

Docket: 2006-609(EI)

BETWEEN:

SYLVIE DUGAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard September 7, 2006, at Rimouski, Quebec.

Before: The Honourable Justice François Angers

Appearances:

Counsel for the Appellant: Hugo Caissy

Counsel for the Respondent: Claude Lamoureux

JUDGMENT

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

Signed at Ottawa, Canada, this 25th day of October 2006.

"François Angers"

Angers J.

Translation certified true
on this 31st day of March 2008.

Elizabeth Tan, Translator

Citation: 2006TCC527
Date: 20061025
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REASONS FOR JUDGMENT

Angers J.

[1] This is an appeal from a decision by the Minister of National Revenue (the "Minister") dated February 8, 2006, that the employment of the Appellant Sylvie Dugas with Soudinox Inc. (the "Payor") from September 16 to December 13, 2002, was not insurable. The Minister claims that the Appellant did not hold insurable employment during that period because there was no insurable employment within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act* (the "Act").

[2] The Payor was incorporated on June 12, 2000. It operates a business specializing in the manufacture of steel and stainless steel equipment in the Montreal region. Its sole shareholder is Claude Bernier, the Appellant's former brother-in-law.

[3] The Payor had had up to six employees at the beginning of its operations. There was a day labourer, welders and a secretary-designer in the office, who also handled the reception. When the Payor's activities slowed down, it dropped to two or three employees, and then Mr. Bernier was alone for the last months of 2002. In other words, in 2002, the Payor hired two part-time employees for the first four months of the year. These employees did welding for the Payor. It was only in

September that the Payor decided to hire the Appellant to answer the phone while Mr. Bernier worked off the Payor's premises. Mr. Bernier stated that he could not do everything by himself and he did not want to lose business opportunities.

[4] According to Mr. Bernier's testimony, the Appellant could keep busy with other things. He testified that she was not required to run errands but she did. She went to get stamps, equipment and checks from clients.

[5] The company's schedule, or Mr. Bernier's, during the period in question was from 7:00 a.m. to 3:30 p.m. Mr. Bernier admitted that the Appellant could start later and finish later. He did not keep any records of the Appellant's hours of work and the work was based on reciprocal trust. According to Mr. Bernier, the Appellant worked 40 hours a week. She established her own schedule and could miss work if she made up the time later. From what he remembered, he stated the Appellant was paid an hourly rate of \$10. She was paid by check on Wednesday or Thursday.

[6] According to Mr. Bernier, the Appellant started to work for the company on September 16, 2002, and her employment ended on December 14, 2002, after he decided to terminate the company's activities. The Appellant received a vacation pay.

[7] Mr. Bernier's company rented a new locale in Terrebonne starting September 1, 2002. The lease was cancelled in December 2002, however, for non-payment of rent. The appeal officer's report (Exhibit I-4) indicates that the owner of the property confirmed in a statutory declaration that the Payor did not have a secretary, and in fact had no employees. The owner occupied the offices next to the Payor. Mr. Bernier stated that the owner in question was not there very often.

[8] Mr. Bernier acknowledged that the Appellant was absent for a week on at least two occasions. During the period in question, she stayed at her sister's and he does not remember what type of car she drove.

[9] The Payor stopped submitting its GST returns as of April 2002. No financial statement was prepared for the 2002-2003 fiscal year. The Payor declared a net loss of \$76,289 for the fiscal year ending July 31, 2001. Claude Bernier filed an assignment in bankruptcy in October 2003.

[10] The question of whether the Appellant's employment was insurable came about when Serge Ouellet, the Appellant's former spouse, signed a statutory

declaration on October 21, 2004. Mr. Ouellet is a resident of Cap-Chat and was the Appellant's spouse during the period in question. In his declaration, he exposed the Appellant, stating that during the period in question she did not work for the Payor because she was with him in Cap-Chat. He also claimed that Claude Bernier was the Appellant's brother-in-law and she paid the Payor's incremental costs to be admissible for employment insurance. She allegedly did not receive pay from the Payor and lived at their residence in Cap-Chat during the entire period in question since, during that period, she signed her daughter's homework and report card. The Appellant did not have a car and she used her spouse's for her travels.

