

Docket: 2007-1611(EI)

BETWEEN:

MICHELINE BERNARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

[TRANSLATION]

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Appeal heard on August 27, 2007, at Sherbrooke, Quebec  
Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the Appellant: Réal Bernard  
Counsel for the Respondent: Christina Ham

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**JUDGMENT**

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is allowed on the ground that Lawrence Bernard performed work for the Appellant, Micheline Bernard, from April 10 to May 19, 2006, for of insurable employment within the meaning of paragraph 5(1)(a) of the Act, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 22nd day of October 2007.

“Alain Tardif”

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Tardif J.

Translation certified true  
on this 6th day of December 2007  
Gibson Boyd, translator

Citation: 2007TCC587

Date: 20071022

Docket: 2007-1611(EI)

BETWEEN:

MICHELINE BERNARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

**REASONS FOR JUDGMENT**

[TRANSLATION]

Tardif J.

[1] This is an appeal dealing with the insurability of work performed during the period from April 10 to May 19, 2006, for Micheline Bernard.

[2] The Respondent relied on the following assumptions of fact to arrive at his decision as to the insurability of the work:

[TRANSLATION]

5. (a) The Appellant operates a 32-seat diner, registered on November 24, ~~1994~~ 1988, under the corporate name “Restaurant Cantine Mimi”;
- b) The Appellant is the owner of the business, but it is managed by Réal Bernard, her spouse;
- (c) Only the Appellant and her spouse work at the business with their daughter working there on occasion;
- d) Réal Bernard also operates a “card lock,” a service station for heavy vehicles, on a lot that he rents;

- (e) Réal Bernard is responsible for the upkeep of the land and the garage, and he bought a “loader” to do perform snow-removal on all of the lots (restaurant, “card lock,” residences and other buildings);
- (f) The Appellant’s restaurant is located at 560 Highway 108, the residence of the Appellant and Réal Bernard at 570 Highway 108, and the worker, Réal’s brother, lives at 580, Highway 108;
- (g) These are 3 buildings located side by side, and the garage is located behind the residence of the Appellant and Réal Bernard;
- (h) The buildings at 560 and 570 Highway 108 belonged to Réal [*sic*] Bernard, while the one at 580 Highway 108 belonged to the Appellant;
- (i) In addition to his other activities, Réal Bernard accepted and new contract in 2006 for building skids out of pieces of melamine;
- (j) More specifically, Réal Bernard cut 3-inch by 3-inch pieces of melamine, 61-inches in length, into lengths of 48 inches; he lashed them and put caps on them to prevent water from damaging the melamine, then wrapped them in plastic for delivery;
- (k) Réal Bernard did not wish to obtain an employer number for his other activities unrelated to the restaurant, and all business transactions went through the Appellant’s business;
- (l) Income from the melamine cutting were reported in the Appellant’s income tax return;
- (m) Réal Bernard made no real distinction between their respective businesses and we can consider that the Appellant is the employer;
- (n) The worker has never performed services for the Appellant’s diner;
- (o) The worker was apparently hired by his brother, Réal, to perform tasks pertaining to the melamine cutting;
- (p) The worker claims that, during the period at issue, he worked 40 hours per week and his hours were not accounted for, neither by the Appellant nor by Réal Bernard;
- (q) The worker was apparently hired by his brother, Réal, to look after work pertaining to the melamine cutting;

- (r) The worker claims that, during the period at issue, he worked 40 hours per week and his hours were not accounted for, neither by the Appellant nor by Réal Bernard;
  - (s) The worker obtained a record of employment from the Appellant, while working at the garage at 570 Highway 108 belonging to Réal Bernard;
  - (t) The worker generally worked alone at the garage and no one kept track of his work hours;
  - (u) During the period at issue, he allegedly received \$12 per hour, for 40 hours per week (\$480 gross) while, in reality, he was paid a cash amount after an amount was deducted for his rent;
  - (v) Réal Bernard decided on the amount given to the worker out of his pay and the amount kept supposedly for the rent;
  - (w) There is no evidence of the amounts paid to the worker for his alleged work performed for the Appellant or Réal Bernard;
  - (x) The record of employment issued by the Appellant in the name of the worker does not reflect reality as concerns the work period or with regard the number of hours actually worked or with regard to the remuneration paid to the worker;
  - (y) The worker's alleged work ended after 6 weeks, at 40 hours per week, i.e. after he had accumulated enough hours to qualify for unemployment benefits;
6. The Appellant and the worker are related persons within the meaning of the *Income Tax Act* because:
- (a) The Appellant is the sole owner of the diner operated under the corporate name "Restaurant Cantine Mimi";
  - (b) The Appellant is considered the worker's payor;
  - (c) The worker is the appellant's brother-in-law;
  - (d) The worker is related to a person who controls the payor;

7. Furthermore, the Minister determined that the Appellant and the worker had a non-arm's length relationship within the context of the employment. Indeed, the Minister was satisfied that it was reasonable to conclude that the worker would not have entered into a substantially similar agreement had they been dealing with one another at arm's length, given the following circumstances:
- (a) The worker claims that he worked for \$12 per hour for 40 hours of work per week, yet no one can specify his actual work hours;
  - (b) The worker received remuneration in cash after Réal Bernard had deducted an amount for payment of rent on the house he rented, which belonged to the Appellant;
  - (c) There is no evidence of the amount paid to the worker for the alleged work performed for the Appellant;
  - (d) The worker was not controlled for the alleged work performed for the Appellant;
  - (e) The worker obtained a record of employment indicating 6 weeks of work, or 240 hours, i.e. enough hours for him to qualify to receive unemployment benefits;

[3] Only the Appellant's spouse, Réal Bernard, testified in support of the appeal. The Respondent called the worker, brother of the Appellant's agent. The Appellant's agent admitted paragraphs 5(a) through 5(o), paragraphs (q), (s) and (t), as well as paragraphs 6(a) through 6(d).

[4] Réal Bernard described the places of performance of the work. He explained that he frequently went to the workshop located very close to the place where the work was performed; he would then help the worker, who could not do certain tasks alone.

[5] He also explained that due to the proximity of the workshop and the place where the work was performed, he had very quick and easy access to the places of work.

[6] Réal Bernard stated that the beginning and the end of the work period were determined by factors beyond his control. Before the work period could start, the employer had to wait for authorization from the raw material supplier; he indicated that the work had ended due to a dispute with the supplier of the raw material.

[7] As concerns the salary, the agent for the Appellant explained that it seemed reasonable to him and comparable to what he would have to pay any person with whom he were to deal at arm's length.

[8] The remuneration of \$12 per hour was paid in cash based on a 40-hour work week. Upon the worker's request, the employer deducted certain amounts from the salary for reimbursement of advances, or even annuities or rent; indeed, the worker resided in a house that was the property of his brother and his brother's spouse, and which was located a few dozen feet from the workshop where the work was performed.

[9] He provided several explanations to justify the payment of the salary in cash, in short, a question of cost, efficiency and advantages as much for the payor as for the worker.

[10] However, he put a lot of emphasis on the fact that everything was clearly and explicitly indicated in the company's payroll, which was kept by an independent firm of payroll experts. He even filed a copy of the accounting documents validating his claims to this effect.

[11] The worker testified upon the Respondent's request. He basically confirmed his brother's testimony, although certain aspects of his testimony were rather vague or unclear, in particular as concerns the source deductions pertaining to his debts to his brother.

[12] Sylvie Bourque also testified as investigator on the case. She indicated that she had investigated the facts at the origin of the decision that is here under appeal.

[13] She noted a series of elements that, evidently, strongly influenced her recommendation to the authorities making the final decision.

[14] She noted the following facts:

- The worker was paid in cash.

- There was often a debt reimbursement or an amount for rent deducted from the amount paid.
- There was confusion surrounding the activities attributed to the restaurant.
- The record of employment did not indicate the non-arm's length relationship between the worker and his employer.
- There was no control of the number of hours worked.
- The employer was consistently absent from the places of work.
- There was one coincidence between the duration of the work and the number of weeks of work required to be eligible for employment insurance.
- The worker was late in filing his application for benefits.

[15] However, the Court learned from Ms. Bourque's testimony that she had communicated with the person from the accounting firm responsible for the entries pertaining to the worker's salary. Because of this information, the fact that the salary was paid in cash lost all relevance.

