Dockets: 2010-2622(EI)
2010-2623(EI)

BETWEEN:

GILBERTE SHEEHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeals heard on common evidence
on September 1, 2011, at Percé, Quebec

Before: The Honourable Justice Alain Tardif

Appearances:

For the appellant:	The appellant herself
Counsel for the respondent:	Marie-France Dompierre

JUDGMENT

The appeals under the *Employment Insurance Act* are dismissed on the basis that the work of the appellant, Gilberte Sheehan, for Les Distributions Richard Langlais Inc., during the periods from July 7, 2008, to November 1, 2008, and from September 14, 2009, to December 31, 2009, was not insurable employment under the Act.

The decision of the Minister of National Revenue dated July 20, 2010, is therefore confirmed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 6th day of October 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of November 2011.
Daniela Possamai, Translator

Citation: 2011 TCC 473
Date: 20111006
Dockets: 2010-2622(EI)
2010-2623(EI)

BETWEEN:

GILBERTE SHEEHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Tardif J.

[1] The appeals involve the insurability of work performed during the two following periods:

a. July 7, 2008, to November 1, 2008;
b. September 14, 2009, to December 31, 2009.

[2] During those periods, the appellant performed work on behalf and for the benefit of Les Distributions Richard Langlais Inc., of which all of the voting shares were held by her husband Richard Langlais. The parties agreed to have the two matters heard on common evidence.

[3] Only the appellant testified at the trial. She admitted almost all of the facts relied on to explain and justify the two determinations under appeal. The facts relied upon are paragraphs and subparagraphs 5 (a) to (c), 6 (a) to (f), (1), (2) and (3) and (g), (h), (j) to (p), and (t).

[TRANSLATION]

(5) The appellant and the payor are related persons within the meaning of the *Income Tax Act*, as

(a) the payor's sole shareholder was Richard Langlais;

(b) Gilberte Sheehan, the appellant, is the wife of Richard Langlais;

(c) the appellant is related by marriage to a person who controls the payor;

(6) The Minister determined that the appellant and the payor were not dealing with each other at arm's length in the course of the employment. Indeed, the Minister was satisfied that it was unreasonable to conclude that the appellant and the payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, having regard to the following circumstances:

(a) the payor was incorporated on April 7, 1998;

(b) the payor ran a business specialized in distributing bread and pastries for the company Multimarques;

(c) the payor is the only one who delivers on a territory that extends from Barachois to Rivière-aux-Renards;

(d) the payor affirmed that business is slower from January to June 24 of each yearcompared to the summertime, which is a busier period owing to the high tourism (large number of tourists?) in Gaspé and compared to the month of December owing to the holidays;

(e) the payor's monthly income from July 2008 to December 2009 was as follows:

July 2008*	**$11,548.49**	April 2009	$11,016.27
August 2008	**$17,639.47**	May 2009	$12,463.68
September 2008	**$11,858.76**	June 2009	$9,884.34
October 2008	**$12,021.36**	July 2009	$12,405.22
November 2008	$14,008.56	August 2009	$13,566.45
December 2008	$10,734.20	**September 2009**	**$8,840.65**
January 2009	$14,436.80	**October 2009**	**$10,853.51**

February 2009	$10,171.35	**November 2009**	**$8,305.32**
March 2009	$11,920.61	**December 2009**	**$8,162.55**

* the months in bold indicate the appellant's periods of employment with the payor;

(f) the delivery of pastries and bread is executed in three stages:

1. every morning deliveries are made to grocery stores, namely, I.G.A. and Provigo de Gaspé where some of the bread is placed on shelves and the rest is kept in a section in the back of the stores;

2. on Tuesdays, Wednesdays and Saturdays, someone must go back to the grocery stores to rotate the bread and place the rest of the stored bread on the shelves;

3. on Thursdays and Fridays, a third service is necessary because the quantity of bread is larger;

(g) the shareholder is the only one authorized to sign the payor's cheques;

(h) the payor hired, in addition to the shareholder, the shareholder's son and the appellant;

(j) the appellant was a stock clerk for the payor and was in charge of the second and third services for some of the payor's clients; she was also in charge of filing invoices and getting the papers ready for the accountant each month, preparing payments for the suppliers (5 to 10 statements of account per month) and making the weekly bank deposits;

(k) the appellant also worked at Canadian Tire where she had a regular schedule of 30 hours per week during the period in issue; she was dismissed in December 2008 and started working again on June 1, 2009, without a regular schedule, and stopped working in December 2009 and started working again on May 17, 2010;

(l) the payor stated that the appellant would always give priority to her employment with Canadian Tire and that it itself would manage to get the appellant's work done if she were unavailable;

(m) the appellant worked 25 hours per week divided as follows: 2 hours per day on Mondays, Tuesdays, Wednesdays and Saturdays and 3 hours per day on Thursdays and Fridays at I.G.A. and ¾ of an hour per day, except

for Saturdays, at Provigo, the payor's clients, and about 7 hours per week for the invoicing and getting the papers ready for the accountant;

(n) the hours worked by the appellant were not recorded by the payor;

(o) the appellant's remuneration was determined by the payor at the hourly rate of $12, including 4% vacation pay, for the period in issue;

(p) the appellant was paid by cheque each week for 25 hours of work;

(t) the payor stated that although the month of December is a profitable month owing to the holidays, he dismissed the appellant on November 1 because he could no longer pay her;

[4] However, the appellant denied the facts set out in subparagraphs 6 (i), (q), (r), (s), and (u) as follows:

[TRANSLATION]

(i) the payor stated that Ricky Langlais would do the deliveries with the payor's shareholder until he was dismissed in April 2009, when the payor lost a part of its territory resulting in a loss of monthly income of about 20%, whereas the appellant stated that she was the payor's sole employee both in 2008 and in 2009, as she was hired to replace their son;

(q) the payor stated that each time the appellant was dismissed, she continued to be in charge of the invoicing without getting paid, as the payor knew nothing about computers and she continued to work with the payor in the afternoon to place the bread on the shelves and rotate it, whereas the appellant stated that she did not perform regular services for the payor after her dismissals, that it was her husband that was in charge of bread and rotating it, and that he was in charge of sorting out the invoices;

(r) the beginning of the period in issue corresponds with the moment at which the appellant started getting paid, whereas she performed the same work before she was hired without getting paid;

(s) an employee unrelated to the payor would not have agreed to work without remuneration;

> (u) the appellant's period of employment with the payor does not correspond with the payor's needs, especially since the monthly income did not fluctuate on a large scale warranting a dismissal;

[5] The basis for the respondent's finding of exclusion is provided for in paragraph 5(2)(*i*) of the Act, which reads as follows:

> **5(2) Excluded employment** − Insurable employment does not include
>
> . . .
>
> *(i)* employment if the employer and employee are not dealing with each other at arm's length.

[6] In the same section, however, Parliament provided that the exclusion could be set aside if parties dealing with each other at arm's length would have entered a substantially similar contract of employment.

[7] In other words, Parliament granted the respondent the discretionary power to assess all facts pertinent to the employment at issue, namely, the remuneration paid, the terms and conditions and the duration of the work performed, and to determine whether or not the employment is insurable. The provisions in question read as follows:

> **5(3) Arm's length dealing** − For the purposes of paragraph (2)(*i*),
>
> *(a)* the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
> (*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.

[8] The Federal Court of Appeal has in a number of decisions held that a decision resulting from the exercise of discretionary power cannot be set aside by the Court unless it is established on a balance of probabilities that the exercise of the discretionary power was tainted by errors or flaws, or was simply exercised

unreasonably, either by failing to take into account relevant elements or by taking into account irrelevant elements.

[9] In short, if the Minister properly and reasonably assessed all the relevant facts, this Court cannot set aside his decision, even if the Court could have arrived at a different conclusion.

[10] The analysis must involve not only the work performed that led to the determination under appeal but also all the facts shown at trial; contrary to the investigation prior to the determination, the hearing before the court provides a set of generally more complete and nuanced facts; moreover, witnesses are more prepared to present all facts they deem important and relevant while allowing for a better assessment of credibility when all relevant parties are present.

[11] In that respect, the two cases most often cited, *Légaré v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 878, 246 N.R. 176, and *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, 261 N.R. 150, indicate the following. In *Légaré*, the Honourable Justice Marceau states as follows:

> 4 The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.
>
> . . .
>
> 12 I have just said that in our view, these facts by themselves do little to explain and support the response of the Minister or his representative. Under the *Unemployment Insurance Act*, excepted employment between related persons is clearly based on the idea that it is difficult to rely on the statements of interested parties and that the possibility that jobs may be invented or established with unreal

conditions of employment is too great between people who can so easily act together. And the purpose of the 1990 exception was simply to reduce the impact of the presumption of fact by permitting an exception from the penalty (which is only just) in cases in which the fear of abuse is no longer justified. From this perspective, after identifying the true nature of the employment, the importance of the duties and the reasonableness of the compensation, it is difficult in our view to attach the importance the Minister did to the facts he relied on to exclude the application of the exception. It is the essential elements of the employment contract that must be examined to confirm that the fact the contracting parties were not dealing with each other at arm's length did not have undue influence on the determination of the terms and conditions of employment. From this standpoint, the relevance of the facts relied on, even without further detail, seems very questionable. And there is no need to go any further. While the facts relied on might legitimately leave sufficient doubt with respect to an objective basis for the conditions of the applicants' employment contract, placing these facts in the context of the evidence adduced before the Tax Court of Canada - evidence which was almost completely accepted by the Tax Court judge - only serves to highlight the unreasonableness of the Minister's initial conclusion. It was in fact clearly explained and established that the applicants' salary was higher than the minimum wage the other employees received because of the responsibility involved in the duties they performed and that that was the prevailing salary in the industry for similar jobs; it was clearly explained and established that the shareholders had decided to reduce the salary normally due to them to provide for the financial support and development of the business; it was clearly explained and proven that a tornado had destroyed a large number of the buildings of the business in 1994, which led to a period of confusion, and then reconstruction and financial difficulties; last, it was explained and proven that the presence of the children of one of the applicants on the land around the greenhouses was very unlikely to affect the performance of her duties and the provision of the services she agreed to provide.

[12] In *Pérusse*, the Honourable Justice Marceau stated as follows:

14 In fact, the judge was acting in the manner apparently prescribed by several previous decisions. However, in a recent judgment this Court undertook to reject that approach, and I take the liberty of citing what I then wrote in this connection in the reasons submitted for the Court:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties.

> The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.
>
> 15 The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function 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, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his 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. However, simply referring to the Minister's discretion is misleading.

[13] Only the appellant testified in support of her appeal. The respondent called as a witness the person in charge of the file at the objection stage for the first-level determination.

[14] The appellant testified in a spontaneous and forthright manner. She explained and described her work, contribution and support with respect to the business, owned by her husband.

[15] She revealed and explained, *inter alia*, that she did not replace her son, who stopped working in order to obtain more suitable and beneficial employment in the course of pursuing his studies. The son drove the company vehicle, whereas she was essentially a stock clerk.

[16] She explained that over the years, she had worked at Zellers and then at Canadian Tire, where she still works, first as a store clerk and now as a cashier.

[17] She indicated that her priority was her work at Canadian Tire and that in the case of a scheduling conflict, she would work for that employer. Her husband’s business came second.

[18] She described her work for her husband’s business; she primarily worked as a stock clerk at the premises of the clients of the business operated by her husband. It was important work with a number of consequences not only on the volume of sales,

but also on the commission the appellant received. Her job was to ensure shelves were always stocked with non-expired and fresh products in order to stimulate sales.

[19] She was also in charge of management, filing, of all work related to the use of a computer, seeing as her husband did not have the ability to use such a management tool.

