Docket: 2002-1464(EI)

BETWEEN:

MARIE-ROSE COULOMBE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on June 12, 2003, at Inukjuak, Quebec

Before: The Honourable Judge François Angers

Appearances:

Agent for the Appellant: Serge Molière

Counsel for the Respondent: Stéphanie Côté

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

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

"François Angers"

Angers, J.

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

Maria Fernandes, Translator

Citation: 2003TCC635
Date: 20031014
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REASONS FOR JUDGMENT

Angers, J.

[1] This appeal was heard at Inukjuak, Quebec, on June 12, 2003. The Appellant appeals from the Minister of National Revenue's decision of January 22, 2002, handed down under subsection 93(3) of the *Employment Insurance Act* (the "Act") that her employment with the Inuulitsivik Health Centre (the Payor) during the period from February 27 to April 8, 2000, is not insurable within the meaning of the Act, namely pursuant to paragraph 5(1)(*a*). The reason for this decision was that the employment does not meet the conditions required for a contract of service.

[2] In making his decision, the Minister relied on the following assumptions of fact, which were admitted or denied as set forth below:

> [TRANSLATION]
>
> (a) The Payor is a member of the CLSC network in Quebec's far north region; **[admitted]**
>
> (b) the Appellant ran a daycare business; **[denied]**

(c) in February 2000, the Payor contacted the Appellant to take care of a child with rickets for a short period of time; **[admitted]**

(d) the Appellant acted as foster family; **[denied]**

(e) for 25 days, the Appellant took care of the child 24 hours a day at her home; **[admitted]**

(f) an officer of the Payor went to the Appellant's home three times a week to pick up the child and bring the child to the doctor; **[admitted]**

(g) save for keeping a log of food consumed by the child, the Appellant acted as she deemed fit; **[denied]**

(h) there was no relationship of subordination between the Payor and the Appellant: **[denied]**

(i) the Payor provided clothing and at times, diapers; **[admitted]**

(j) the Appellant provided her home, furniture, food, milk and at times, diapers; **[admitted]**

(k) the Appellant received a per diem rate of $14.97 plus a premium of $6.62 for milk. **[admitted]**

[3] The Appellant testified that a woman approached her about looking after a one-year-old child for an initial period only of three days. She was simply required to take care of the child, feed and give the child the proper medication, and someone would then come to pick up the child. At that time, the Appellant was not running a daycare business, was not registered as a daycare business and did not have a business registration number. Compensation was based on a per diem rate of $14.97 plus a premium for milk, which was set by the Payor.

[4] The Appellant had extensive experience in the field since she had run a daycare business from 1991 to December 1999.

[5] The initial three-day period was extended and the Appellant ended up taking care of the child until April 8, 2000. A representative of the Payor would come to pick up the child two or three times a week for visits to the doctor or to the child's parents. Following these visits, the Appellant submitted the log she kept, which indicated all that the child consumed in food and in medication. Such monitoring

was necessary because the child suffered from malnutrition. This was the Appellant's first experience with the Payor and she believed she would receive her usual per diem rate. However, it was the Payor who set the rate and the Appellant pointed out that she was providing her services for humanitarian reasons.

[6] Pierre Laroche is a human resources management consultant at the Inuulitsivik Health Centre. His tasks include being in charge of youth protection. According to his testimony, children are placed in temporary foster care by order of a court or by a community worker. Foster families are compensated for this service according to a scale that is based on the child's age. Some criteria are used in determining the set per diem rate. The Appellant in this case was considered the foster family.

[7] According to Mr. Laroche, a community worker visits with foster families based on requirements set out in the court order. He pointed out that the Health Centre as such has no control over foster families. The community worker chooses the foster families and is the one who visits the children and ensures adherence to the court order and proper care of the children. The community worker reports to the Health Centre. Mr. Laroche testified that, like that of other foster families, the Appellant's name does not appear on the Health Centre's list of employees. Payment is made to foster families upon submission of an invoice, as was the case for the Appellant in this case.