[11] In his testimony before the Court, Serge Ouellet changed his version of the facts and claimed that the Appellant worked outside of Cap-Chat in the fall of 2002. She left for three days to a week but was in Cap-Chat on weekends, leaving again on Sunday or Monday evening. She used her mother's car. During this period, Serge Ouellet and the Appellant's mother took care of the Appellant's daughter. He claims to have signed her homework.

[12] On cross-examination, he stated that when he made his declaration, he was angry and gave an erroneous presentation of the facts on the ground that the investigator promised him he would get his house back. It is of note that at the time the declaration was made, Serge Ouellet and the Appellant lived separately and property division was before the courts. At the hearing he stated that the Appellant sometimes arrived Wednesday or Thursday evening and left the next day. She came two to three times a week. He told the appeals officer that he was the victim of a head injury in 1992 and that since then he had memory problems and his recollections about 2002 were vague.

[13] The Appellant testified that she tried to find work doing summer projects but could not. At the end of the summer, she was still looking for a job. She therefore went to Montreal to see her brother. This is when Bernier allegedly asked her to help him out by answering the phone and setting up the tools. She was to do 40 hours a week from Monday to Friday, from 9:00 a.m. to 5:00 p.m. During the weekends, she went to Cap-Chat to see her daughter who was in school.

[14] Once the Payor's company moved to its new locale in Terrebonne, the Appellant went to live with her sister.

[15] The Appellant acknowledges that she sometimes went to Cap-Chat two, three or sometimes four times during the week during the period in question. She went with Claude Bernier's permission to see her daughter who was 12 at the time.

She testified that she deposited her paycheque at the Caisse Populaire in Terrebonne and that her mother and daughter were authorized to make withdrawals, which would explain certain withdrawals made during the week from her account in Cap-Chat.

[16] The Appellant also testified on the difficulties she had following the separation. There is no doubt that Serge Ouellet, her ex-husband, caused her problems in all aspects, including the information that led to the investigation on her employment for employment insurance purposes.

[17] She appeared before an investigator working for Human Resources Canada and signed a declaration dated February 8, 2005. This declaration indicates that the Appellant worked for the Payor at the reception and she painted and decorated the new office and prepared boxes for the welders. She worked Monday to Friday, from 9 :00 a.m. to 5 :00 p.m. and was paid \$9 an hour through direct deposit to an account with the Caisse Populaire de Cap-Chat and by cheque. There was a woman at work she did not know and she did not know where she deposited her cheque. She stated that there were seven or eight employees working at this location and that during the period she worked, Claude Bernier was her brother-in-law.

[18] In September 2002, the Appellant travelled with her mother's car. She did not present any invoices for gas. She claimed that she tried to visit her daughter every 15 days to three weeks. When she was shown a statement of the banking operations at Cap-Chat, she explained that they could have been her daughter's or her mother's. She added that they might also have been her while in Cap-Chat on Monday, Tuesday or Wednesday because she had taken vacation. She could work a Saturday to have the following Tuesday off and she also worked evenings. She denied that she went to school to get her daughter's report card because the report card was sent by mail.

[19] The Appellant then had a telephone interview with Jacynthe Bélanger, appeal officer. Her counsel was at the telephone interview. The following is a summary of this conversation that is found in Ms. Bélanger's report (Exhibit I-6) with specifications made by the Appellant on her statutory declaration of February 8, 2005.

[TRANSLATION]

Industrie Inox Pro offered mobile welding services. Claude Bernier, the company's owner, performed the work himself by going to the clients. He worked full time.

The company operated Monday to Friday, from 8:00 a.m. to 5:00 p.m.

At the time she was hired, the Worker was to take care of the reception only. She did not do any bookkeeping because another person was hired for that. The Worker mentioned that she “found the time dragged on” and that later she painted and cleaned.

In the summer of 2002, the Worker was supposed to work in her region but she did not get the expected position. She had no choice but to go into town to work and get her required number of weeks. She has family in the Montreal area.

When she started her job, the Worker lived with her brother in Ste-Julie, around an hour from her place of work. She then lived with her sister Nancy, on des Harfangs, around 30 minutes from the Payor’s office. She travelled by bus.

The Worker received an hourly wage of \$9 for 40 hours a week. When I mentioned that her record of employment indicated \$400 a week, the Worker could not provide any information.

The Worker went to Gaspésie twice a month because she wanted to see her daughter.

The Worker was laid off when the Payor had fewer contracts.

I reread the Worker’s statutory declaration of February 8, 2005, to her. She confirmed facts number 1, 4, 6, 7 and 8. For the other information, she made the following specifications:

- To fact No. 2, the Worker said she worked from Monday to Friday, 8:00 a.m. to 5:00 p.m. and to fact No. 9, she said she worked Saturdays or evenings to have time off during the week. The Worker confirmed that she had a flexible schedule and that her time off allowed her to return to her region.
- To fact No. 3, the Worker stated that the Payor hired seven to eight employees. At the time of our interview, she said there were guys who came to help Claude Bernier but she did not know what they did or whether they were paid.
- To fact No. 5, the Worker mentioned that Claude Bernier was her brother-in-law. During our interview, she denied this and added that Claude Bernier and her sister were already separated in 2002.
- To fact No. 10, the Worker had said she had received her daughter’s report card by mail. During our interview, she said that she went to the report card distribution herself.

[20] The Appellant then produced an affidavit to the Agence des douanes et recouvrement du Québec on May 23, 2006 (Exhibit I-8). In the document, she corrected certain statements such as her understanding of direct deposit and she made comments on the points raised by the appeals officer in her report. She admitted she signed homework and also stated that Serge Ouellet also signed some. She stated that she went to the school for her daughter. She admitted she made an error regarding her hourly wage and that it was \$10. The record of employment indicates \$10 an hour. She confirmed that she ran errands for the Payor and that she prepared the welders' boxes. She also gave documents to the secretary, whose name she does not know. During her testimony, she stated that she never saw her. She also stated that her boss talked about a salary of \$9 or \$10 an hour. It would depend on her motivation at work. She stated that she brought work home.

[21] In cross-examination, the Appellant testified that she did not know whether the people who were at the Payor's were Claude Bernier's employees or friends. She did not know their names. They came to help Claude but she did not know what they did there. She added that she kept busy doing all kinds of tasks because she found the time dragged on when she had nothing to do. She even cleaned Claude Bernier's car.

[22] Denise Roy is a teacher. The Appellant's daughter and Serge Ouellet's son were her students during the period in question. She stated that she asked the Appellant to the school to resolve some issues and that the report cards were distributed in the presence of the parents. According to Ms. Roy, all the homework was signed by the Appellant. She admitted that it was possible that some of the Appellant's daughter's homework was signed by the grandmother but in her opinion this was not the case at the beginning of the school year. One thing was certain, none of the homework was signed by Serge Ouellet.

[23] According to the documents submitted as evidence, the Appellant opened an account at the Caisse Populaire de Terrebonne and deposits corresponding to the net salary were made, except one that was made at the Caisse Populaire de Ste-Anne-des-Monts. No statement of account from Terrebonne was submitted as evidence. For the Ste-Anne-des-Monts account, the statement indicates that withdrawals were made during the week in the Cap-Chat region during the period in question.

[24] The issue is to determine whether the Appellant held a job within the meaning of the Act during the period in question. Did the terms of the employment

in question invalidate the contract of service such that it is no longer insurable employment within the meaning of the Act?

[25] Tardif J., in *Thibault v. Canada*, [1998] T.C.J. No. 690 (Q.L.), affirmed that genuine employment is employment remunerated according to market conditions, which contributes in a real and positive way to the advancement and development of the business paying the salary in consideration of work performed. He added that these are basically economic factors that leave little, if any, room for generosity or compassion. Charron J., in *Matineau v. Canada*, [2000] T.C.J. No. 270 (Q.L.), stated that 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, invalidates the contract of service.

[26] In this case, are we faced with a situation where the facts invalidate the contract of service between the Payor and the Appellant? There is no doubt that the testimony by the Payor's representative and the Appellant raise questions as to the quality of the contract for employment and its *raison d'être*. In my opinion, the Respondent was correct in challenging this employment contract.

[27] In this case, we have an employer whose financial situation does not appear to provide the means to hire an employee, in particular an employee whose sole duty is to work at the reception. The Payor had significant losses at the end of his previous fiscal year, he stopped producing goods and services tax reports in April 2002 and was not able to pay his rent during the period in question. At the beginning of 2002, he did not have a receptionist and two welders' jobs were terminated in February and April 2002 respectively. Claude Bernier was the sole person at the service of his company until September 2002, when he decided to hire the Appellant as receptionist.

[28] The Payor hired a receptionist whose only duty was to answer the phone. She could entertain herself by doing other things but she was not required to run errands. Moreover, she was authorized to leave work during the week and the evidence shows that she was in fact absent during the week on a number of occasions. The Payor allowed her the possibility of making up her hours during the evenings and Saturdays, but the services of a receptionist during these periods seems, for all practical purposes, rather useless to me.

[29] The Payor did not keep any records of the Appellant's hours of work and Claude Bernier claimed that she established her own schedule. Nothing in the evidence shows me that the Appellant's schedule met the company's needs.

[30] According to Claude Bernier, the Appellant was absent during the week on two occasions. According to the Appellant, she was absent two, three or four times during the employment period and, if we are to believe the witness Serge Ouellet, she was in Cap-Chat every week during the period in question. According to the owner of the offices next to the Payor, the Payor had no employees. Claude Bernier testified that the Appellant was paid by cheque whereas the Appellant mentioned direct deposit until she explained what she believed direct deposit was. Mr. Bernier does not recall the type of car the Appellant drove.

[31] As for the Appellant, she first stated that she received vacation pay and then claimed that she took all her vacation days to explain her presence in Cap-Chat during the week. First she stated that her salary was \$9 an hour and then, when Record of Employment entries were pointed out, she corrected herself and said it was \$10. She explained that her hourly wage depended on her. She did not know the name of the Payor's secretary and stated that she never saw her but did claim that she gave her documents. She denied going to school to pick up her daughter's report card and said that it came by mail and that Serge Ouellet signed her daughter's homework. Ms. Roy claimed the contrary. Lastly, the Appellant first claimed that she prepared boxes for the welders and that the Payor had seven to eight employees during her period of employment. Then, she claimed that they were only Claude Bernier's friends and that she didn't know what they were doing there.

[32] It is very strange that it is so difficult to establish facts regarding a contract of employment that, at first, seemed to be relatively simple. The lack of details, the uncertainties, hesitations and unlikelihoods that can be found in Claude Bernier's and the Appellant's testimony made it relevant to question the authenticity of the contract of service between the two parties.

[33] The Appellant did not, on a balance of probabilities, convince me that the employment she held with the Payor was a genuine contract of services within the meaning of the Act. For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 25th day of October 2006.

"François Angers"

Angers J.

Translation certified true
on this 31st day of March 2008.

Elizabeth Tan, Translator

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PLACE OF HEARING: Rimouski, Quebec
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DATE OF JUDGMENT: October 25, 2006

APPEARANCES:

Counsel for the Appellant:	Hugo Caissy
Counsel for the Respondent:	Claude Lamoureux

COUNSEL OF RECORD:

For the Appellant:

Name: Hugo Caissy

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada