

Docket: 2004-581(EI)

BETWEEN:

ANIL KUMAR VARMA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

and

9036-3896 Québec Inc.,

Intervener.

Appeal heard on October 28, 2004 at Montreal, Québec

Before: The Honourable Deputy Judge S.J. Savoie

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Emmanuelle Faulkner

Agent for the Intervener: Raj Kumar Varma

JUDGMENT

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

Signed at Grand-Barachois, New Brunswick, this 13th day of December 2004.

"S.J. Savoie"

Savoie, D.J.

Citation: 2004TCC778

Date: 20041213

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BETWEEN:

ANIL KUMAR VARMA,

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THE MINISTER OF NATIONAL REVENUE,

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9036-3896 Québec Inc.,

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REASONS FOR JUDGMENT

Savoie, D.J.

[1] This appeal was heard in Montreal (Québec) on October 28, 2004.

[2] This is an appeal from a decision by the Minister of National Revenue (the "Minister"), wherein he informed the Appellant that while he was working for 9036-3896 Québec Inc., the Payer, from November 1st, 2001 to June 1st, 2002, the period under review, his employment was not insurable.

[3] The Minister further informed the Appellant that having regard to all the circumstances, it is not reasonable to conclude that he and the Payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] In making his decision, the Minister relied on the following assumptions of fact as set forth in paragraph 5 of the Reply to the Notice of Appeal:

- a) the Payer, incorporated on May 23, 1996, operated a restaurant under the banner of "Dunkin Donuts"; (admitted)
- b) the restaurant closed on June 1st, 2002; (admitted)

- c) Raj Kumar Varma was the sole shareholder of the Payer; (admitted)
- d) the Appellant is the son of Raj Kumar Varma; (admitted)
- e) the Appellant was related to the Payer within the meaning of the *Income Tax Act*; (admitted)
- f) the Appellant worked at the Payer's place of business located at 1580, St-Hubert Street in Montréal; (admitted)
- g) the Appellant worked for the Payer as a manager and an administrator, he ran the business on a daily basis; (admitted)
- h) the Appellant generally worked between 40 and 60 hours per week; (admitted)
- i) the Appellant's working hours were not registered by the Payer; (admitted with some clarification)
- j) as of the beginning of the year 2000, donuts were no longer prepared in the Payer's restaurant but were delivered to the Payer's place by another Dunkin Donuts; (admitted)
- k) on June 7, 2002, the Payer prepared a record of employment in the name of the Appellant indicating April 24, 2000 as first day of work, June 1st, 2002 as last day of work, 1,200 insurable hours (30 weeks of 40 hours) and an insurable remuneration of \$29,360.00 for the last 14 periods of wage; (admitted)
- l) the Appellant was working for the Payer since the end of 1999 but he was not registered in the payroll of the Payer prior to the last 15 bi-weekly periods of wages ending on June 1st, 2002 (6 weeks in 2001 and 24 weeks in 2002); (admitted with some clarification)
- m) the Appellant claimed that he received a fixed salary of \$1,000.00 per week while in fact he declared in his income tax return only \$6,000.00 in earnings from the Payer in the year 2001 and nothing from the Payer in the years 2000 and 1999; (admitted with some clarification)
- n) in the years 1999 and 2000, the Appellant declared a salary of \$3,350.00 and \$31,000.00 respectively received from 9014-6150 Quebec inc., an associated company of the Payer, which still does not represent \$1,000.00 per week; (admitted with some clarification)

- o) the Appellant claimed that he received a fixed salary of \$1,000.00 per week while his brother, Arun Kumar Varma, received \$500.00 per week as the manager and administrator of another Dunkin Donuts owned by their father; (admitted with some clarification)
- p) the record of employment given out by the Payer in the name of the Appellant is false because it doesn't represent the true number of hours worked nor the actual remuneration paid to the Appellant. (denied)

[5] The evidence disclosed that the working hours of the Appellant were not registered by the Payer. The payroll was prepared by a firm called Seridian. The Court was told that this firm simply assumed that the Appellant worked 40 hours per week, unless informed otherwise. There is no evidence that any information in this regard was provided to Seridian by either the Appellant or the Payer.

[6] The Appellant testified that he worked for an associated company of the Payer in 1999, 2000 and 2001. He also stated that he earned \$1,000 gross per week.

[7] The evidence shows that while the Appellant's brother, Arun Kumar Varma, earned only \$500 per week, since the latter the Appellant did not have all the responsibilities of his brother, nor did he have to do all the paperwork, as his brother did. He also had a car and gas allowance and was provided with food and lodging at his father's expense.

