

same business, in the same geographical area, and use the same media of advertising to attract the same customers, the likelihood of confusion was clearly substantial. The injunction was proper.

Finally, we should note that the defendant has remarked upon the trial court's expressed predisposition to find that the facial similarity between the two names at issue was alone sufficient to warrant a finding that confusion was likely. The plaintiff has suggested that this predisposition vitiated the court's finding in this regard. There are two answers to this suggestion. The first is that the evidence amply supports the court's finding, whatever the judge's preliminary sentiments may have been. The second is that the issue of the trial judge's state of mind is not properly before us, because the defendant failed to raise the matter at trial. We will not consider issues raised on appeal that were not presented in the trial court. *Daboul v. Town of Hampton*, 124 N.H. 307, 309, 471 A.2d 1148, 1149 (1983). We do not, therefore, question the propriety of the injunction.

*Affirmed.*

JOHNSON, J., did not sit; the others concurred.

Department of Employment Security  
No. 85-021

APPEAL OF LAKES REGION COMMUNITY SERVICES COUNCIL  
(New Hampshire Department of Employment Security)

October 30, 1985

*Wescott, Millham & Dyer*, of Laconia (*Susan B. Carbon* on the brief and orally), for Lakes Region Community Services Council.

*Stephen E. Merrill*, attorney general (*Daniel J. Mullen*, assistant attorney general, on the brief and orally), for the State.

## MEMORANDUM OPINION

This is an appeal from a determination by the department of employment security (DES), which ruled that the appellant had failed to demonstrate that it was not the employer of respite care providers. See RSA 282-A:9, III (Supp. 1983). We hold that the ruling prejudiced the appellant's substantial rights because it rested on conclusions of fact that are clearly erroneous in view of the evidentiary record. See RSA 282-A:97 (Supp. 1983) and :67, IV (Supp. 1983).

Services for wages are "employment" under RSA 282-A:9, I (Supp. 1983), unless the employing unit establishes that it does not control or direct the services performed by the wage recipient, RSA 282-A:9, III(a) (Supp. 1983), that the service is outside the usual course of the unit's business or performed outside all of its places of business, *id.* at (b), and that the recipient is customarily engaged in an independently established occupation, *id.* at (c). On the evidence, DES could not reasonably have found that the appellant had failed to satisfy each condition.

Evidence indicated that the appellant maintains a roster of individuals who will provide temporary care for disabled persons, thus giving their normal custodians a short respite from responsibility. The appellant gives a respite provider only brief training, and thereafter matches providers with applicants for help. Providers keep a log of time spent at recipients' houses or elsewhere, and send the appellant a bill for services at an hourly rate. The appellant verifies with the regular custodian that the services were provided and asks the custodian to make an evaluation of the services, for consideration in making or declining to make future linkages of applicants with the provider in question. Recipients pay for services to the extent they are able, but most of the compensation comes from a budget provided by the State Department of Health and Human Services. Except as noted, the appellant does not attempt to monitor the provision of services or instruct providers what to do.

The only reasonable conclusions from this evidence are that the respite care providers are free from control or supervision by the appellant and that all of their services are performed outside the appellant's place of business. The evidence indicated that respite care has recently been devised in order to promote care for the disabled at home rather than in institutions. Respite care providers thus engage in an occupation not previously practiced by institutions or businesses, and therefore engage in an independently established occupation.

Since these conclusions entitle the appellant to a finding that services performed by respite care workers are not employment within



the meaning of the statute, RSA 282-A:9, III(a) to (c) (Supp. 1983), the contrary finding by DES must be reversed.

*Reversed.*



Merrimack  
No. 85-045

DAVID R. ASADORIAN

v.

DIANE M. ASADORIAN

October 30, 1985



*Law Offices of R. John Roy, of Manchester (Janos Bobula and R. John Roy on the brief), by brief for the plaintiff.*

*Rinden Professional Association, of Concord (Richard Y. Uchida) and Schiavoni, Cirome & Mooradian, of Haverhill, Massachusetts (Alfred J. Cirome on the brief), by brief for the defendant.*

MEMORANDUM OPINION

This is an interlocutory appeal from the Superior Court's (*Dunn, J.*) approval of the Master's (*Bruce F. DalPra, Esq.*) recommendation in a divorce action that defendant's motion to dismiss the libel