Docket: 2007-2621(EI)

BETWEEN:

PAMELA BENOIT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LIONEL BENOIT,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on September 2, 2009, at Miramichi, New Brunswick.
Before: The Honourable Justice Lucie Lamarre

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dominique Galant
For the Intervener:	The Intervener himself

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (EIA) is allowed and the decision made by the Minister of National Revenue, for the period from November 1, 2005, to October 13, 2006, is varied as follows: During that period, the Appellant held insurable employment with Acadia Rebar Ltd. which is not excluded under paragraphs 5(2)(*i*) and 5(3)(*b*) of the EIA.

Signed at Ottawa, Canada, this 14th day of September 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 21st day of October 2009.

Brian McCordick, Translator

Citation: 2009 TCC 455
Date: 20090914
Docket: 2007-2621(EI)

BETWEEN:

PAMELA BENOIT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LIONEL BENOIT,

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Lamarre J.

[1] This is an appeal from a decision by the Minister of National Revenue (Minister) whereby it was determined that the Appellant did not hold insurable employment when she worked for Acadia Rebar Ltd. (Acadia) during the period from November 1, 2005, to October 13, 2006. The Minister determined that the Appellant and Acadia were not dealing with each other at arm's length within the meaning of paragraphs 5(2)(*i*) and 5(3)(*b*) of the *Employment Insurance Act* (EIA). Those statutory provisions read as follows:

> Types of insurable employment
>
> 5.
> Excluded employment
>
> (2) Insurable employment does not include

> (*i*) employment if the employer and employee are not dealing with each other at arm's length.

Arm's length dealing

> (3) For the purposes of paragraph (2)(*i*),
>
> > (*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.

[2] The facts on which the Minister based his conclusion are set out in paragraph 6 of the Reply to the Notice of Appeal and read as follows:

> 6. In making his decision, the Respondent relied on the following assumptions of fact:
>
> > (a) The Payor [Acadia] is a body corporate whose sole shareholder was the Appellant's brother, Lionel Benoît ("the shareholder"). [admitted]
> >
> > (b) The Payor's business consisted in building steel reinforcement bars at St. Léolin, New Brunswick. [admitted]
> >
> > (c) The Payor's business operated year-round although the busiest months were May to October. [admitted]
> >
> > (d) The Appellant had been hired as a secretary and bookkeeper. [admitted]
> >
> > (e) The Appellant's duties included: preparing the employees' pay; remitting source deductions; preparing T4s; preparing records of employment; making entries in the accounting software; preparing invoices and bank deposits; answering the telephone; and performing other office tasks. [admitted]
> >
> > (f) The Appellant had neither the necessary training nor experience in this field and during a previous period, the

shareholder and the Payor's outside accountant had given her on-site training. [admitted]

(g) The Appellant worked in the Payor's office, located in the shareholder's personal residence. [admitted]

(h) During the period in issue, for 13 non-consecutive weeks, the Appellant had worked full-time, 5 days and 45 hours a week ("the full-time work"). [admitted]

(i) During the period in issue, for 20 non-consecutive weeks, the Appellant had worked part-time ("the part-time work"). [admitted]

(j) For the part-time work, her hours of work were reduced to 5 hours per week and she received an hourly wage of $10.00, including 4% holiday pay. [denied in part]

(k) For the full-time work, the Appellant's remuneration, at the beginning of the period in issue and until July 2006, was $468.00 per week, including 4% holiday pay. [admitted]

(l) Beginning in July 2006, the Appellant's remuneration for the full-time work was $718.00 per week, plus 4% holiday pay, representing an increase of $250.00 a week. [admitted]

(m) The Appellant had to travel in the performance of her duties in order to deposit pay cheques and expense-reimbursement cheques in employees' bank accounts at two local financial institutions. [admitted]

(n) The Appellant also had to travel occasionally to make bank deposits, pay invoices and run other errands for the Payor. [admitted]

(o) Most of the Appellant's trips were between St. Léolin and Bathurst, Bas-Caraquet, St. Simon, Shippagan, Tracadie and Caraquet. [admitted]

(p) The increase in the Appellant's weekly remuneration specified in subparagraph 6(l) above was supposedly an allowance aimed at covering her travel expenses. [denied]

(q) The Appellant also had to travel in the performance of her duties during her weeks of part-time work, and during those

weeks she received no allowance or reimbursement for her travel expenses. [denied in part]

(r) The Appellant's pay cheque for the week of July 10, 2006, was used to pay an insurance invoice for the Payor. [denied]

(s) The Appellant deposited two more of her pay cheques directly into the account of a creditor of the Payor. [denied]

(t) At an unspecified date before the period in issue, the Appellant had received a personal loan ("the Loan") from the Payor. [admitted]

(u) During the period in issue, the Appellant repaid a total of $952.06 of the Loan, through pay deductions, in 21 unequal payments ("the payments"). [admitted]

(v) Eighteen of her 21 payments represented 100% of her net remuneration during weeks of part-time work. [admitted]

(w) During the period in issue, the Appellant was not entered in the payroll journal for seven weeks, and during those seven weeks there were more than nine employees working for the Payor. [admitted]

(x) There was no correlation between the number of hours the Appellant had to work each week and the number of other employees hired. [admitted]

(y) The other employees were governed by a collective labour agreement and received 8% holiday pay, an hourly wage of $11.56 to $23.00 and regular pay increases, in accordance with their collective agreement. [admitted]

(z) The Appellant was not laid off because of a shortage of work. [denied]

[3] The Appellant and her brother Lionel Benoit, the owner of Acadia, both testified. The Appellant explained that when she worked part-time, it could be for more than five hours. This is shown by the copy of the payroll journal filed in evidence as Exhibit I-2 and reproduced in a table prepared by the appeals officer of the Canada Revenue Agency (CRA), Isabelle Gauthier (Exhibit I-4). Those documents show that the Appellant was always paid for all her hours of work.

[4] At first, the Appellant received $10.00 an hour, with no allowance for work-related travel. She said that she made a 92.6-km round trip from the office to the different places she had to go (to deposit employees' pay cheques at their financial institutions, remit taxes to the government, make bank deposits for the employer) about two or three times a week. After a certain time she realized that her remuneration was not high enough to cover the expenses she incurred travelling for the employer. In mid-July-2006, her brother proposed increasing her weekly salary by $250.00 in order to cover those expenses and give her a raise. Lionel Benoit explained that he had started by paying her $10.00 an hour at the beginning of the period while waiting to see how well she adapted to her new job.

[5] According to the record of employment (ROE) filed as Exhibit I-1, the Appellant worked for Acadia from June 20, 2005, to October 22, 2005, and received a gross weekly salary of $468.00, for 40 hours of work, representing an hourly wage of just over $10.00.

[6] The second ROE, also filed as Exhibit I-1, shows that the Appellant worked again from November 1, 2005, to October 13, 2006. According to Exhibits I-2 and I-4, she worked from 5 to 10 hours per week from early January 2006 to early June 2006, at an hourly rate of $10.00. During that period, there were 10 weeks in which she did not work at all. As of June 3, 2006, she began working full-time again for a weekly salary of $468.00 until July 15, 2006, the date on which her salary was increased to $728.00 for 42 to 45 hours of work per week. According to these documents, there were four non-consecutive weeks during the summer in which the Appellant did not work at all, and one week in which she worked five hours. After her layoff, she apparently worked for seven non-consecutive weeks, between 5 and 11 hours per week, until late December 2006, at an hourly wage of $10.00.

[7] The Appellant explained that she agreed to help her brother after her layoff. He explained that his business, after starting with $32,000.00 in losses in 1997, now had sales of $1.5 million. He now has contracts across Canada and during the period in issue he had to be away regularly to check on things at all his worksites. There were many employees scattered not only across the province, but also outside the province. It was too expensive for him to institute the direct deposit system for employee pay. Also, he needed someone to deposit his employees' pay directly at each of their financial institutions.

[8] Since he was travelling more and more, he also needed someone on the spot, especially when he was away, to handle bookkeeping, invoicing, bank deposits and tax remittances. That is why he asked his sister, the Appellant, if she would be

interested in doing that work. He explained that during those weeks when he was at the head office of the business, he could also do that work himself.

[9] The appeals officer also noted that the Appellant had received pay advances from the employer, which she repaid sporadically by deducting the amount repaid directly from her pay. Lionel Benoit explained that this was not preferential treatment of his sister. He has some thirty employees and he also gives those employees advances on their wages. All of those advances are made by cheque and entered in the books of the business.