[8] The Appellant further testified that he was out of work for one year having been dismissed by his father in the fall of 2000. When he was asked why he did not advise the investigators of this, his response was that he was not asked that question. Yet, he claims to have informed them that he was off work for that period.

[9] In a statement to the appeals officer, the Appellant disclosed that the Payer hired him as soon as the operations began in 1996 as a manager of one of his outlets. Soon afterwards, he left his employment and was hired by the Payer as manager of its Dunkin Donuts store at 1580 St-Hubert Street in Montreal. He informed the appeals officer that he was paid \$2,000 gross every two weeks and that he received a vacation pay of \$1,360 at the closing of the business on June 1, 2002. He further claimed that he was working between 40 to 60 hours per week from Monday to Sunday. He had no set work schedule. He had the entire responsibility for the restaurant seven days per week.

[10] The record of employment of the Appellant shows a period of employment beginning on April 24, 2000 and ending on June 1, 2002 and is signed by the sole

shareholder of the Payer. The employer is shown as Dunkin Donuts, with an address at 1580 St-Hubert, Montreal. However, the Appellant advised that the period shown is incorrect since he worked for the Payer starting at the end of 1999 until June 1, 2002, as manager. He further advised that, at first glance, the earnings and insurable hours indicated on this record of employment appear to be correct.

[11] At the hearing, both the Appellant and Raj Kumar Varma, sole shareholder of the Payer, both stated that the 1st day of work reported on the record of employment was incorrect. The Payer stated that the period of employment began in November 2001 while the Appellant maintained that the period began late in 1999.

[12] The Appellant is asking the Court to set aside the decision of the Minister who relied on paragraphs 5(1)(a) and 5(2)(i), subsections 5(3) and 93(3) of the *Employment Insurance Act* ("Act") as applicable to the period in question and on sections 251 and 252 of the *Income Tax Act*. The Minister concluded 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 not reasonable to conclude that the Appellant and the Payer would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[13] Having conducted his investigation, the Minister concluded that under paragraph 5(2)(i) of the *Act* the employment of the Appellant was not insurable because the Appellant and the Payer were not dealing with each other at arm's length, since it was established that the sole shareholder of the Payer is the father of the Appellant.

[14] For the purposes of this exercise, it is useful to refer to the relevant provisions of the *Income Tax Act* and the *Employment Insurance Act*.

[15] They are as follows:

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

(1) For the purposes of this Act,

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

(b) it is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length.

(2) For the purposes 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 (i) or (ii); and;

Section 5 of the *Insurable Employment Act* reads in part as follow:

(1) 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;

(2) Insurable employment does not include

...

(i) employment if the employer and 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.

[16] The Federal Court of Appeal has set down guidelines to follow when dealing with a problem such as the one in the case at bar. Marceau, J. speaking for the Court, stated the following in the case of *Légaré v. Canada (Minister of National Revenue- M.N.R.)*, [1999] F.C.J. No. 878:

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.

[17] Let us examine the facts before the Court under the criteria listed in paragraph 5(3)(b) of the *Act*.

Remuneration paid

[18] Did the Appellant actually work 40 to 60 hours per week for the Payer full time between late 1999 until June 2, 2002. If he did then he was not paid \$2,000 bi-monthly, as alleged as a volunteer for the Payer during a good part of that period. A T4 issued by the Payer for the year 2001 reveals the Appellant's income for that year is \$6,000. This would represent, using the Appellant's own figures, earnings for a 6-week period only.

[19] In his statutory declaration to the Commission, (Exhibit R-2), the Appellant admitted to his special treatment by the Payer. He stated and I quote:

If it would of [sic] been another employee doing the same job as me, my father would of [sic] pay [sic] him/her, I thing [sic] a bit less. I was getting this salary because he was my father and because I was working for a family business.

[20] The Minister has established the earnings of the Appellant and his brother Arun Kumar Varma over the period of 1998 to 2002 inclusive from the Payer 9036-3896 Québec Inc. and the Payer's associated company 9014-6150 Quebec Inc., from information found on the income tax T4 forms provided by the employers, as illustrated on the following chart:

T4 from. 9036-3896 Québec Inc - D. Donuts, 1580 St-Hubert	1998	1999	2000	2001	2002
To Anil Kumar Varma	nil	nil	nil	\$6,000	nil
To Arun Kuamr Varma	\$9,000	nil	\$4,000	nil	nil
T4 from 90146150 Québec Inc - D. Donuts, 306 Ste-Catherine					
To Anil Kumar Varma	\$7,578	\$3,350	\$31,000	nil	\$1,569
To Arun Kuamr Varma	nil	\$3,000	nil	nil	\$10,000

[21] The information gathered by the Commission and the Minister has proven misleading and the evidence before the Court at the hearing has failed to clarify the ambiguities which are still prevalent in this matter.