[20] When called upon to explain her unpaid or volunteer work, she admitted that it was correct and true but added that in the Gaspé region, it is not unusual to work for one's employer without remuneration.

[21] She also stated that it was normal to help and support her husband in the operating his business. She also indicated that everyone knew, supported and helped everyone else.

[22] Finally, as regards her volunteer work, she stated that it was a period during which she was learning the job and which occurred over a number of years. She also mentioned that she did not perform work but rather lent her support.

[23] She mentioned that her husband attempted to no avail to find a qualified and competent employee, given the requirements, in a region where the unemployment rate is generally higher than anywhere else on the one hand, and on the other hand, that it was a job that had to be learned, but did not require specialized or specific training.

[24] Johanne Potvin, appeals officer, whose responsibilities included the appellant's appeals, also testified; she relied on the report of her investigation and the analysis contained in her report adduced as Exhibit I-1. She also considered elements which I believe would be useful to reproduce:

[TRANSLATION]

> **Duration, nature and importance of the work**
> The payor's activity is to deliver pastries and bread, namely to I.G.A. and Provigo de Gaspé grocery stores. Delivery is undertaken by the payor's shareholder who places the products on the stores' shelves. Some of the bread is immediately placed on the store shelves, whereas the rest is placed in a section situated in the back of the stores. Such an operation is called service 1. Service 2 is required on Tuesdays, Wednesdays and Saturdays, as someone must return to the stores to place the rest of

the bread on the shelves and rotate it. A 3rd service is necessary on Thursdays and Fridays, owing to the larger quantity of bread during those two days.

The appellant was hired on July 7, 2008, as a stock clerk and was responsible for performing the second and third services in groceries stores. She was also responsible for the invoicing of thirty or so clients and getting papers ready for the accountant each month. She was also in charge of preparing 5 to 10 statements of account per month to pay the suppliers and making bank deposits once a week. The facts showed that the appellant worked just over fifteen hours or so per week in order to take care of the bread, and that she spent 7.5 hours per week on paperwork.

The appellant is the payor's sole employee and the reason she was hired seems vague, which raises the issue of the importance of the work performed by the appellant. First, the payor's shareholder stated that the appellant had always worked before she was hired but was not paid. How can one justify the appellant's hiring then?

. . .

The facts showed that the appellant also worked 30 hours per week at Canadian Tire in Gaspé during the period in issue. The shareholder stated that the appellant still works for that employer, but that she currently does not have a regular schedule. The shareholder also claimed that the appellant will always give priority to Canadian Tire and that he himself would manage to get the appellant's work done if she were unavailable. Was the work performed by the appellant truly essential to the payor at that time?

Another important element was raised over the course of the review that raises the issue of the importance of the work. It is the fact that the payor's shareholder stated that despite the fact that the payor operates year-round, it is less busy from January to June compared to the month of December, which is a profitable month owing to the holidays. However, the payor terminated the appellant's services on November 1, 2008, under the pretext that it was no longer able to pay her.

. . .

Terms and conditions of employment

The appellant had the latitude to adjust her schedule to accommodate her other employer. She did not record her hours of work and she received fixed remuneration for 25 hours per week throughout the entire period at issue. The payor's shareholder told the decision-making officer that the appellant worked between 20 and 25 hours per week, but that he always paid her for 25 hours of work as it was easier to calculate for the payor's accountant, who was his brother-in-law.

> The payor's shareholder also stated that their daughter would sometimes help the appellant with her work during school holidays. The appellant should have therefore worked fewer hours during those times and yet she was always paid for 25 hours.
>
> We are of the view that the payor would have exercised control over the hours performed by a stranger, and that such a person would have been paid for hours actually worked.
>
> **Remuneration paid**
> The appellant's salary was at the rate of $12 per hour, including the 4% vacation pay, and she was always paid for 25 hours of work per week. The facts showed that the appellant received paycheques every week in the amount of $202.32 during the period in issue.
>
> The payor began paying the appellant for her services in July 2008, while, before that, roughly ten years as the payor has been operating since 1998, she had always performed the work without being paid. Moreover, the appellant continued to be in charge of invoices without being paid since the end of her employment as the shareholder knew nothing about computers. Also, the shareholder stated that the appellant continued to work with him in the afternoon.
>
> We are of the view that a stranger would not have agreed to work that long without being paid nor would a stranger agreed to continue to perform duties without being paid.
>
> . . .
>
> **Conclusion**
> The analysis of the non-arm's-length dealings has shown us 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 unreasonable to conclude that the parties would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length. The Minister is therefore satisfied that it is reasonable to conclude that the employment of Giberte [*sic*] Sheehan for Les Distributions Richard Langlais Inc. was excluded from insurable employment under paragraph 5(2)(*i*) of the *Employment Insurance Act* for the period from July 7, 2008, to November 1, 2008.

[25] The appeals officer's analysis is beyond reproach, except for the fact that she contended, incorrectly, that the appellant replaced her son, whereas the evidence established that it was a misinterpretation on her part as the appellant and her son did not perform the same work. Such a detail is however irrelevant within the context of the analysis particularly since it did not manifestly impact the conclusion reached.

[26] As for the other aspects, elements and facts considered by the appeals officer, the evidence confirmed their accuracy, even those denied, with the exception of the issue that she replaced her son. The evidence, therefore, added nothing new.

[27] The evidence submitted by the appellant validated all the assumptions of fact made. The evidence also revealed that the investigation and analysis took into account all relevant facts and that their assessment was conducted in a correct and judicious manner.

[28] The evidence validates or confirms, on a balance of probabilities, the reasonableness of the two determinations under appeal.

[29] Certain determining facts in that respect are, *inter alia*, the unpaid work, the surprising flexibility, the particular approach to her work for the payor compared to that for Canadian Tire, but also and above all the fact that her work covered periods where the sales figures were lower than those where she did not work.

[30] The Gaspé region is a very particular region which consists of several dozen small communities. The people who live in that region are warm and welcoming. Support, generosity and collaboration are qualities that properly characterize and define those communities.

[31] Exceptional qualities, however, somewhat complicate the analysis of a file where the employee and the employer are not dealing with each other at arm's length. In fact, what is often implausible, unreasonable even, in large urban areas where people do not know one another and where the rule in relationships is often individualism, is entirely reasonable and customary in such regions as the Gaspé.

[32] Such qualities and characteristics shape labour relations and it can become very difficult to draw the distinction between what is reasonable and what is unreasonable.

[33] One thing is for certain, that reality cannot explain and justify all the terms and conditions of a contract of service.

[34] The fact that a person would agree to work without being paid for a short period of time, that a person would take work home without being compensated, that a person would be more flexible about his or her workload, that a person would more

easily accept certain difficulties or irritants can be viewed as acceptable and customary.

[35] However, such characteristics must not and cannot dominate the terms and conditions of a contract of service.

[36] In the case at bar, the appellant testified in a spontaneous and forthright manner. She admitted almost all the facts assumed; the evidence also revealed the truth of the facts denied with the exception of that pertaining to the replacement of her son. That element does not constitute a determining factor in the analysis and conclusion that followed.

[37] Seeing as the investigation and analysis were validated by the evidence, it appears that the resultant conclusion is reasonable. The conclusion reached and contested is reasonable and entirely consistent with all the relevant facts available both in the exercise of discretion and during the hearing before the court.

[38] For all these reasons, the appeals are dismissed.

Signed at Ottawa, Canada, this 6th day of October 2011.

"Alain Tardif"

Tardif J.

Translation certified true
on this 22nd day of November 2011.
Daniela Possamai, Translator

CITATION:	2011 TCC 473
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STYLE OF CAUSE:	GILBERTE SHEEHAN and M.N.R.
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DATE OF JUDGMENT:	October 6, 2011

APPEARANCES:

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Counsel for the respondent:	Marie-France Dompierre

COUNSEL OF RECORD:

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Firm:	
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