

Docket: 2007-2360(EI)

BETWEEN:

LES IMMEUBLES ANCHORAGE INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

DIANE ÉMOND

Intervener.

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Appeal heard on December 13, 2007, at Montreal, Quebec.

Before: The Honourable Justice Réal Favreau

Appearances:

Representative for the Appellant:	Michael Mendelson
Counsel for the Respondent:	Christina Ham
For the Intervener:	The intervener herself

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**JUDGMENT**

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Montreal, Canada, this 5th day of February 2008.

“Réal Favreau”

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Favreau J.

Citation: 2008TCC50  
Date: 20080205  
Docket: 2007-2360(EI)

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LES IMMEUBLES ANCHORAGE INC.,

Appellant,

and

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### **REASONS FOR JUDGMENT**

Favreau, J.

[1] This is an appeal under the *Employment Insurance Act*, S.C. 1996, c. 23, as amended (the "*Act*"), from a decision of the Minister of National Revenue (the "Minister") that during the period from January 1, 2003 to January 10, 2004 (the "period"), Ms. Diane Émond had acquired 1 855 insurable hours.

[2] The only issue in this appeal is the determination of the number of insurable hours Ms. Émond worked during her period of employment with the appellant. By letter dated February 21, 2007, the Minister informed the appellant that it had been determined that Ms. Diane Émond had accumulated 1855 insurable hours and that, in calculating this number, the Minister had relied on subsections 10(4) and 10(5) of the *Employment Insurance Regulations*, SOR/96-332 (the "*Regulations*").

[3] The appellant disagreed with this determination, as it considered that Ms. Émond's insurable hours ought to be determined according to the number of hours that she actually worked, which totalled approximately 720.

[4] Counsel for the respondent submitted that, during the period in question, Ms. Émond worked 1855 insurable hours during 53 weeks of 35 hours, as per subsections 10(4) and 10(5) of the *Regulations*, which read as follows:

10(4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.

10(5) In the absence of evidence indicating that overtime or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.

[5] The assumptions upon which the Minister based his decision are the following:

- (a) Ms. Émond had worked for the appellant for five years;
- (b) Ms. Émond mentioned that it was not necessary to complete time sheets while she was working for the appellant;
- (c) Ms. Émond had to respect the opening hours, which were Monday to Wednesday from 1:00 p.m. to 8:00 p.m., Saturday and Sunday from 1:00 p.m. to 5:00 p.m.; Thursdays and Fridays were days off;
- (d) the Minister asked the appellant for documents showing the details of the number of hours worked by Ms. Émond;
- (e) the appellant did not record Ms. Émond's working hours;
- (f) as no documents were submitted by the appellant and as the parties were not in agreement, the Minister established Ms. Émond's working hours as follows:  
53 weeks at 35 hours per week = 1855 hours.

[6] Ms. Émond began to work for the appellant on February 7, 1999 as a sales representative. The appellant is a general contractor and developer involved in the

construction of single-unit residential homes at Saint-Basile-le-Grand. The appellant's head office was in the Town of Mount-Royal.

[7] The appellant's sales office was located in the model home, which was also for sale. Ms. Émond's responsibilities included the following:

- answering phone enquiries;
- scheduling appointments with potential clients and organizing visits of the model home;
- providing information to potential clients concerning the choice of materials, available options, prices, time of delivery, etc;
- checking the competition;
- organizing the advertising campaigns and purchasing promotional materials.

Ms. Émond was not present at the model home every day, but she was always available on her cellular phone.

[8] Ms. Émond was paid on a commission - only basis (2% of the sale price to begin with, increasing later to 3%) with advances of \$200 per week to be deducted from the commission payable on the next sale. The appellant also reimbursed her cellular phone fees, the cost of her business cards, and the cost of magazines, displays and promotional materials that she acquired.

[9] During 2003, Ms. Émond sold only five (5) houses and earned commissions of approximately \$ 20,000.

[10] As the appellant requested a report of her activities, Ms. Émond used a calendar on which she wrote the number of visits she had every day, the names and phone numbers of potential purchasers and any other relevant information. That calendar was left on her desk so that it could be consulted at any time by Mr. John Mendelson, the president of the appellant.

[11] Mr. Michael Mendelson, vice-president of the appellant in charge of administration and financial matters, produced as Exhibit A-1 the said calendar and testified that it was a very reliable source of information concerning the activities

of Ms. Émond and the number of hours that she actually worked during the 2003 calendar year. He said that Ms. Émond was a well-organized and very meticulous person. After making many remarks concerning the days on which, according to him, Ms. Émond did not work because there were no annotations concerning the number of visits on those days or because the annotations were of a personal nature, Mr. Mendelson concluded that, based on the calendar, Ms. Émond worked no more than 800 hours in 2003.

[12] In her testimony, Ms. Émond stated that she never filled out time sheets to record the actual hours she worked each day during the period in question and that the calendar was not really a report of her activities but a personal working document to help her recall the names and phone numbers of serious potential clients. Not all visits were recorded on the calendar. Ms. Émond said that she followed the business hours of the competition. She further said that she was given the flexibility to substitute days of work. She also pointed out that, during the summer of 2003, she moved across the street from where the appellant's model home was located. From her new residence, she could see if a client was looking at the model home or was parked in its driveway. Ms. Émond further stated that there was a sign at the sales office which indicated that she was available for an appointment at any time.

[13] Ms. Émond said that she worked many more hours than the 15 hours per week argued by the appellant. She mentioned that she had to call Mr. John Mendelson often after 8 p.m. to determine the price of houses based upon requested modifications. She also mentioned that occasionally she had to meet with designers and architectural technicians to finalize or simply pick up plans. Ms. Émond also mentioned that she received calls and visits from various suppliers when Mr. John Mendelson was not present on the construction site.

[14] From the information provided and the documents filed during the hearing of the appeal, I am unable to conclude that there is any clear evidence of the hours that Ms. Émond actually worked during the period in question.

[15] Given the above findings, there is also no evidence indicating that "overtime or excess hours were worked", as contemplated by subsection 10(5) of the *Regulations*.

[16] Accordingly, the Minister was correct to calculate the number of insurable hours in accordance with the formula in subsection 10(4) of the *Regulations*. The appeal is dismissed.

Signed at Montreal, Canada, this 5th day of February 2008.

“Réal Favreau”

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Favreau J.

CITATION: 2008TCC50

COURT FILE NO.: 2007-2360(EI)

STYLE OF CAUSE: Les Immeubles Anchorage Inc. v. M.N.R.  
and Diane Émond

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: December 13, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice Réal Favreau

DATE OF JUDGMENT: February 5, 2008

APPEARANCES:

Representative for the Appellant:	Michael Mendelson
Counsel for the Respondent:	Christina Ham
For the Intervener	The Intervener herself

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

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