[8] The Appellant's representative argues that the Appellant cannot be a self-employed worker because she was not registered as such and had no business registration number. Furthermore, he argues that the Health Centre exercised control over the Appellant's work in the sense that the community worker who reported to the Centre visited the Appellant three times a week. This regular supervision, carried out to meet significant requirements for the child, created in view of the Appellant's representative, a relationship of subordination essential to a contract of service. He adds that a self-employed worker would not have agreed to a per diem rate of $14.96.

[9] Counsel for the Respondent claims that the fact that the Appellant kept a food and medication log does not constitute control over her by the Health Centre. It is only one way to ensure that the child is well and that the requirements of a court order are met. The Appellant acted as mother and given their low number, weekly visits represented a monitoring of result only and did not constitute a control over the Appellant. She adds that the Appellant's work was not part of the Health Centre's activities and that the application of the integration test does not

demonstrate the existence of a contract of service. Compensation received by the Appellant is not a wage but rather a reimbursement for expenses incurred. It does not correspond to the insurable hours equal to wage hours.

[10] Of the documents filed as evidence there is schedule 5 of Exhibit A-3, where one finds a description of the recruitment and selection process of foster families. Under "control, supervision and visit of foster families", the document explains that: [TRANSLATION] "a person from the Centre de protection de l'enfance et de la jeunesse pays regular visits to the beneficiary of a foster family as well as to the foster family itself, in order to meet their social service requirements, ensure that the pairing is still adequate, prevent any misunderstanding, and make sure that the child is still receiving proper care in his or her foster family."

[11] The question at issue is summarized as follows: to determine if the Appellant's employment from February 27 to April 8, 2000, with the Inuulitsivik Health Centre was insurable employment in accordance with the provisions of the Act. It is up to the Appellant to demonstrate on a balance of probabilities that a genuine contract of service existed between the Appellant and the Health Centre.

[12] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada approved the tests established by the Federal Court of Appeal in *Wiebe Door Services Ltd. v. M.N.R.* After analyzing the caselaw and the tests therein used to help courts rule on the question of the existence of a contract of service, Major J. summarized it all in paragraph 47 as follows:

> Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*, supra. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[13] The applicable tests are the degree of control exercised by the Payor, the ownership of tools, chance of profit, risk of loss and degree of integration.

[14] In *Charbonneau v. Canada*, [1996] F.C.J. No. 1337 (Q.L.), Décary J.A. of the Federal Court of Appeal said that the monitoring of results must not be confused with the control of a worker. In this case, the facts demonstrated that it was necessary that the Appellant assume her responsibilities and obligations continuously on a daily basis, and that the community worker visit her three times a week. It is clear that some instructions were given when the child was placed in the Appellant's home, but I am not convinced that they constitute as such the degree of control found in an employer-employee relationship. This case entails a situation wherein the community worker's visit was rather to ensure that all was going well and that the court order protecting the child's welfare was indeed being followed. The evidence submitted in the proceedings is not enough for me to conclude that the Payor exercised control over the Appellant. The application of control test, therefore, does not support the existence of a contract of service.

[15] The ownership of tools is irrelevant in this case. As for the chance of profit and risk of loss, the Appellant was paid a per diem rate. Though an additional sum was awarded towards the purchase of milk and diapers, the admitted facts demonstrate that the Appellant also contributed towards the purchase of those items. The daily rate of $14.97 for 24-hour care and attention far from meets employment standards and is even further from meeting the minimum wage standard. On the other hand, I agree with the statement of the Appellant's representative that a self-employed worker would not work for such a rate either. The chance of profit and risk of loss test is therefore difficult to apply here and does not tend to establish the existence of neither a contract of service nor a contract for services. This is truly a humanitarian gesture on the part of the Appellant.

[16] The Appellant's activities in this case were not part of those of the Inuulitsivik Health Centre. Rather, the Appellant provided services that are incidental to the responsibilities of the Centre and this service was more closely related to the execution of court orders for the placement of children in order to

protect their welfare. Therefore, the integration test does not demonstrate the existence of a contract of service.

[17] The Appellant's work is commendable and essential to ensure the welfare of children in need. In this case, however, the context unfortunately does not lead me to conclude that she and the Payor had an employer-employee relationship within the meaning of the Act.

[18] For these reasons, the Minister's decision is confirmed.

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

"François Angers"

The Honourable François Angers, J.

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

Maria Fernandes, Translator