[10] The appeals officer also noted that one the Appellant's pay cheques was used to pay an insurance broker, Assurance Chaleur Ltée (Exhibit I-3, cheque dated 2006-06-08). Ms. Gauthier checked with the broker, which confirmed that Acadia had an account there. However, Ms. Gauthier did not check whether the Appellant herself also had an account with the broker. The Appellant adduced an insurance certificate she had kept for her personal vehicle, effective from May 24, 2008, to May 24, 2009, with the broker Assurance Chaleur Ltée (Exhibit A-2). She also showed the Court her insurance certificate with the same broker for the current year. According to Exhibit A-2, the insurance premium for the year 2008-2009 was $870.00. The amount of the cheque to which the appeals officer refers is $372.05 and it was paid in early June 2006. This date is within two weeks of the expiry date of the insurance policy adduced by the Appellant for the year 2008-2009. In my opinion, this evidence is sufficient to show, on a balance of probabilities, that the Appellant held an insurance policy with the broker Assurance Chaleur Ltée in 2006, and that her pay cheque was used to pay part of her own insurance and not that of the business.

[11] The appeals officer also noted that the Appellant had deposited one of her pay cheques directly with CitiFinancial (Exhibit-I-3, cheque dated 29-09-2006 in the amount of $548.17). The Appellant filed in evidence a mortgage loan account statement, note and security agreement for a personal loan that she contracted with CitiFinancial on 04-07-2004 (Exhibit A-1). That is sufficient to show that the cheque was used for her personal purposes and not on behalf of her brother's business.

[12] The appeals officer also noted that the Appellant sometimes had her brother's authorization to sign for him. The Appellant explained that she signed for her brother, with his authorization, when there was an emergency and he was away. Lionel Benoit said that he does not have much education ("Grade 9", in his words) and that he did not know that he could give the Appellant power of attorney, as secretary of the business, to sign on behalf of the business. However, Lionel Benoit

said that he was the one who had signed all cheques made out to the Appellant (Exhibit I-3).

[13] The appeals officer also considered the layoff unjustified, since in October 2006 there were between 8 and 12 employees still working for the business. Lionel Benoit explained that he always returns to the area at that time of year because his son starts his hockey season. Since he is there, he performs the tasks himself, although he still asks the Appellant to work part-time when needed (especially for making entries in the payroll journal or for invoicing). During those periods, the Appellant would sometimes make a few trips for the business. He explained that if some worksites were still operating, there were controllers and foremen on site.

[14] Counsel for the Respondent argues that the Minister was justified in concluding that Acadia, the employer, would not have entered into a substantially similar contract of employment with the Appellant if they had been dealing with each other at arm's length. Counsel for the Respondent points, in particular, to the pay advances allegedly made to the Appellant and which she allegedly repaid by foregoing her entire pay on several occasions, mainly when she was working part-time for Acadia.

[15] Counsel for the Respondent deplores the fact that the Appellant adduced no evidence of the pay advances allegedly made by Acadia. She also suggests that the Appellant worked without remuneration, under the pretext that she was repaying advances that she cannot prove she received.

[16] Counsel for the Respondent also raises the question of the Appellant's pay cheque which was given to the insurance broker with which Acadia did business. According to counsel for the Respondent, the Appellant did not adduce evidence that she had a personal insurance policy with the same broker. I already stated above that I accepted the Appellant's evidence on this point.

[17] Furthermore, counsel for the Respondent notes that the Appellant received a considerable salary increase in July 2006, to cover travel expenses, although no study was done on the actual expenses connected with her trips.

[18] On this last point, I am of the opinion that the Appellant was specific on the kilometres covered in the performance of her duties and that it was easy for Lionel Benoit to determine the cost, based on the distance travelled.

[19] Counsel for the Respondent also raises the fact that the Appellant could work fewer hours, or not at all, while there were still as many employees working for the business.

[20] The role of the Tax Court of Canada in an appeal from a determination by the Minister under the exclusionary provisions of subsections 5(2) and 5(3) of the EIA 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 still seems reasonable. However, the Court must not substitute its 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 (*Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 310, at paragraph 15).