[16] The record of employment used to determine the number of hours missing also revealed that the worker's salary for cutting Christmas trees corresponded substantially with the one received for the performance of the work in question.

[17] In essence, the grounds of the determination are in no way conclusive when put into their true context. In other words, the analyst interpreted most of the facts out of context.

[18] As for the Appellant, she claims that a true contract for services was entered into and that all conditions necessary for the existence of such a contract were present.

[19] Beyond concluding that the non-arm's length relationship forged or influenced the work relationship, the Respondent argued that this was an arrangement between brothers designed to help Lawrence Bernard to become eligible for employment insurance benefits.

Analysis

[20] The outcome of this case essentially rests on the credibility of the parties.

[21] First of all, I acknowledge that certain elements were clearly identified by the investigator in this case, in particular: (1) payment in cash, (2) deductions for various debts and (3) the period of work corresponding with the hours required by the worker to be eligible for employment insurance benefits.

[22] These elements support the recommendation of the investigator, who, moreover, concluded that the employer exercised little or no control and that the activities were attributed to the diner, the normal activities of which had nothing to do with the activities performed by the worker.

[23] The evidence brought light to the facts discrediting the evaluation upon which the decision under appeal was founded.

[24] Indeed, the Respondent claimed that there is no evidence of remuneration payments, given that the payments were made in cash. Yet, the accounting records of the company do indeed indicate payments due and made for remuneration. The fact that someone is paid in cash may complicate things in terms of the evidence, but it is certainly not in itself proof of non-payment.

[25] In this case, the Appellant's agent explained why the payments were made in cash. The explanation that the employer did not have to make a deposit to cover cheques, a practical consideration for both the debtor and the creditor, is plausible and reasonable.

[26] As for the administration integrated with the restaurant activities, this was not the ideal way of doing things, but it certainly was not acceptable.

[27] As for the duration of the employment, the Appellant's representative provided valid explanations, namely that the start of the work coincided with the green light given by the company that owned the pieces of melamine to be used for the work. As for the end of the work, Mr. Bernard stated that the agreement was unsatisfactory and that without an increase in the consideration, he had concluded that the activity was not profitable; he therefore abandoned the activity and returned the raw material to the company. Documentary evidence was provided in support of this evidence.

[28] As for the salary, it was reasonable and corresponded with the regular salary he received for cutting Christmas trees.

[29] Finally, as to the control, I find the explanations submitted easily suffice to conclude that there was such a control, which is the foundation of a true relationship of subordination.

[30] Indeed, the proximity of the places of work, the nature of the work and the frequent visits of the agent for the Appellant easily suffice to conclude that there was a true relationship of subordination.

[31] These are elements that constitute the foundations of the evidence submitted by the Appellant. This is proof on a balance of evidence, the components of which were available at the time of the investigation.

[32] Analysis of these elements, and in particular and the conclusions arrived at are not reasonable; they are even unreasonable since they mainly rest on the fact that the declarations of the worker and the payor are not credible; in other words, to justify his decision, the Respondent made the assumption that the worker and his brother, agent for the Appellant, lied on all accounts. This would require demonstrating facts warranting such a severe appreciation.

[33] I admit that I have reserves with regard to the veracity of some of their statements. However, I do not believe that the totality of their evidence should be set aside on the ground that they are not trustworthy.

[34] Balance of probabilities calls for a review of the decision under appeal by the Appellant.

[35] I find that the appeal has merit on the ground that the work performed between April 10 and May 19, 2006, was performed under a true contract for services similar to one that a third party would have entered into in a comparable situation.

[36] Therefore, the appeal is allowed.

Signed at Ottawa, Canada, this 22nd day of October 2007.

“Alain Tardif”

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Tardif J.

Translation certified true  
on this 6th day of December 2007  
Gibson Boyd, translator

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COURT FILE NUMBER: 2007-1611(EI)  
STYLE OF CAUSE: MICHELINE BERNARD AND MNR  
PLACE OF HEARING: Sherbrooke, Quebec  
DATE OF AUDIENCE: August 27, 2007  
REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif  
DATE OF JUDGMENT: October 22, 2007  
APPEARANCES:

Agent for the Appellant: Réal Bernard

Counsel for the Respondent: Christina Ham

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