

Docket: 2002-2718(EI)

BETWEEN:

SIU KUEN KU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on February 5, 2003 at Vancouver, British Columbia

Before: The Honourable D.G.H. Bowman, Associate Chief Judge

Appearances:

Agent for the Appellant: Alan M. Bruyneel

Counsel for the Respondent: Jasmine Sidhu

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JUDGMENT

It is ordered that the appeal from the decision made under the *Employment Insurance Act* dated April 9, 2002 be dismissed.

Signed at Toronto, Canada, this 11th day of February 2003.

"D.G.H. Bowman"

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A.C.J.

Citation: 2003TCC39  
Date: 20030211  
Docket: 2002-2718(EI)

BETWEEN:

SIU KUEN KU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

#### **Bowman, A.C.J.**

[1] This is an appeal from a decision of the Minister of National Revenue that the appellant was not employed under a contract of service from the period from May 1, 2000 to May 28, 2001. The respondent's position was that the appellant through the period was not an employee of her husband but was a partner.

[2] An alternative position was pleaded. It was that even if the appellant was employed by her husband under a contract of service she was not at arm's length with him and the employment was not insurable because of paragraph 5(2)(i) of the *Employment Insurance Act*. Although they were related it was alleged they would not have entered into a similar contract of employment if they had been at arm's length. This argument was not pursued by the respondent at trial. The exception to paragraph 5(2)(i) contained in paragraph 5(3)(b) depends, according to the Federal Court of Appeal, upon an act of ministerial discretion and no evidentiary basis for the exercise or non-exercise of that alleged discretion was pleaded or proved. We will have to leave for another day the question whether it follows from the Federal Court of Appeal's conclusion that the words "if the Minister of National Revenue is satisfied ..." creates an administrative discretion, that the failure by the Minister of National Revenue even to consider the question under paragraph 5(3)(b) is itself an act of ministerial discretion that is subject to review by this court.

[3] The sole remaining question is whether the appellant during the period in question was employed by her husband under a contract of service within the meaning of paragraph 5(1)(a) of the *Employment Insurance Act*.

[4] In 1998 the appellant and her husband, Kypros Kyprianou, became equal partners in Mail Boxes Etc. ("MBE"), a business consisting of a retail service centre providing services such as copying, packaging and shipping as well as mail box rental. Up to August 1, 2000 both the appellant and her husband worked full time in the business six days a week.

[5] When the appellant became pregnant with her second child they decided that for her to be entitled to claim employment insurance maternity benefits she would need to be an employee. From August 1, 2000 on she put herself on the payroll and declared employment income of \$1,992 per month and at the end of the year filed a T-4 slip showing employment earnings in this amount. She deducted and remitted income tax as well as Canada Pension Plan and Employment Insurance premiums on this amount.

[6] I do not draw any adverse inference from the fact that the motivation behind the purported change in the relationship was to entitle the appellant to the employment insurance benefits or from the fact that the accountants for the appellant and her husband described them as partners in their income tax returns for 2000. This was inadvertent.

[7] The question is whether their apparent intention to dissolve the partnership and transfer the appellant's partnership interest to her husband and to make the appellant an employee of her husband was carried out in a legally effective way. It is not what they intended to do or why they wanted to do it. It is whether they in fact and in law did it.

[8] The transformation of a partnership relationship into an employee relationship is a fundamental one. It involves at least three steps:

- (a) a dissolution of the partnership,
- (b) a transfer of one party's interest to the other partner,
- (c) a hiring of the outgoing partner by the new sole proprietor under a contract of employment.

[9] This requires some evidence that there has been a change in the relationship and that at least the bare minimum of legal formalities have been observed. It is not enough merely to think it. One must do it.

[10] The appellant and her husband were a well meaning and totally credible young couple and I am sure they hoped and probably intended to change the legal relationship. However much as I would like to help them the evidence does not support the view that anything changed. The appellant continued to act like a partner, or a part owner. Her hours were the same, her activities in running the business were the same. Even putting herself on the payroll was more of a cosmetic than a substantive change. She continued to sign cheques on the business bank account paying varying amounts into her own bank account to reimburse her for expenses of the business that she had paid. There is no evidence that she was paid the salary of \$1,992 per month. The evidence is far more consistent with the conclusion that she got to keep out of the payments whatever amounts, if any, were left after the other expenses had been paid. This is the sort of thing an owner of a business, not an employee, would do. By way of contrast, the two unrelated employees whom the business hired, Angela and Vladimir, were paid wages based upon a specified hourly rate and on the precise number of hours worked.

[11] I have concluded therefore that the appellant never ceased to be a partner and was not during the relevant period an employee of her husband. I reach this conclusion with regret. I would have liked to help the appellant and her husband. They were a decent, honest and industrious couple and the business was not a success. It was terminated and sold at a loss in 2002.

[12] The appeal is dismissed.

Signed at Toronto, Canada, this 11th day of February 2003.

"D.G.H. Bowman"

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A.C.J.

CITATION: 2003TCC39

COURT FILE NO.: 2002-2718(EI)

STYLE OF CAUSE: Between Siu Kuen Ku and  
The Minister of National Revenue

PLACE OF HEARING Vancouver, British Columbia

DATE OF HEARING February 5, 2003

REASONS FOR JUDGMENT BY: The Honourable D.G.H. Bowman  
Associate Chief Judge

DATE OF JUDGMENT February 11, 2003

APPEARANCES:

Agent for the Appellant: Alan M. Bruyneel

Counsel for the Respondent: Jasmine Sidhu

COUNSEL OF RECORD:

For the Appellant:

Name: --

Firm: --

For the Respondent: Morris Rosenberg  
Deputy Attorney General of Canada  
Ottawa, Canada