal in *Ferme Émile Richard et Fils and the Minister of National Revenue*, [1994] F.C.J. No. 1859, indicated that when subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act* is applied, now paragraph 5(3)(b) of the *Employment Insurance Act*, the Court must ask if the Minister's decision "resulted from the proper exercise of his discretionary authority". The Court must require first that the Appellant "present evidence of wilful or arbitrary conduct by the Minister".

[42] In *Bérard v. Canada (Minister of National Revenue – M.N.R.)* [1997] F.C.J. No. 88 Hugessen, J. stated as follows:

. . . The clear purpose of the legislation is to except contracts of employment between related persons that are not similar in nature to a normal contract between persons dealing with each other at arm's length. It is in our view clear that this abnormality can just as well take the form of conditions unfavourable to the employee as of favourable conditions. In either case, the employer-employee relationship is abnormal and can be suspected of having been influenced by factors other than economic forces in the labour market.

[43] In *Légaré v. Canada (Minister of National Revenue – M.N.R.)*, [1999] F.C.J. No. 878, Marceau, J. stated:

. . . In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they

occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

[44] The three decisions cited above refer to the principles that this Court must apply in analysing the evidence in appeals.

[45] The evidence has shown that the Payor and the worker are not dealing at arm's length.

[46] The Court must ascertain if the facts on which the Minister based his ruling are erroneous or if the Minister acted in bad faith.

[47] The main facts accepted by the Minister are: the worker's hourly rate of pay, her salary increases, the Payor's financial ability, the worker's actual number of hours of work and the fact that the main shareholder of the company was receiving no salary when the worker was on the payroll.

[48] It was established that Claude Lapointe was receiving no salary when the worker was on the payroll. The purpose of this arrangement was to keep expenses to a minimum in order to satisfy the bank. This requirement by the bank could explain the company's financial situation; however, even in this financial situation, the worker received pay increases.

[49] The payer has admitted that the company was in deficit during the years 1999, 2000 and 2001.

[50] These facts were proved before this Court; accordingly, these facts accepted by the Minister are not erroneous.

[51] The worker's duties consisted primarily in answering the telephone, receiving sales representatives, maintenance of the premises and the two trucks, painting the premises and engraving the tools.

[52] Claude Lapointe explained that his wife filled out bids and issued the paycheques. Claude Lapointe and Nicole Tremblay both had signing authority for cheques. Claude Lapointe and Nicole Tremblay shared the signing of a series of cheques filed as Exhibit A-5.

[53] It is on the record that the worker performed certain calculations on the bids but Claude Lapointe wrote in the appropriate figures based on the drawings and

specifications. The worker explained that she totalled the figures, prepared the photocopies and placed the tenders in envelopes; therefore, her participation in preparing bids is limited. Moreover, the bids are prepared before the contracts are obtained.

[54] Claude Lapointe has acknowledged that the documents filed as Exhibit I-4 (invoicing) were prepared by the worker and that he simply calculated the amounts.

[55] The worker did not perform physical labour every week; spring cleaning was done once a year, the trucks were washed every 15 days, the tools were painted on a few occasions and inventory was taken once a year in June and July; therefore, manual labour did not occupy many of her work hours.

[56] On the whole, Nicole Tremblay's duties do not realistically reflect the hours actually worked.

[57] The worker received 11% of her pay as vacation pay; that is, the same percentage received by Claude Lapointe. The explanation given to the Court is that this percentage was established by decree while the worker's salary is not governed by decree. Was it necessary then to establish even the percentage of the worker's remuneration?

[58] The other employees received lower pay increases than the worker. The decree set the minimum increase for the employees subject to the decree but not the maximum.

[59] The worker's salary increases are more generous than those given to the other employees; these increases are unreasonable, considering her responsibilities and the company's financial capacity.

[60] Jurisprudence has established that the Court may not substitute its discretion for that of the Minister if the facts on which it is based are not erroneous or if he has not acted in bad faith.

[61] In consideration of all the circumstances in the matter, the Appellants have not established on a balance of probabilities that the Minister acted in a wilful or arbitrary fashion.

[62] The working conditions would not have been similar if the worker and the Payor had been dealing with each other at arm's length.

[63] The Appellant Nicole Tremblay's employment is not insurable by virtue of subsection 5(2)(i) and paragraph 5(3) of the Act.

[64] The appeals are dismissed.

Signed at Ottawa, Canada, this 11th day of September 2003.

"J. F. Somers "

Somers, D.J.

Translation certified true
on this 22nd day of March 2004.

Sharon Moren, Translator

