Docket: 2003-4371(EI)

BETWEEN:

KATHERINE SMITH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 7, 2004 at Moncton, New Brunswick

Before: The Honourable Justice Brent Paris

Appearances:

Counsel for the Appellant: Peter J. Beardsworth

Counsel for the Respondent: Antonia Paraherakis

JUDGMENT

The appeal is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 1st day of September 2004.

"B. Paris"

Paris, J.

Docket: 2003-4372(CPP)

BETWEEN:

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Appellant,

and

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"B. Paris"

Paris, J.

Citation: 2004TCC576
Date: 20040901
Docket: 2003-4371(EI)
2003-4372(CPP)

BETWEEN:

KATHERINE SMITH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] The Appellant is appealing decisions of the Minister of National Revenue that her employment with Ronald Smith, her spouse, during the periods July 21, 2001 to February 8, 2002 and from July 1, 2002 to February 28, 2003 was not insurable under the *Employment Insurance Act* (*Act*) and not pensionable under the *Canada Pension Plan* (*Plan*) because it was not performed under contracts of service and was excepted employment.

[2] The issues in these appeals are:

> Whether it was reasonable for the Minister to conclude that the Appellant and her spouse would not have entered into a substantially similar contract of employment had they been acting at arm's length; and
>
> Whether the Appellant performed her work for Mr. Smith pursuant to a contract of service.

Evidence

[3] Three witnesses were called at the hearing: the Appellant, Ronald Smith and Germaine Landry, the appeals officer at the Canada Revenue Agency who handled the Appellant's appeal of the ruling that her employment was not insurable.

[4] The evidence showed that Mr. Smith has worked as an industrial mechanic for the Potash Corporation of Saskatchewan since 1990 and had a firewood business from 1993 to 1999. In late 1998 he purchased a delimber machine, a piece of logging machinery used to cut the tops and branches off trees which have been felled, and to pile the logs that are produced on "bunks" for transportation to mills. The delimber was a 1978 model and had many hours on it but Mr. Smith was able to get it in running condition. In January 1999 Mr. Smith obtained a contract to do delimbing work for a pipeline company that was clearing land. In order to carry out the work, he hired his spouse, the Appellant, to operate the machine.

[5] The Appellant had significant experience in operating heavy equipment and has worked often in the woods. Her skill and competence in operating the delimber was not disputed by the Respondent.

[6] Over the next years Mr. Smith expanded his forestry business, adding a grapple skidder in 2000 and a feller buncher in 2002. These machines were used to cut and move the trees, and along with the delimber, allowed Mr. Smith to carry on a self-contained logging business. Other workers were hired to operate these machines. Two 4x4 pickup trucks, each equipped to carry fuel for the logging machinery, were also purchased.

[7] Mr. Smith obtained contracts that allowed him to operate the business each year for the full logging season. No logging could be done during spring breakup (approximately March to May) when the ground in the woods was too soft for the machines to work on. Although Mr. Smith continued to work full-time at the potash mine, he also put in many hours in the evening operating the skidder himself and doing power saw work and repairing the machinery. The Appellant said that although she was able to carry out small mechanical repairs, her spouse was responsible for larger jobs and anything to do with hydraulics and motors.

[8] The Appellant stated that she had received employment insurance benefits when she was laid off each year between 1999 and 2002. Initially, in 1999, her claim was investigated because she and Mr. Smith did not deal at arm's length, but her claim was approved and benefits were paid for each period. In the spring of 2003 her application for benefits relative to her employment in the 2002-2003 season was

reviewed and benefits were refused. She was also required to repay benefits she had received under her two previous claims which related to her employment during the periods in issue.

[9] The Replies to the Notices of Appeal filed in each of these two appeals set out identical assumptions relied on by the Minister in deciding that the Appellant's employment was not insurable or pensionable. I propose to deal with those contained in subparagraphs 7(d) to (n), which were at the heart of the Minister's decision regarding the Appellant's employment:

> (d) the Payor and the Appellant were liable for the debt against their forestry machinery;

[10] It was admitted that the Appellant guaranteed the loans taken out by Mr. Smith to purchase the various pieces of machinery and the vehicles used in the forestry business. She explained that the bank required her to provide the guarantee because the business was being operated as a sole proprietorship and did not have any assets that could be used as collateral for the loans. Mr. Smith confirmed that the bank asked for the Appellant's signature for any loan that he took out, because all of the property he could use as collateral, such as the family home, was jointly owned with the Appellant. Mr. Smith was the owner of the equipment and made all of the payments on the loans used to purchase it.

> (e) the Payor and the Appellant had signing authority on the business bank account; the business bank account was also used for personal transactions;

[11] The evidence showed that the Appellant and her spouse had only one bank account which was used for both business and personal purposes, and therefore was one on which both of them had signing authority.

> (f) the Payor and the Appellant had signing authority on the business credit cards (Visa and Mastercard);

[12] This was confirmed, but the Appellant stated that other workers in the business used the credit cards as well for purchases of parts and necessary supplies.

> (g) the four cellular phones used in the business were registered to the Appellant;

[13] This was admitted. The Appellant had an existing account at a cellular phone store and for the sake of convenience simply added more cell phones to the account for Mr. Smith's business as needed. The phones were necessary while working in the woods, and the cost of the phones was paid by the business.

> (h) the three vehicles used in the business were registered to both the Appellant and the Payor;

[14] This was admitted. This was done because it was cheaper for insurance if she were one of the registered owners. The cost of the vehicles and the running expenses were paid by the business.

> (i) the Appellant's duties included operating and maintaining the 1978 John Deere delimber and she was required to produce 250 cords of wood per week;
>
> (j) the Appellant worked 60 hours per week, usually from 6 a.m. to 6 p.m. Monday to Friday; any hours not worked because of inclement weather or equipment breakdown were made up on Saturday or Sunday;

[15] These facts were admitted as well, but the Appellant said that she had the same hours of work as the other machine operators.

> (k) in addition to her duties as a delimber operator, the Appellant completed the Payor's bookkeeping duties and ordered and picked up parts without remuneration;

[16] This was admitted. Both the Appellant and Mr. Smith said that she did some of the bookkeeping for the business in the evenings along with their daughter. Machinery parts were picked up occasionally.

> (l) the Appellant's weekly salary was calculated based on $720 plus vacation pay of $28.20;
>
> (m) the Appellant did not receive her wages each week but withdrew funds from the business/personal account as she needed money;

[17] These facts were also admitted. Mr. Smith said that the Appellant's rate of pay was set based on prevailing hourly rates for equipment operators in the area. Copies of bank statements showing regular withdrawals of cash by the Appellant from the

joint account were put into evidence, and she said that she received all amounts that were due to her. This evidence was not challenged in cross-examination.

> (n) during the two weeks ending September 13, 2002 the Appellant was included in the Payor's payroll for her regular salary plus vacation pay while she was vacationing in Hawaii.

[18] The Appellant and Mr. Smith told the Court that the business had to shut down for two weeks in September 2002 to permit work to be done on the delimber. During the previous month the Appellant said that she worked weekends and longer hours during the week and in effect built up enough overtime to allow her to take the two weeks off work with pay. Since it was known in advance that the delimber was going to require the servicing, the Appellant was able to anticipate the down-time and build up overtime. The other worker in the business had not put in overtime and was not paid for the two weeks that the business did not operate.

Analysis

[20] In an appeal from the Minister's decision under the two Acts in question that the Appellant and Mr. Smith would not have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length, the role of this Court is "to verify whether the facts inferred or relied upon by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, … decide whether the conclusion with which the Minister was satisfied still seems reasonable"[1].

[21] It is clear from the evidence that most of the facts relied on by the Minister were accepted by the Appellant as true; it is the conclusion reached by the Minister that she says is unreasonable.

[22] In making the determination of whether a contract is substantially similar to one between arm's length parties, the Minister must consider all of the circumstances of the employment. In this case however the Minister has taken into account circumstances that existed independently of the employment relationship between the Appellant and Mr. Smith. For example, the Minister relied on the fact that the Appellant was liable on the debt against the forestry machinery purchased by Mr. Smith, although there was no evidence to suggest that she guaranteed the loans as an

[1] *Perusse* v. *Canada* (2000) 261 N.R. 150 (F.C.A.)

employee of Mr. Smith or that the guarantee was related to her employment in any way. I accept that the bank required her to co-sign for the loans because she was the spouse of the borrower and that she would have been required to do so even if she had not been working for him.