Conditions of employment

[22] In light of the position, which the Appellant was holding as manager for the Payer, the kind of restricted supervision and control to which he was subjected would appear normal in the circumstances.

Duration of the work performed

[23] The Appellant has maintained that he worked 40 to 60 hours a week full time from late 1999 to June 1, 2002 but the contradictions between the parties and other information gathered have shown that the duration of the work performed could very well be between April 24, 2000 and June 1, 2002, according to the record of employment of June 7, 2002 or between November 2001 to June 1, 2002, according to the statement of Raj Kumar Varma, the sole shareholder of the Payer.

[24] The Appellant's statement regarding his period of employment with the Payer is completely contradicted by the T4 issued by the Payer, which establishes his earnings at \$6,000, all of which was earned in 2001.

[25] Furthermore, how can the Appellant's position regarding his period of employment be reconciled with his own statement that the data contained in the record of employment of June 7, 2002 appears to be correct, i.e., earnings of \$26,360.00 and insurable hours of 1,200.

[26] The T4s issued indicate that the Appellant did work for 9014-6150 Québec Inc., the Payer's associated company in 1998, 1999, 2000 and 2002. This makes it impossible to establish an accurate period of employment, or the insurable earnings or the actual number of hours worked for the Payer.

Nature and importance of the work performed

[27] The nature and importance of the work performed by the Appellant for the Payer has been considerably undermined by the fact that the Payer, according to the evidence, has failed to remunerate the Appellant his full salary of \$4,000.00 bi-weekly, over the extended period alleged by the Appellant. In other words, the nature and importance of the work performed by the Appellant do not measure up to the expectations of the Appellant nor of the Payer.

[28] The Minister was asked to make a determination throughout his investigation; he was faced with an abundance of contradictions which rendered his task most difficult.

[29] Out of the three periods of employment which the facts gathered revealed, the Minister did not know which period was applicable. That made it impossible for him to establish the insurable earnings and the exact number of hours worked by the Appellant. During the investigation it was established that the Appellant and the Payer disagreed with each other over the employment period of the Appellant.

[30] The documents obtained by the Minister, in turn, disagreed with the information received from either the Appellant or the Payer, The documents consist of the Record of Employment, the Statutory declaration of the Appellant and the document printout taken from the T4 forms of the Appellant establishing his income from various sources from 1998 to 2002.

[31] The Minister, in light of the above, established that the employment of the Appellant with the Payer was not insurable by virtue of paragraph 5(2)(i) of the *Act*.

[32] In my view, the factual basis confronting the Minister made it impossible for him to render a proper determination with respect to the period of employment, the number of insurable hours and the amount of insurable earnings.

[33] The onus is on the Appellant to prove that the Minister's assumptions of fact are erroneous. This he has failed to do. Indeed, he admitted most of these assumptions and the evidence he produced did not amount to a significant challenge with respect to the assumptions of the Minister that he attempted to clarify.

[34] In the absence of an important document, namely a T4, which, if produced, could have identified his employer who paid him \$26,929.00 in 2002, the Appellant simply explained that the firm Seridian failed to produce it. However, counsel for the Minister pointed out that the latter had contacted Seridian in that regard, yet Seridian was unable to satisfy such request.

[35] Earlier this Court cited the decision of the Federal Court of Appeal in *Légaré, supra*, and the guidelines to follow in the determination of situations such as the one before us.

[36] The same Court again offered some guidance in this exercise in the case of *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 310 when it held as follows:

The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[37] Having heard the evidence produced at this hearing and having examined the documents produced, this Court is of the view that the Minister's conclusion, when considered with the evidence brought before it at this hearing, still seems reasonable.

[38] Therefore, this Court does not deem appropriate, in the circumstances, to interfere with the Minister's determination.

[39] Consequently, the appeal is dismissed and the Minister's decision is confirmed.

Signed at Grand-Barachois, New Brunswick, this 13th day of December 2004.

"S.J. Savoie"

Savoie, D.J.

CITATION: 2004TCC778

COURT FILE NO.: 2004-581(EI)

STYLE OF CAUSE: Anil Kumar Varma and M.N.R. and
9036-3896 Québec Inc.

PLACE OF HEARING: Montreal, Québec

DATE OF HEARING: October 28, 2004

REASONS FOR JUDGMENT BY: the Honourable Deputy Judge
S.J. Savoie

DATE OF JUDGMENT: December 13, 2004

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Emmanuelle Faulkner

Agent for the Intervener: Raj Kumar Varma

COUNSEL OF RECORD:

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