[21] In this case, the appeals officer stated in her report, and during her testimony, that despite considerable goodwill both on her part and by Lionel Benoit, he had not had the opportunity to give his version of the facts. Lionel Benoit travels a great deal for his business and communication by cellular telephone or by a public telephone was not possible at the time the investigation was being conducted. The hearing of this appeal had in fact already been postponed to allow Lionel Benoit, who was at a worksite in Alberta, to come and testify at the Appellant's trial. I heard his testimony and that of the Appellant. Even though Lionel Benoit is a relatively prosperous businessman, who creates jobs that are useful to our country's economy, he humbly admits to not having much education ("Grade 9", as he says). It may be because of that lack of education that certain documents were not drawn up (such as written agreements proving that his business had made pay advances to its employees) and that he let his sister sign cheques for him in emergencies when he was unable to do so himself. There are certainly certain gaps in the evidence that the Appellant could have filled. For instance, Lionel Benoit says that he regularly makes pay advances to his employees who need them, that those advances are made by cheque, and that he writes on the cheques that they are advances on wages.

[22] The Appellant did not bring cheques showing that she had also received certain pay advances. She adduced a copy of the payroll journal which shows the repayment of those advances through pay reductions. Counsel for the Respondent suggests that this may be an indication that the Appellant worked without remuneration.

[23] I found the Appellant and her brother, Lionel Benoit, to be very credible. Both of them explained, entirely in good faith, the Appellant's duties and the reasons for which she worked an uneven number of hours when she was a part-time employee.

She said that she had never worked without remuneration and I have no reason to doubt her words. The appeals officer suggested in her testimony that a third party would not have been as dedicated to Lionel Benoit. I do not agree. Anyone working for a business can have the same dedication, especially to help out the boss who ultimately provides the person's work. It is a very normal relationship of trust and mutual support between an employer and an employee.

[24] Lionel Benoit gave his version and said quite naturally that he treated all of his employees the same way. Thus, he accommodated them by seeing that their pay cheques were deposited directly into their bank accounts on payday, which was what the Appellant had been hired to do if Mr. Benoit could not do so himself. Just as he made advances on wages to his other employees, he made some to his sister.

[25] As for the expenditures that the appeals officer considered were made by the Appellant for the employer with her own pay cheques, the Appellant adduced sufficient evidence, in my opinion, to show that that was not the case.

[26] The documents filed in evidence by the Appellant, as well as the testimony of Lionel Benoit, are new facts that were not available to the Minister when he made his decision.

[27] In my opinion, these new facts change the view of things. They seriously undermine the apparent reasonableness of the Minister's decision (*Le Livreur Plus Inc. v. Canada (Minister of National Revenue – M.N.R.)*, [2004] F.C.J. No. 267, at paragraph 13). The fact that the Appellant reduced her hours of work or ceased work altogether reflects the agreement she had with her employer. I do not believe that the Appellant worked without remuneration, or that she was overpaid for the work she performed. The increase in her remuneration was very well explained and was meant to cover the expenses of the trips she made for the employer. Even though she was not reimbursed for those expenses when she worked part-time, I understand from the evidence that those trips were greatly reduced and that her work consisted largely in making entries in the payroll journal, doing invoicing and preparing employee pay cheques.

[28] In light of the new evidence in the record, which could not be adduced during the Minister's investigation, I consider that the Appellant has shown, on a balance of probabilities, that the Minister's decision no longer appears reasonable in the circumstances.

[29] The appeal is allowed and the decision is varied to take into account the fact that, during the period from November 1, 2005, to October 13, 2006, the Appellant held insurable employment which is not excluded under paragraph 5(2)(*i*) of the EIA, since she and Acadia (the employer) are deemed to have dealt with each other at arm's length under paragraph 5(3)(*b*) of the EIA.

Signed at Ottawa, Canada, this 14th day of September 2009.

"Lucie Lamarre"

Lamarre J.

Translation certified true
on this 21st day of October 2009.

Brian McCordick, Translator

CITATION:	2009 TCC 455
COURT FILE NO.:	2007-2621(EI)
STYLE OF CAUSE:	PAMELA BENOIT AND M.N.R. AND ACADIA REBAR LTD.
PLACE OF HEARING:	Miramichi, New Brunswick
DATE OF HEARING:	September 2, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice Lucie Lamarre
DATE OF JUDGMENT:	September 14, 2009

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Dominique Galant
For the Intervener:	The Intervener himself

COUNSEL OF RECORD:

For the Appellant:	
Name:	
Firm:	
For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada