Docket: 2003-697(EI)

BETWEEN:

EXTRA-KLEEN INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

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Appeal heard together with the appeal of *Berthe Casavant (2003-789(EI))* on 11 July 2003, at Bathurst, New Brunswick

Before: The Honourable Judge C.H. McArthur

Appearances:

| | |
|---|---|
| Representative for the Appellant: | Joséphat Casavant |
| Counsel for the Respondent: | Stéphanie Côté |

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JUDGMENT

The appeal is dismissed and the decision of the Minister, made pursuant to paragraph 5(1)(*a*) of the *Employment Insurance Act*, is confirmed.

Signed at Ottawa, Canada, this 13th day of November 2003.

"C.H. McArthur"

McArthur, J.

Translation certified true
on this 2nd day of February 2004.

Maria Fernandes, Translator

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## REASONS FOR JUDGMENT

**McArthur, J.**

[1] The appeals concern the insurability of work performed by the Appellant Berthe Casavant for the business, Extra-Kleen. The Appellants, Extra-Kleen and Berthe Casavant, claim that Berthe Casavant (the "Worker") held insurable employment for the period from 3 December 2001 to 31 May 2003 at Extra-Kleen Inc. The Respondent argues that the Worker did not hold insurable employment at Extra-Kleen Inc. during this period within the meaning of paragraph 5(1)(*a*) of the *Employment Insurance Act (*the "Act").

[2] In concluding that the Worker did not hold insurable employment, the Minister of National Revenue ("Minister") relied on the following facts:

[TRANSLATION]

(a) the Appellant was incorporated on or around 24 July 1980;

(b) the Appellant's shareholders during the period at issue were as follows:

| | |
|---|---|
| Berthe Casavant (the Worker) | 0.02% |
| Joséphat Casavant (the Worker's husband) | 0.87% |
| Florina Nauss (Joséphat Casavant's sister) | 0.02% |
| Russell Nauss (Florina's husband) | 44.58% |
| Natalie Nauss (Florina and Russel Nauss' daughter) | 43.89% |
| Norbert Savoie | 10.62% |
| Total | 100% |

(c) Russell and Florina Nauss live in Myrtle Beach, South Carolina;

(d) Russell Nauss performs the Appellant's accounting work;

(e) the Worker's husband is the Appellant's general manager, who monitors the Appellant's operations and hires employees;

(f) the Appellant's business involves the sale of sheet metal, nails, screws, doors, windows and other materials purchased in surplus or damaged material sales;

(g) the Worker's duties during the period at issue were to answer the telephone, feed and look after the dog, run errands, stock merchandise, perform the inventory and do bank deposits;

(h) the Worker prepares and signs deposit slips throughout the year;

(i) the Appellant's telephone rings at the business and residence of the Worker and her husband;

(j) the Worker's husband answered the Appellant's telephone most of the time during the period at issue;

(k) the Worker was unable to handle heavy stock and had to ask her son for assistance;

(l) neither the Worker's husband nor the other shareholders of the Appellant managed the Worker's duties;

(m) during the period at issue, the Worker had to look after the personal needs of her husband and make him breakfast every morning, which would often take until 11:00 a.m.;

(n) the Worker was on the payroll journal with a weekly salary of $400.00 for a 40-hour workweek;

(o) neither anyone working for the Appellant nor the Worker knew how many hours per week the Worker worked;

(p) during the period at issue, the Worker's husband prepared most of the invoices;

(q) the Appellant is open for business from May to November, and is run by the Worker's husband, his son, Sylvain, and sometimes another employee;

(r) the Appellant usually has no employees between November and May, except for the Worker's husband, who is not always on the payroll during this period;

(s) no genuine contract of service existed between the Appellant and the Worker.[1]

For the most part, these assumptions are well founded.

[3] At the hearing, it was revealed that the Worker had been hired at a time when Extra-Kleen was hiring experienced workers. The Appellant's representative, Joséphat Casavant (the Appellant's husband), explained that hiring his wife was more cost-effective for the Appellant. However, the Worker was paid $10 per hour, as were the Appellant's other workers. Joséphat Casavant argued that the Appellant had still saved money because:

> [TRANSLATION]
> ... Ms. Casavant worked in the winter because business was slow and there was not enough money to pay high salaries since the others work at least 50 hours per week, including Saturday and Sunday. My wife worked 40 hours. ...[2]

[4] In addition to the testimony of the Worker and her husband and the payroll journal entries, no other evidence supports the theory that the Worker worked

[1] Reply to the Notice of Appeal, at paragraph 6.

[2] Transcript, at page 2.

40 hours per week. It cannot be established with certainty when the work was performed: from Monday to Friday, from what time until what time?

[5] There is no evidence showing that the Worker was paid for her work since no cheque issued by the Appellant in the Worker's name was cashed. According to Joséphat Casavant's explanation, he personally cashed the Worker's cheques by drawing on the company's cash assets:

> [TRANSLATION]
> As proof of paid wages, the company always has a petty "cash flow" and when there is not enough money to pay wages, the company pays out in "cash" to honour the cheque, Your Honour.[3]

[6] Did Berthe Casavant hold insurable employment within the meaning of the Act while working for Extra-Kleen Inc.?

[7] In *Wiebe Door Services Ltd v. M.N.R.*,[4] the Federal Court of Appeal established four tests to determine whether a worker is an employee or is self-employed: (1) the control test, (2) the ownership of tools, (3) the chance of profit or risk of loss, (4) the integration test.

[8] In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*,[5] the Supreme Court of Canada affirmed that the tests established in *Wiebe Door Services Ltd.* are not a magic formula. It is important to maintain an overall perspective and not to blindly apply these tests:[6]

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra,* that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that "no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations ..." (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door,* at p. 563, citing

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[3] Transcript, at page 10.

[4] [1986] 3 F.C. 553.

[5] [2001] 2 S.C.R. 983.

[6] At page 1004.

> Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:

[9] In an employment insurance case, *Duplin v. Canada*,[7] Tardif, J. defined contract of service as follows:

> On the matter of insurability, I must basically decide whether the facts brought out in the evidence show that there was a genuine contract of service during the period or periods at issue. A genuine contract of service exists where a person performs work that is defined in time and generally described in a payroll journal, in return for which that person receives fair and reasonable remuneration from the payer, which must at all times have the power to control the actions of the person it is paying. The remuneration must correspond to the work performed for a defined period of time.
>
> . . .
>
> The fundamental components of a contract of service are essentially economic in nature. The records kept, such as payroll journals and records concerning the mode of remuneration, must be genuine and must also correspond to reality. For example, the payroll journal must record hours worked corresponding with the wages paid. Where a payroll journal records hours that were not worked or fails to record hours that were worked during the period shown, that is a serious indication of falsification. Such is the case where pay does not correspond with the hours worked. Both situations create a very strong presumption that the parties have agreed on a false scenario in order to derive various benefits therefrom, including benefits with respect to taxes and employment insurance.[8]

[10] Several decisions have cited this definition of contract of service: *Landry c. Canada*, [2003] A.C.I. n$^{o}$ 341 (Q.L.), *Bérubé c. Canada*, [2003] A.C.I. n$^{o}$ 188 (Q.L.), *Livreur Plus Inc. c. Canada*, [2002] A.C.I. n$^{o}$ 579 (Q.L.), *Nadeau c. Canada*, [2002] A.C.I. n$^{o}$ 513 (Q.L.).

[11] Tardif J. is of the view that any arrangement intended to take advantage of the *Act* when no contract of service really exists is at variance with the contract of service. The judge states the following in *Laverdière v. Canada*[9]:

> 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

[7] [2001] T.C.J. No. 136 (Q.L.).

[9] [1999] T.C.J. No. 124.

> other objectives, such as taking advantage of the Act's provisions, is not in the nature of a contract of service.
>
> . . .
>
> Of course, a contract of employment may be lawful and legitimate even if it sets out all kinds of other conditions, including remuneration much higher or lower than the value of the work performed; some contracts may even involve work performed gratuitously. Work may be performed on a volunteer basis. All kinds of assumptions and scenarios can be imagined.
>
> Any contract of employment that includes special terms can generally be set up only against the contracting parties and is not binding on third parties, including the respondent.
>
> 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.[10]

I share the same view as Tardif, J., and I am using his words for the purpose of this decision.

[12] The words of Tardif, J. are consistent with those of the Supreme Court of Canada in *671122 Ontario Ltd.*, *supra*. Beyond the contract of service tests, one must not lose touch with reality. Is there really a contract of service between the Appellant and the Worker?

[13] The Worker, Berthe Casavant, did not hold insurable employment within the meaning of the *Act*. This conclusion is based on Paragraph 5(1)(*a*) of the *Act* which stipulates that:

> 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 the piece, or partly by time and partly by the piece, or otherwise.

[10] *Ibid*, at paragraphs 46 to 50.

[14] In applying the tests in *Wiebe Door Services Ltd.*, *supra*, and in *671122 Ontario Ltd.*, I come to the following conclusions: the Respondent took the position that no one oversaw the Worker's work. Yet, the Worker explained that this was because she knew what she had to do. The Worker would not have been able to decide which duties to perform and which not to, or how to perform them. The Appellant determined this in advance. Therefore, there was a certain degree of control over the Worker's work.

[15] Ownership of tools: the Worker did not need tools as such to perform her work: answering the telephone, feeding and looking after the dog, running errands, stocking merchandise, performing the inventory and making bank deposits.

[16] Chance of profit or risk of loss: the Worker owned a tiny percentage of the Appellant's shares (0.02 percent). We can assume that she was eligible to receive dividends if they were paid to the shareholders. (We have no information on the type of shares that the Worker owned.) Furthermore, as a minority shareholder, the only loss that she could incur was that of the purchase cost of her shares. Basically, she had little chance of profit or risk of loss.

[17] The integration test is of no help to us. The principal issue is to determine if the Worker works on her own. The tests are simply evidence to which we can accord more or less weight in a given situation in order to determine if the Worker was part of the Payor's business or if she worked independently. The Respondent did not invoke subsection 5(2) of the Act; it is clear, however, that the Worker assisted her husband and that this was a situation in which parties are not dealing with each other at arm's length.

[18] Despite the fact that the employment at issue meets the tests, some key elements of the contract of service are absent. Beyond these tests, is it possible, in fact, that there was no contract of service? This seems to be the case.

[19] Firstly, we have no concrete proof, other than the payroll journal and the testimony of the Worker and her husband, that the Worker worked 40 hours per week. Nothing in the evidence indicates that these 40 work hours were actually worked. In *Bouchard c. Canada*, [1991] A.C.I. n$^{o}$ 842 (Q.L.), the absence of a set schedule and evidence of the number of hours worked had a major impact on the Court's decision:

[TRANSLATION]

Counsel for the Respondent argued that the Appellant had performed the accounting and had run errands but there was no proof of the number of hours that she had worked. She did not have a set schedule and her husband, who used to be away for two (2) to three (3) days, was unable to exercise control.

The evidence is not sufficient to prove the existence of a genuine contract of service between the Appellant and the company:

(1) There is no resolution from Pêcherie J.E. Lelièvre Inc. to hire the Appellant;
(2) The documents produced show little indication of work performed by the Appellant;
(3) The absence of control on the part of the company;
(4) No set schedule and no record of the number of hours actually worked.

For these reasons, the appeal is dismissed.[11]

[20] Secondly, we have no evidence that the Worker's paycheques were cashed. Joséphat Casavant affirmed that he took the Worker's cheques and paid her the amounts in cash from the Appellant's cash assets. No evidence in this sense was given to the Court and no record of these cash outflows was filed. In *Bourgouin c. Canada*, [2001] A.C.I. n° 558 (Q.L.), there was also the issue of paycheques endorsed by the Worker and cash paid in exchange for cheques. Here is what the Court concluded on the subject at paragraphs 23 to 25:

[TRANSLATION]

The Appellant endorsed the cheques signed by Yvan Millette, gave them back to him and, in return, received these wages. Those cheques had to be drawn on Yvan Millette's personal bank account, or that of Gestion Micoraba Ltée, while Gestion Micoraba Ltd. had been assigning debts.

No evidence was submitted showing that Yvan Millette was solvent during that period. How could he honour these cheques?

The Appellant submitted no concrete proof: she only made claims. Under the circumstances, a simple testimony cannot demonstrate on the balance of probabilities that a genuine contract of service existed between the parties for the period from 18 July 1999 to 10 September 1999.[12]

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[11] [1991] A.C.I. n° 842 (Q.L.), at paragraphs 9 to 11.

[12] [2001] A.C.I. n° 558.

[21] In the absence of fundamental evidence, I conclude that the Worker did not hold insurable employment because she was not working for the Appellant under a contract of service. No concrete evidence as to the Worker's schedule or the number of hours actually worked by the latter was filed before the Court. No evidence concerning the cashing of the Worker's paycheques through Joséphat Casavant was brought forward. The testimony of the Worker and her husband alone do not make a strong case on a balance of probabilities. Accordingly, the appeals are dismissed.

Signed at Ottawa, Canada, this 13th day of November 2003.

"C.H. McArthur"

McArthur, J.

Translation certified true
on this 2nd day of February 2004.

Maria Fernandes, Translator