

Docket: 2007-4231(EI)

BETWEEN:

PÂTISSERIES JESSICA INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on April 28 and 30, 2008, at Montréal, Quebec.

Before: The Honourable Justice Louise Lamarre Proulx

Appearances

Counsel for the Appellant: Chantal Labelle
Counsel for the Respondent: Chantal Roberge

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue pursuant to the *Employment Insurance Act* is reversed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of May 2008.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 10th day of June 2008.
Carole Chamberlin, Translator

Citation: 2008TCC283
Date: 20080508
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BETWEEN:

PÂTISSERIES JESSICA INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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REASONS FOR JUDGMENT

Lamarre Proulx J.

[1] This is an appeal from a decision by the Minister of National Revenue (the "Minister") that Taissir Aref held an insurable employment with the Appellant from January 22, 2006, to January 26, 2007.

[2] The facts on which the Minister relied in arriving at the decision are set in paragraph 5 of the Reply to the Notice of Appeal, as follows:

[TRANSLATION]

- a) the Appellant was incorporated on March 1, 2000;
- b) the Appellant produced and sold pastry goods to a number of clients such as IGA, Métro and Sobeys;
- c) the Appellant employed an average of 26 workers in 2006;
- d) the worker had been in the Appellant's employ since 2000;
- e) the Appellant considered the worker self-employed, while the worker considered himself an employee;

- f) the worker was the Appellant's sales manager and was appointed Vice-President in charge of sales in January 2006;
- g) the worker's duties involved finding new clients, showing clients new products, providing client service, and handling complaints;
- h) up until September 2006, the worker was the only person working in sales for the Appellant;
- i) the worker had an office at the Appellant's place of business;
- j) the worker worked at the Appellant's place of business, on the road on clients' premises, or from home;
- k) the worker worked five days a week, between 9 a.m. and 8 p.m.;
- l) the worker did not keep a time sheet;
- m) the worker was paid on a commission basis;
- n) the worker received a 10 per cent commission for sales to Métro and 5 per cent for sales to other clients;
- o) the worker was paid by cheque every two weeks;
- p) the sole shareholder in the Appellant was Man Chor Wong;
- q) Mr. Wong, who was often in Toronto, regularly emailed or telephoned the worker to inquire about the outcome of meetings with clients;
- r) the worker gave the Appellant frequent reports on the production of the pastry goods and on sales;
- s) the worker followed instructions and responded to the Appellant's requests;
- t) the worker worked exclusively for the Appellant;
- u) on January 26, 2007, the Appellant wrote to the worker to terminate his services effective that same day;
- v) the worker lodged a complaint with the Commission des normes du travail;
- w) from July 23, 2006, to January 26, 2007, the Appellant paid the worker \$64,299.88;

- x) in the 53 weeks of the period at issue, the Appellant paid the worker \$127,410.31. This amount divided by the minimum wage of \$7.60 an hour equals 16,764 hours. Consequently, based on a maximum of 35 hours per week, the worker's insurable hours totalled 1,855 hours (53 X 35 = 1,855).

[3] George Wong, who founded the company in 2000, his son, Jake Wong, who has been managing the company's operations since May 2006, and Eric Duval, head pastry maker for the Appellant for several years, all testified on behalf of the Appellant.

[4] George Wong stated that Mr. Aref was experienced in the area of sales of pastry goods, as he had done similar work for another bakery for several years. He indicated that Mr. Aref had not wanted to work as an employee, but as a self-employed worker, and had not wanted a written agreement.

[5] He had acted as a sales representative and had been paid on the basis of a percentage of sales. During the first few months of the company's operation, he had asked for a non-refundable advance on his commissions of \$1,000 a week. By the end, he had reported commission earnings of \$116,182 in 2005 and \$96,882 in 2006.

[6] Mr. Aref had covered all of his own expenses.

[7] The evidence showed that he would go to the company premises once every week or two to pick up his cheque. He would sometimes meet with clients in the company's meeting room. He had his own space in an office shared by a few people, but his home was his workplace.

[8] Mr. Aref set his own work schedule. The payer did not know how many hours Mr. Aref spent on his work as a sales representative. There were no arrangements for vacation time. He took time off when he wanted. He did not ask for authorization and there were times when Mr. Wong was not informed of time taken off by Mr. Aref.

[9] Mr. Aref's services were required in order to sell the company's products and develop clientele. He had networks and knew his work well.

[10] He was not required to work exclusively for the Appellant, as long as he did not sell products that would be in competition with those of the Appellant.

[11] Mr. Wong spoke with Mr. Aref once or twice a week to inquire about product sales.

[12] Jake Wong's account of the facts was virtually the same.

[13] In September 2006, there was a complaint from a major client. That client had changed buyers and the new buyer did not get along with Mr. Aref. As a result of this incident and the loss of two major clients, the relationship between the Appellant and Mr. Aref deteriorated to the point that, on January 26, 2007, the Appellant notified Mr. Aref that his services were no longer required.

[14] Messrs. Wong admitted that Mr. Aref had held the title of Vice-President, Sales and Marketing. However, they indicated that this had been to give Mr. Aref a higher profile in the eyes of clients. Mr. Aref had not supervised any company employees or been involved in the company's management. In their view, his role had always been limited to that of sales representative, an extremely important role for the company, but one that Mr. Aref had carried out independently and over which they had had no control. They had not given him any instructions on recruiting new clients or maintaining good relations with existing ones.

[15] On April 14, 2006, the company had shot a promotional video. Mr. Aref had been involved, appearing at the start of the video to do the introduction and then narrating.

[16] In his testimony, Mr. Aref stated that he had put in many hours at the company office—at least 30 hours a week. He admitted that he had had no personnel management duties. He had taken a two-week vacation twice a year. He would take complaints from clients and pass them on to the company, then discuss potential solutions with general manager Jérôme T. and the head pastry maker, Mr. Duval. He had not been given instructions on meeting with clients, but Jake Wong had entered into contact with an unhappy buyer.

[17] Eric Duval worked as the company's head pastry maker from 2000 to 2007, with work interruptions in 2004 and 2005. He no longer works for the company.

[18] He stated that he had rarely seen Mr. Aref. He indicated that Mr. Aref would come in when there were special items being prepared, that is, to see the special occasion cakes made at various times of the year. Mr. Aref had not had to manage any staff, as the company had always had a general manager, Jérôme T. The witness knew about the confrontation between Mr. Aref and the new buyer for the company's biggest client, as Mr. Aref had taken him with him to help with his sales presentation.

[19] Mr. Duval stated that he, Jérôme T. and Mr. Aref had often had lunch together when Mr. Aref had come to the company premises. The witness also stated that he and Jérôme T. had thought that Mr. Aref must have occupations other than that of sales representative for the company, given his rare visits.

[20] Elaine Vennes, an officer for the Minister, explained why she had deemed Mr. Aref an employee in a situation where the terms and conditions of employment do not clearly point one way or the other. She had spoken to Mr. Aref over the telephone and to the employer's attorney. The attorney had given her what she had considered pat answers, and she had given more weight to the worker's account, which had seemed more genuine.

Analysis and conclusion

[21] Counsel for the Respondent referred to articles 2085, 2098 and 2099 of the *Civil Code of Québec*. These are key articles, reproduced here:

2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

2098. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to carry out physical or intellectual work for another person, the client or to provide a service, for a price which the client binds himself to pay.

2099. The contractor or the provider of services is free to choose the means of performing the contract and no relationship of subordination exists between the contractor or the provider of services and the client in respect of such performance.

[22] In addition to these articles, article 2087 of the Code is of interest here, as it further elucidates the relationship between employer and employee.

[23] Article 2087 reads as follows:

2087. The employer is bound not only to allow the performance of the work agreed upon and to pay the remuneration fixed, but also to take any measures consistent with the nature of the work to protect the health, safety and dignity of the employee.

[24] Counsel for the Respondent referred to the article by Marie-France Bich entitled "Le contrat de travail", in *La Réforme du Code civil : Obligations, contrats*

nommés. Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec.

[25] The translation* of paragraph 26 at page 753 reads:

As...the employee rises in the hierarchy, the...type of control exercised by the employer changes.... There are numerous examples of jobs requiring much professional latitude, one which increases with experience: take for example the case of lawyers who work in a private office or as employees or in the legal department of a large company, or the case of senior managers or highly specialized workers (for example in the fields of pharmaceuticals, computers, engineering...etc.), or even people in the sciences; think of some types of vendors whose functions cannot be contained by tight controls. In these cases the power to direct is usually manifested by checking or evaluating the work which is done. As Gagnon, LeBel and Verge state, power to control in such cases "concerns not the way of carrying out the work, but that the work is carried out regularly and is of a certain quality." Even though the employer retains the power to give specific instructions it is generally not done.

[26] Counsel argued that, in Mr. Aref's case, there had been no need for tight control.

[27] Although this is true, there must nonetheless be some control over the worker with regard to how service is delivered. Otherwise, there is no contract of employment involved. In this case, the Court fails to see any such control by the payer in Mr. Aref's work arrangements. There was no compulsory attendance at a workplace, no fairly regular assignment of work, no imposition of rules of conduct or behaviour, no requirement of activity reports, and no control over the quantity or quality of the work done.

[28] In fact, there is no evidence of instructions as to the frequency with which Mr. Aref was to meet with clients or how he was to do so. There is no evidence of direction with respect to the procedure for producing activity reports or their frequency.

[29] Moreover, there was no requirement of exclusivity, provided Mr. Aref did not render services to clients in competition with the payer's company.

* Translator's note: Translation taken from *Reform of the Civil Code. Texts written for the Barreau du Québec and the Chambre des notaires du Québec*. Trans. by Susan Altschul. Volume 2-B: Obligations III, V, VI, pp. 6-7.

[30] Mr. Wong kept abreast of performance with Mr. Aref. Since Mr. Aref was the company's sole sales representative, it is understandable that Mr. Wong would want to be kept updated. Sales were the nerves and sinews of his company. However, he spoke to Mr. Aref as he would to a person who exercised free choice in his methods of operation. There is no evidence that direction was given with respect to methods of operation. Mr. Aref was the one who decided when, where and how he would meet with clients. There was no relationship of subordination between him and the company in regard to methods of delivery of his services.

[31] In decisions on appeals of this nature, the Federal Court of Appeal has consistently placed very strong emphasis on the common intent of the parties. Such intent is manifested at the start and over the course of the agreement, not at the end of the agreement. There is no evidence of intent on the part of Mr. Aref to be an employee either at the start or during the agreement. Nothing was put in writing. No verbal requests or complaints were made. The subject does not appear to have been raised at any of the friendly lunches he had with Mr. Duval, the head pastry maker, and Jérôme T., the manager of operations. Mr. Duval certainly did not discuss anything of the kind, and Jérôme T. was not called on to testify.

[32] Mr. Aref is an intelligent man. His services were of great value to the company. He negotiated the method of payment for his services and the two parties arrived at an agreement, which was a contract of enterprise. The contract between Mr. Aref and the Appellant was a contract of enterprise within the meaning of article 2098 of the *Civil Code of Québec*.

[33] Accordingly, the appeal must be allowed.

Signed at Ottawa, Canada, this 8th day of May 2008.

"Louise Lamarre Proulx"

Lamarre Proulx J.

Translation certified true
on this 10th day of June 2008.
Carole Chamberlin, Translator

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