

Docket: 2010-179(EI)

BETWEEN:

2536-5412 QUÉBEC INC.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on February 9, 2011, at Ottawa, Ontario

Before: The Honourable Justice Paul Bédard

Appearances:

Counsel for the appellant: Roger Paradis

Counsel for the respondent: Marie-France Camiré

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 Ottawa, Canada, this 1st day of March 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 29th day of March 2011.

Elizabeth Tan, Translator

Citation: 2011 TCC 97
Date: 20110301
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2536-5412 QUÉBEC INC.,

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REASONS FOR JUDGMENT

Bédard J.

[1] The appellant is appealing from the decision rendered by the Minister of National Revenue (the Minister) under the *Employment Insurance Act* (the Act). The Minister determined that Paul Séguin Jr. (the worker) did not hold insurable employment while working for 2536-5412 Québec Inc. (the payor) because he considered it to be excluded employment since a similar contract for employment would not have been entered into if the worker and the payor had been dealing with each other at arm's length.

[2] The Minister rendered his decision after determining that the worker and the payor were related persons within the meaning of the *Income Tax Act* (the ITA). To reach this finding, he relied on the following presumptions of fact, which were admitted:

[TRANSLATION]

- (a) the sole shareholder of the appellant was Paul Séguin; **(admitted)**
- (b) Paul Séguin is the father of Paul Séguin Jr., the worker; **(admitted)**
- (c) the worker is related to a person who controls the appellant; **(admitted)**

[3] In rendering his decision, the Minister also determined that the worker and the payor [TRANSLATION] "were not dealing with each other at arm's length for the purposes of the employment" and it was not reasonable to conclude that the worker and the payor [TRANSLATION] "would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, considering the following circumstances:

- (a) the appellant was incorporated on June 17, 1987;
- (b) the appellant operated a bar known as Bar La Ronde;
- (c) the shareholder is the sole signer of cheques issued by the appellant;
- (d) the appellant's shares were sold on July 14, 2009;
- (e) the bar's hours of operation were from 8:00 a.m. to midnight, Monday to Friday;
- (f) the appellant hired five employees, namely the shareholder, his wife, the worker and two other persons unrelated to the appellant;
- (g) the worker worked for the appellant full time for some twenty years;
- (h) the worker was the bar's manager and as such, he was responsible for customer service, cleaning and orders and also for organizing social activities designed to attract clients such as golf and fishing tournaments, bean bag toss, pool and bowling leagues, and for the video poker machine;
- (i) the worker's regular hours of work were from 8:00 a.m. to 5:00 p.m., Monday to Friday;
- (j) the social activities took place mainly in the evening, three times a week;
- (k) the worker was present for a few hours during the activities;
- (l) the worker and the shareholder were the only ones authorized to take care of the video poker machine; it had to be emptied many times a day and the paper changed as often;
- (m) the worker regularly went to the bar in the evenings and weekends to take care of the video poker machine;
- (n) it took around five minutes to attend to the machine, and the worker's residence was 2.8 kilometres from the bar;

- (o) the worker was available 24 hours a day, 7 days a week;
- (p) none of the workers had to write down their hours worked;
- (q) the worker was paid on a weekly basis;
- (r) the worker received set compensation of \$650 per week for 40 hours of work;
- (s) this compensation was determined by the appellant;
- (t) the worker kept his tips, which represented 8% of the sales, estimated at \$650 per week;
- (u) the worker was paid by cheque every week, as were the other workers;
- (v) in addition to his salary, the worker received the following bonuses:
 - 2007: \$35,000 paid April 1 and \$15,000 paid December 20 for a total of \$50,000
 - 2008: \$15,000 paid June 1, and \$2,000 paid December 26 for a total of \$17,000
 - 2009: \$30,000 paid in June during the sale of the appellant's shares;
- (w) the appellant confirms that these bonuses were paid to the worker to reward him for his wide availability to work evenings and weekends to take care of the video poker machine;
- (x) none of the non-related workers received such large bonuses or even any bonuses;
- (y) no other worker received a bonus except the wife of the appellant's shareholder, who received the following amounts:
 - 2007: \$46,000
 - 2008: \$15,000 paid on December 26
 - 2009: \$30,000 paid in June during the sale of the appellant's shares;

- (z) the shareholder's wife worked between 20 and 25 hours per week and received compensation of \$450;
- (aa) the worker was supervised by the appellant's shareholder;
- (bb) the worker also had to advise the appellant when he was absent;
- (cc) the worker had two-weeks' vacation per year;
- (dd) the worker was required to personally carry out the services for which he was hired.

[4] All the facts (listed in the preceding paragraph) on which the Minister based his decision were admitted by the appellant, except for the use of the word "bonus". The appellant claims that they were not "bonuses" but rather salary adjustments.

[5] The role of the Court is to verify the existence and accuracy of the facts the Minister relied on to make his decision, to review all the facts submitted before it as evidence, in particular any new fact, and then decide whether the Minister's decision is still "reasonable" in light of the Court's findings of fact. While conducting this exercise, the Court must grant certain deference to the Minister.

[6] The worker's testimony can be summarized as follows:

- (i) In addition to carrying out the tasks described at paragraph 6(h) of the Reply to the Notice of Appeal, the worker also took care of the landscaping, filling the fridges, hiring and replacing servers (and ensuring their presence), repairing the leaseholder improvements and defective equipment and responding to alarms. The worker added that he built the outdoor terrace himself and entirely renovated the appellant's premises. The worker explained that the only tasks the payor did not give him were the administrative duties. It should be noted that the worker was unable to provide the number of hours of work he had accumulated outside his regular work hours, which I recall were from 8:00 a.m. to 5:00 p.m., Monday to Friday;
- (ii) If not for his constant contributions, his regular presence, skills as animator and the warm welcome he gave all the payor's clients, the number of patrons at the payor's bar would have dropped by at least half;

- (iii) he fully deserved the bonuses the payor gave him, which he considered more as salary adjustments considering his participation in the payor's company. It must immediately be noted that the worker was unable to identify the basis on which the salary adjustment (or bonuses) had been determined.

[7] Moreover, the evidence showed the following in regard to the payor's income and operating costs and the income of the worker, Marguerite Séguin, Maxim McDonough and Marc Huard while they worked for the payor in 2007, 2008 and 2009:

	Payor's total income	Payor's operating costs (including wages)	Payor's annual losses	Worker's employment income (T4)	Bonus paid to the worker
2007	\$359,552	\$431,279	(\$71,727)	\$93,814	\$50,000
2008	\$356,495	\$364,126	(\$7,631)	\$60,973	\$17,000
2009	\$434,047	\$294,524	(\$46,542)	\$55,536	\$30,000

Comparison of annual salaries of the payor's employees

	Worker (excluding the bonuses) 40 hrs per week	Marguerite Séguin (wife of Paul Séguin Sr.) 20 to 25 hrs per week	Maxime McDonough (no relationship) 40 hrs per week	Marc Huard (no relationship) 20 to 25 hrs per week
2007	\$43,814	\$0 (bonus was \$46,000)	\$20,684	\$10,253
2008	\$43,973	\$22,950 (bonus was \$15,000)	\$21,619	\$10,704
2009 (for 6 months)	\$25,536	\$42,150 (bonus was \$30,000)	\$24,910	\$12,357

[8] I retain essentially the testimony of Paul Séguin Sr., that the duties of Marguerite Séguin (his wife) at the payor's company during the years in question consisted of cleaning the payor's premises and she spent around 20 to 25 hours per week on this. Mr. Séguin added that the payor gave Ms. Séguin a weekly salary of \$450 during the years in question and bonuses of \$46,00, \$15,000 and \$30,000 in 2007, 2008 and 2009, respectively. It is interesting to note that Mr. Séguin stated that the payor's external accountant had advised him to empty the payor's bank account before the sale of the payor's shares in June 2009, specifically, by paying a bonus of \$30,000 to Ms. Séguin. This admission merely strengthened my belief that the decision to pay the worker and Ms. Séguin bonuses had been made by Mr. Séguin purely arbitrarily and that he determined the amount of the bonuses also purely arbitrarily. I note that Mr. Séguin was unable to identify the basis on which the bonuses had been paid during the years in question.

Analysis and conclusion

[9] It must be noted that the issue was solely regarding the worker's compensation. The Minister admitted that the set compensation of \$650 per week (plus tips) for 40 hours of work from 8:00 a.m. to 5:00 p.m., Monday to Friday, was reasonable compensation in the circumstances. However, the Minister claims that if the payor and the worker had an arm's length relationship, the worker would never have agreed to take on so many responsibilities and dedicated so much time and energy to the payor outside his regular hours of work (being 8:00 a.m. to 5:00 p.m., Monday to Friday) without being assured in advance that he would be compensated for doing so, since the decision to give the worker a bonus was made by Mr. Séguin purely arbitrarily and since he determined the amount of the bonus just as arbitrarily.

[10] The evidence showed very clearly that the decision to pay a bonus to the worker was made by Mr. Séguin purely arbitrarily and he determined the amount of the bonus just as arbitrarily. The evidence also showed very clearly in this case that the worker took on multiple responsibilities and dedicated many hours to meet them, all outside his regular work week. As a result, the Minister was convinced of his decision that a third-party dealing with the payor at arm's length would not have agreed to take on so many responsibilities and spend so much time fulfilling them outside the regular 40-hour work week, from Monday to Friday, without being assured in advance that he would be compensated or, at the very least, without first being aware of the objectives to meet to be paid for doing so; this decision still seems reasonable to me, considering the evidence presented.

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

Signed at Ottawa, Canada, this 1st day of March 2011.

"Paul Bédard"

Bédard J.

Translation certified true
on this 29th day of March 2011.

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APPEARANCES:

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Counsel for the respondent: Marie-France Camiré

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