

Docket: 2008-2177(EI)

BETWEEN:

ALAIN LESSARD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

110319 CANADA LTÉE

Intervener.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *110319 Canada ltée*
(2008-2198(EI)), on August 31, 2010, at Baie-Comeau, Quebec
Before: The Honourable Justice Alain Tardif

Appearances:

Agent for the appellant: Marie-Josée Bernier, Student-at-law
Counsel for the respondent: Christina Ham
Agent for the intervener: Marie-Josée Bernier, Student-at-law

JUDGMENT

The appeal under subsection 103(1) of the *Employment Insurance Act* (the Act) is dismissed on the ground that Alain Lessard's employment as a truck driver with 110319 Canada ltée, from June 4 to November 30, 2007, and from December 10 to December 14, 2007, did not constitute insurable employment within the meaning of the Act.

Signed at Ottawa, Canada, this 14th day of October 2010.

"Alain Tardif"

Tardif J.

Translation certified true
on this 8th day of December 2010
Margarita Gorbounova, Translator

Docket: 2008-2198(EI)

BETWEEN:

110319 CANADA LTÉE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on common evidence with the appeal of *Alain Lessard*
(2008-2177(EI)), on August 31, 2010, at Baie-Comeau, Quebec
Before: The Honourable Justice Alain Tardif

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Tardif J.

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Citation: 2010 TCC 517
Date: 20101014
Dockets: 2008-2177(EI)
2008-2198(EI)

BETWEEN:

ALAIN LESSARD,
110319 CANADA LTÉE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] This is an appeal from a decision concerning the insurability of the work performed by Alain Lessard from June 4 to November 30, 2007, and from December 10 to 14, 2007, for 110319 Canada ltée, the sole shareholder of which was his father, Yvon Lessard.

[2] Both the employer and the worker appealed the decision dated April 14, 2008. The employer also chose to intervene in the worker's appeal.

[3] The parties proceeded on common evidence.

[4] In making and confirming the decision under appeal, the respondent relied on the following assumptions of fact:

[TRANSLATION]

(7) The appellant company and the worker are not dealing with each other at arm's length within the meaning of the *Income Tax Act*, because

(a) Yvon Lessard is the sole shareholder of the appellant;
(**admitted**)

- (b) Yvon Lessard is the worker's father; **(admitted)**
 - (c) The worker is related by blood to a person who controls the appellant; **(admitted)**
- (8) The Minister determined that the appellant company and the worker were not dealing with each other at arm's length for the purposes of the worker's employment. In fact, the Minister was satisfied that it was not reasonable to conclude that the appellant company and the worker would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, in light of the following facts:
- (a) The appellant company was incorporated on September 8, 1981; **(admitted)**
 - (b) The appellant had a bulk trucking permit; **(admitted)**
 - (c) The appellant company was a member of the Association des transporteurs en vrac de Baie-Comeau (the Association); **(admitted)**
 - (d) The appellant company could not transport any goods in bulk without the authorization and control of the Association; **(admitted)**
 - (e) The worker was hired as a truck driver; **(admitted)**
 - (f) The worker drove a 10-wheel truck belonging to the appellant company; the driver had to have a class-3 licence to drive it; **(admitted)**
 - (g) The worker was always entered in the appellant company's payroll journal for 40 hours per week with \$670 pay, regardless of the number of hours actually worked; **(denied)**
 - (h) On February 12, 2007, the worker told the respondent's representative that, in 2007, he was the only one who drove the appellant company's truck; **(admitted)**
 - (i) On February 12, 2007, the worker told the respondent's representative that, during the winter of 2007, he had transported snow and that he had accumulated hours in order to get higher pay; **(denied)**
 - (j) In 2007, the appellant company had no entries in its payroll journal between January 1, 2007 and June 4, 2007; **(admitted)**
 - (k) In 2007, the day-to-day information provided by the appellant company to the Association did not correspond to the entries in the appellant

company's payroll journal with respect to the hours, days and weeks worked by the worker; (**denied**)

- (l) On December 7, 2007, the appellant company gave the worker a record of employment, which stated that his first day of work was June 4, 2007, that his last day of work was November 30, 2007, that the number of insurable hours was 512 and that his insurable earnings totalled \$8,576; (**admitted**)
- (m) The record of employment did not reflect the actual number of hours worked or the actual period worked; (**denied**)
- (n) From January 9 to June 4, the worker had worked 167 hours for the appellant company, which were not entered in its payroll journal; (**denied**)
- (o) An employee at arm's length would not agree to work without pay; (**denied**)
- (p) In August 2007, the worker obtained a medical certificate stating that he had to stop working; (**admitted**)
- (q) On February 12, 2007, the worker told the respondent's representative that, during the summer, he drove the truck even though he was on sick leave and was not paid; (**denied**)
- (r) From August 22 to October 12, the appellant company reported 228.2 hours of transport to the Association without a single entry in the payroll journal; (**denied**)
- (s) From December 9 to 14, the appellant company reported 18 hours of transport to the Association; (**admitted**)
- (t) On January 15, 2008, the appellant company gave the worker a record of employment that stated that his first day of work was December 10, 2007, that his last day of work was December 14, 2007, that the number of insurable hours was 40 and that the insurable earnings totalled \$670.00; (**admitted**)
- (u) The worker's pay entered in the appellant company's payroll journal did not reflect the appellant company's actual periods of activity; (**denied**)
- (v) The actual period of the worker's employment did not correspond to the period at issue; (**denied**)

(w) The Minister is satisfied that the worker's remuneration and the duration and terms and conditions of employment could not apply if the parties were dealing with each other at arm's length; **(denied)**

[5] In this case, the burden of proof is on the appellants. The burden of proof is somewhat unusual, in the sense that it is necessary to show, on the balance of probabilities, that the respondent made a palpable and overriding error or that his factual analysis was unreasonable.

[6] In other words, it must be proven that facts were omitted, overlooked or withheld, or that certain evidence was given too much weight, thus demonstrating that the analysis was not sound and reasonable in order to show that the Court's intervention is warranted.

[7] To determine whether the employment contract was influenced by the parties' non-arm's-length relationship, Parliament provided various criteria to be considered, such as the duration and the terms and conditions of employment.

[8] Based on these criteria or other evidence that could prove relevant, if the analysis was done soundly, the Court must essentially confirm the decision, even if the Court could have concluded differently based on the same facts.

[9] In this case, the worker, his brother Yvan Lessard and his father, Yvon Lessard, the sole shareholder of the appellant company, testified for the appellants.

[10] Stated briefly, they testified that Alain Lessard's hours of work were consistent in all respects with the wages paid, that he did not perform any unpaid work and that the remuneration and terms and conditions of employment were entirely comparable to those that existed when he had performed similar work for another employer for about ten years.

[11] To explain certain inconsistencies and ambiguities uncovered during the investigation and stated in a document entitled [TRANSLATION] "CPT 110 Report on an Appeal" (Exhibit I-1), the appellants stated that the hours that seemed to have been worked by the appellant were actually worked by his brother, even though his brother did not have the licence required to perform the work in question.

[12] In cross-examination, the appellants argued that the work in question had been done on private land, off public roads, and that it was not necessary to have a special licence to drive in such places.

[13] For his part, the respondent called as witness the appeals officer, who explained the work done during his analysis described in Exhibit I-1. Other documents consulted included the business's log book with the bulk trucking association, which ensures that work is distributed fairly within the area it controls.

[14] That evidence confirmed some ambiguities and inconsistencies, particularly, with respect to the explanations given by Alain Lessard and his father at the time of the first-level analysis.

[15] That evidence also established that the appeals officer had taken into account everything that the appellants had told him on the telephone during his investigation, even though some facts had been presented differently during the first-level investigation.

[16] According to those documents, the appellant company performed about 325 hours of transport while it had only one driver with the appropriate licences, namely, Alain Lessard. Yet, those hours were not in Alain Lessard's various log books.

[17] In other words, those hours of work do not coincide with those attributed to Alain Lessard, even though, based on the evidence, he was the only qualified driver.

[18] To disprove the assumptions, the appellants stated that they were based on interpretation and speculation. In other words, they argued that the respondent's evidence was incomplete and deficient.

[19] The appellants maintain that the number of hours is speculative because the evidence did not make it possible to distinguish between the hours worked on public roads and those worked on private land. The appellants also stated that the reports prepared by the Association were incomplete and unreliable.

[20] In addition, the appellants admitted that some of the hours worked were not worked by the appellant, but rather by his brother Yvan, who, although he had no licence, agreed to work as a truck driver mainly on private roads, where, according to the appellants, it was not necessary to have a special licence.

[21] The explanations were essentially speculative. No one testified, and no documents were filed in support of the unpaid hours of work, the hours attributed during which no work was done, the lack of a licence requirement for work done on private land or the number of hours possibly worked on private land.

[22] The evidence that was before the tribunal does not allow the Court to identify any critical errors in the processing of the file leading to the decision; on the contrary, the balance of the evidence shows that the conclusion was reasonable.

[23] It would have been appropriate to submit evidence that was not based solely on the appellants' essentially verbal explanations that were speculative and biased, especially since the respondent's evidence is based on reasonable and very credible documents.

[24] I repeat that, in this case, the burden of proof is on the appellants, not the respondent. In addition, when the case contains contradictions, or at least, varying versions between the first investigation and that conducted by the review officer, it becomes particularly important that the version filed with the Court is reasonable with a serious basis, not, as in this case, essentially speculative and based on the pretext that the respondent's investigation was incomplete. Neither the appellant, nor the intervener discharged their burden of proof.

[25] For these reasons, the appeal is dismissed.

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

“Alain Tardif”

Tardif J.

Translation certified true
on this 8th day of December 2010
Margarita Gorbounova, Translator

CITATION: 2010 TCC 517

COURT FILE NOS.: 2008-2177(EI) and 2007-2198(EI)

STYLES OF CAUSE: Alain Lessard and 110319 Canada ltée and M.N.R.

PLACE OF HEARING: Baie-Comeau, Quebec

DATE OF HEARING: August 31, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Alain Tardif

DATE OF JUDGMENT: October 14, 2010

APPEARANCES:

Agent for the appellants: Marie-Josée Bernier, Student-at-law

Counsel for the respondent: Christina Ham

COUNSEL OF RECORD:

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