[23] With respect to the vehicles and cell phones, the cost of these items were paid by the business and it is more appropriate to consider that Mr. Smith was the beneficial owner of each of these assets, with the Appellant holding legal title.

[24] It is also apparent that the Minister has failed to take into account relevant facts relating to the circumstances of the Appellant's employment. For example the Appellant did have use of company credit cards, but this was true of other workers as well. Also, she was paid for two weeks when she was in Hawaii, but this was in lieu of extra time worked in the period prior to the holidays. And, while the manner in which she was paid is not what would be expected in an arm's length situation, the Appellant did receive all of her pay for the work done.

[25] These errors in the Minister's appreciation of the circumstances surrounding the Appellant's employment lead me to find that the decision that the contract was not substantially similar to one that would have been entered into between arm's length parties was not reasonable. Therefore it is necessary for me to determine that question on the evidence before me.

[26] It was not suggested that the duration or the nature or importance of the work performed by the appellant or the remuneration paid to her were indicative of a non-arm's length contract. The work lasted for the entire wood harvesting season each year, was essential to Mr. Smith's business and was of the same nature as the work performed by an arm's length worker for Mr. Smith in the 2003-2004 season when the Appellant was not available to work. The Appellant was paid at an appropriate rate and received all of the amounts that she earned.

[27] With respect to the terms and conditions of employment, it is true that the appellant worked long hours but this appeared to be the case for Mr. Smith's other workers too. The Appellant also did work for Mr. Smith's business for which she was not paid, and this is not a normal feature of an arm's length contract, but the extent of that unpaid work was insignificant compared to her paid duties.

[28] Overall I am satisfied that the contract between the appellant and Mr. Smith was substantially similar to one that would have been entered into by arm's length

parties, and therefore that the employment was not excluded employment under the *Act* and the *Plan*.

[29] The Minister also found that the Appellant was not in insurable employment because she was not employed under a contract of service by Mr. Smith.

[30] The question of whether a worker is an employee or an independent contractor must be determined on a consideration of all of the circumstances of the relationship between the parties. In the Supreme Court of Canada decision, *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, Major J. stated[2]:

> ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. ...
>
> ...
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

[31] In this case the evidence shows that the location of the work to be done was decided by Mr. Smith's customers and that he would pass these instructions on to the Appellant. In some cases the customer would tell the Appellant directly where to work. Mr. Smith went to the work sites every night to check out the progress that had been made on the job and to attend to any mechanical work that needed to be done. He said that he did not need to tell the appellant how to do the work because she was very good at her job. The Appellant was required to work 60 hours per week and to produce a set volume of wood during those hours. He did not verify her hours but knew that she left the house for work before him and would still be on the job when he arrived in the evening.

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[2] at pages 985 and 1005.

[32] These facts lead me to conclude that Mr. Smith retained a right of control over the Appellant's work but that because of her level of skill it was not necessary to exercise more than a minimum of supervision over her. This aspect of the employment is more consistent with a contract of service than with a contract for services.

[33] The equipment necessary to do the work was all provided by Mr. Smith. Although the vehicles used in the business were registered in both names they were paid for by the business and I consider them to have been supplied by Mr. Smith. This would point in the direction of a contract of service as well.

[34] The Appellant was paid a fixed wage and had no chance of profit. She was required to produce a certain amount of wood each week, but there was no indication that she would receive additional remuneration if she exceeded that total. With respect to her risk of loss the Respondent alleges that she was liable on debts that Mr. Smith incurred to buy the equipment used in the business, and that this entailed financial risk to her. However, as I said earlier, this risk did not arise from the employment relationship and existed whether she worked for Mr. Smith or not. These factors also support the view that the Appellant was an employee rather than an independent contractor.

[35] After considering all of these circumstances it does not appear to me that the Appellant was performing the work in question on her own account. I find that her employment with Mr. Smith was performed pursuant to a contract of service and that the employment was insurable and pensionable and the appeals are therefore allowed.

Signed at Ottawa, Canada, this 1st day of September 2004.

"B. Paris"

Paris, J.

CITATION:	2004TCC596
COURT FILE NO.:	2003-4371(EI) and 2003-4372(CPP)
STYLE OF CAUSE:	Katherine Smith and M.N.R.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 7, 2004
REASONS FOR JUDGMENT BY:	The Honourable Justice B. Paris
DATE OF JUDGMENT:	September 1, 2004

APPEARANCES:

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