

Docket: 2016-2217(EI)

BETWEEN:

AMADEEP K. JOHAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 18, 2016, at Vancouver, British Columbia

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant: The Appellant herself
Counsel for the Respondent: Chantelle Coulson

JUDGMENT

The appeal with respect to Minister of National Revenue's decision dated March 9, 2016 made under the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 6th day of December 2016.

“V.A. Miller”

V.A. Miller J.

Citation: 2016TCC284

Date: 20161206

Docket: 2016-2217(EI)

BETWEEN:

AMADEEP K. JOHAL,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant was engaged in insurable employment during the period June 1, 2012 to October 31, 2012 (the “Period”) when she performed services for Boyal Drywall Services Ltd. (the “Payer”).

[2] The Minister of National Revenue (the “Minister”) determined that the Appellant’s employment was not insurable because she and the Payer were not dealing with each other at arm’s length in accordance with paragraphs 5(2)(i) and 5(3)(b) of the *Employment Insurance Act*.

[3] The Appellant’s brother-in-law, Manpreet Boyal, owns 100% of the shares in the Payer.

[4] The Appellant was the only witness at the hearing. It was her evidence that she was not related by blood to the Payer. She was engaged by the Payer as a bookkeeper/office administrator and both she and the Payer intended that she would be an employee.

[5] In determining that the Appellant was not engaged in insurable employment with the Payer, the Minister made the following assumptions of fact:

The Payer

- a) the Payer provided drywall installation services in Surrey, British Columbia;
- b) the sole shareholder of the Payer's voting shares was Manpreet Boyal ("Manpreet");

The Appellant

- c) on June 1, 2012, the Appellant was hired by the Payer;
- d) Manpreet was married to the Appellant's sister, Tejinder Boyal ("Tejinder");

Terms and conditions

- e) the Appellant and the Payer intended for the relationship to be one of employer and employee, and agreed that the Appellant was an employee of the Payer;
- f) the Appellant duties were to record the hours worked by the Payer's employees and to check the Payer's emails;
- g) on a daily basis, the Payer informed the Appellant by telephone as to the number of hours worked by the Payer's employees;
- h) the Appellant recorded the hours in a spreadsheet;
- i) on a biweekly or monthly basis, the Appellant verbally informed Manpreet of the total hours worked by the employees;
- j) Manpreet recorded the total hours worked by the employees and submitted the hours to the Payer's accountant;
- k) the Appellant only forwarded important emails to Manpreet;
- l) the Appellant did not respond to any emails on the Payer's behalf;
- m) the Appellant did not complete any other duties for the Payer;
- n) the Payer's accountant did the actual payroll and bookkeeping for the Payer;

- o) in 2012:
 - i. the Payer had 6 employees, including the Appellant; and
 - ii. the Payer had one subcontractor;
- p) the Appellant did not have set days and hours of work;
- q) the Appellant set her own schedule;
- r) the Appellant usually worked in the evenings;
- s) no one recorded the Appellant's hours of work;
- t) the Appellant was paid for 70 hours per month, regardless of how long it actually took to perform her duties;
- u) the Appellant was paid \$16 per hour;
- v) the Payer set the Appellant's pay rate;
- w) per the Government of Canada's Job Bank database, data entry clerks in the Appellant's region were typically paid between \$12.00 to \$22.60 per hour;
- x) the Payer paid the Appellant by cheque on a monthly basis;
- y) the Payer's other employees were paid every two weeks;
- z) the Payer paid any subcontractors on a monthly basis;
- aa) the Appellant's pays included vacation pay;
- bb) the Appellant paid the majority of her pays to her sister, Tejinder, to repay a loan;
- cc) the Appellant worked in her own home;
- dd) on October 31, 2012, the Appellant ended her employment with the Payer;
- ee) the Appellant ended the employment due to illness or injury;
- ff) in the month in which the Payer hired the Appellant, the Payer's gross revenue had decreased from the previous quarter;
- gg) in the month in which the Appellant ended her employment with the Payer, the Payer's gross revenue had increased from the previous quarter;

hh) the Appellant was previously employed as a part-time bookkeeper at a taxi company;

ii) during the Period, the Appellant also worked for another employer, RWM, four days per week, six hours per day; and

jj) one month after the Appellant's employment ended, the Payer hired Tejinder to perform administrative duties.

[6] The Appellant agreed with all except two of these assumptions. She had no knowledge of the assumptions at paragraph 10(ff) and (gg) as they related to the Payer's gross revenues. I will discuss the assumptions and the Appellant's evidence in the context of the legislation.

[7] The circumstances of the employment considered by the Minister and confirmed by the Appellant's evidence were as follows.

[8] The Payer provided drywall services in Surrey, British Columbia. During the period, it had one subcontractor and six employees, including the Appellant.

[9] According to the Appellant, she was engaged by the Payer to perform two tasks. They were to record the hours worked by the Payer's other employees and to check the Payer's emails. Each day the Payer telephoned the Appellant to tell her the number of hours worked by each employee. She recorded the hours on a spreadsheet. The Appellant then, on a biweekly basis, informed the Payer of the total hours for each employee. She gave the spreadsheet she had prepared to her brother-in-law. The Payer then submitted the hours to its accountant. The Appellant also checked the Payer's emails and notified it if there were any important emails. She did not respond to any emails.

[10] Prior to hiring the Appellant, the Payer's shareholder, Manpreet Boyal, performed these duties.

[11] The Appellant worked from her home on her own computer. She stated that she worked on average 2 to 3 hours a day. She testified that it could have been less than "2 to 3 hours a day but it was never more". She had no set hours; she set her own schedule and she did not record her hours. It was agreed between her and the Payer that she would be paid \$16 per hour for 70 hours a month regardless of the number of hours she worked.

[12] The Appellant was paid by cheque on a monthly basis whereas the other employees were paid every two weeks. The subcontractor was paid on a monthly basis.

The Legislation

[13] Whether persons are related is determined by section 251 of the *Income Tax Act*. For the purposes of this case, the relevant provisions are paragraphs 251(1)(a), 251(6)(a) and (b), 251(2)(a), subparagraph 251(2)(b)(ii). They read:

251 (1) For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length;

Definition of related persons

251 (2) For the purpose of this Act, *related persons*, or persons related to each other, are

(a) individuals connected by blood relationship, marriage or common-law partnership or adoption;

(b) a corporation and

(i) a person who controls the corporation, if it is controlled by one person,

(ii) a person who is a member of a related group that controls the corporation, or

(iii) any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and

251(6) For the purposes of this Act, persons are connected by

(a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

[14] The Appellant was the sister-in-law of the Payer's sole shareholder. Therefore, she was connected to the Payer's sole shareholder by marriage. In

accordance with subparagraph 251(2)(b)(ii), the Appellant was related to the Payer during the period and she and the Payer were not dealing with each other at arm's length.

[15] The relevant statutory provision of the *Employment Insurance Act* reads:

5(2) Insurable employment does not include

(i) employment if the employer and employee are not dealing with each other at arm's length.

5(3) For the purposes of paragraph (2)(i),

(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.

[16] In *Birkland v Minister of National Revenue*, 2005 TCC 291, Bowie J. reviewed the various decisions from the Federal Court of Appeal that discussed this court's role in an appeal pursuant to the above provisions. He stated:

At this point it is sufficient simply to state my understanding of the present state of the law, which I derive principally from paragraph 4 of *Légaré* (reproduced above) and from the following passage from the judgment of Richard C.J., concurred in by Létourneau and Noël J.J.A., in *Denis c. Ministre du Revenu national*

5 The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, March 10, 2000).

This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the

Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(b) accords to the Minister's opinion.

Analysis

[17] The question is whether, in light of the evidence adduced at court, would the Minister, if he had the benefit of all this evidence, reasonably have concluded that the Payer and a person acting at arm's length would have entered into a substantially similar contract of employment. It is my opinion that the answer to this question is no.

[18] The evidence adduced at the hearing was exactly the same as the assumptions made by the Minister.

[19] I find it hard to believe that if the Appellant had not been related to the Payer, she would be paid \$16 per hour for 70 hours a month regardless of the number of hours she worked. The Appellant stated that she was hired as a bookkeeper/office administrator. However, none of her duties involved maintaining the Payer's books. She prepared a spreadsheet for the Payer. At the hearing she stated that she gave the Payer the spreadsheet who in turn gave it to its accountant. However, according to the assumptions made by the Minister and also agreed to by the Appellant at the hearing, she verbally informed the Payer of the total hours worked by the employees.

[20] When I consider the testimony presented at the hearing with respect to the remuneration paid, the terms and conditions, the duration and the nature of the work performed, I conclude that the Minister's decision was reasonable. The appeal is dismissed.

Signed at Ottawa, Canada, this 6th day of December 2016.

“V.A. Miller”

V.A. Miller J.

CITATION: 2016TCC284
COURT FILE NO.: 2016-2217(EI)
STYLE OF CAUSE: AMADEEP K. JOHAL AND M.N.R.
PLACE OF HEARING: Vancouver, British Columbia
DATE OF HEARING: November 18, 2016
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller
DATE OF JUDGMENT: December 6, 2016

APPEARANCES:

For the Appellant: The Appellant herself
Counsel for the Respondent: Chantelle Coulson

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada