

Docket: 2003-3125(EI)

BETWEEN:

G&L DISTRIBUTORS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of *Cary Craig*
(2003-3126(EI)) on March 26, 2004 at Edmonton, Alberta

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Dawn Taylor

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the Employment Insurance Act is allowed and the decision that Cary Craig was engaged in insurable employment by G&L Distributors Ltd. is vacated.

Signed at Ottawa, Canada on this 29th day of June, 2004.

"J.M. Woods"

J.M. Woods J.

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Citation: 2004TCC479
Date: 20040629
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Appellant,

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Docket: 2003-3126(EI)

CARY CRAIG,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] These are appeals by Cary Craig and his employer, G&L Distributors Ltd. from a ruling in which the Minister of National Revenue decided that Mr. Craig was engaged in insurable employment for purposes of the *Employment Insurance Act* for the period January 1, 2002 to November 29, 2002.

[2] G&L Distributors is in the business of packaging picnic supplies and sells mainly to large retail grocery chains. The business was started by Mr. Craig's father, Gordon Craig, over 20 years ago and now employs over 20 people. Mr. Craig is 30 years of age and works as the general manager of the plant. Mr. Craig owns five percent of the shares of G&L Distributors; his parents own the balance.

[3] For purposes of determining whether a person is engaged in insurable employment under the *Employment Insurance Act*, the employment of a person who is related to the employer, as Mr. Craig was, is excluded unless the Minister is satisfied that the terms of employment are substantially similar to arm's length terms.

[4] These appeals arose as a result of an application for a refund of employment insurance premiums. The Minister concluded that the terms and conditions were substantially arm's length and ruled that the employment was insurable.

Statutory provisions

[5] The relevant statutory provisions are contained in paragraphs 5(2)(i) and 5(3)(b) of the *Employment Insurance Act* which read:

(2) Insurable employment does not include

...

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

(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.

(emphasis added)

[6] This case was one of four similar appeals that I heard in Edmonton, Alberta over a one week period. In the judgment for another case, *C&B Woodcraft Ltd.*, I commented generally on the scope of these provisions. I will not repeat that discussion here.

The Minister's determination

[7] The Minister concluded that Cary Craig was engaged in insurable employment because the terms and conditions of his employment were substantially similar to arm's length terms. The facts upon which the Minister relied are set out as assumptions of fact in the pleadings and are attached as an appendix to these reasons.

[8] Mr. Craig and his father testified at the hearing. Based on their testimony, I would conclude that the Minister did not take into account several facts that should have had a bearing on his decision. Some of these are:

- Although the Minister correctly took into account Mr. Craig's salary of \$51,000 and bonus of \$31,000, the Minister did not appreciate that that this remuneration was influenced by factors related to Mr. Craig's personal situation. For example the bonus for 2002 was influenced by Mr. Craig's desire to purchase a new car.
- The Minister did not appreciate the extent to which the working conditions were casual. While the Minister appreciated that Mr. Craig was entitled to come and go as he pleased, the Minister also assumed that arm's length managers were given the same flexibility. I believe that the Minister did not correctly appreciate difference in the working conditions of the arm's length managers. For example, Mr. Craig indicated that he took time off from regular working hours to go to his rugby club. His father testified that arm's length managers would have to report to him if they were out of the office. It is unlikely that arm's length employees would be given permission to take time off for recreational purposes. The father is a hands-on owner who was described as being strict with the arm's length employees. I do not accept the Minister's assumption that arm's length managers could come and go as they pleased. Mr. Craig on the other hand, was free to do so, presumably because of the trust that the father had in the son.
- The Minister failed to appreciate that Mr. Craig had more flexibility with vacations than the other employees. Mr. Craig could take vacations when it suited him whereas the arm's length employees needed approval so that the vacation time would not interfere with the business.
- The Minister did not appreciate the extent to which Mr. Craig was involved in management of the business. The department heads reported to him, he did the

banking and he was involved with the major management decisions. I accept the father's testimony that he would not have entrusted an arm's length employee to this extent. Certainly it did not happen with the previous general manager, who acted in controller capacity.

- Mr. Craig has a company credit card. The arm's length employees do not and I accept the father's testimony that he would not give a company credit card to arm's length employees.

Are employment terms arm's length

[9] The picture that emerged at the hearing was that Mr. Craig was treated much more like a partner in the business than an arm's length employee. He was given shares in the company, he was involved in management decisions, he took over responsibility for the business when his father was ill, his work hours were more flexible and his compensation was affected by his personal circumstances. In my view, his overall terms of employment were significantly different from what they would be if he were an arm's length employee.

Conclusion

[10] The appeals are allowed and the decision of the Minister that Cary Craig was engaged in insurable employment is vacated.

Signed at Ottawa, Canada on this 29th day of June, 2004.

"J.M. Woods"

J.M. Woods J.

APPENDIX
Assumptions of Fact

In deciding as he did, the Minister relied on the following assumptions of fact:

- (a) the Appellant operated a business which packaged and distributed disposable picnic supplies;
- (b) the Appellant's business operated year round but was busiest in the summer and at Christmas;
- (c) the share structure of the Appellant was as follows:

Gordon Craig	54%	(husband)	(hereinafter	"the	Shareholder")
Lorraine Craig	51%	(wife)			
the Worker	5%				
- (d) the three shareholders above were also directors of the Appellant;
- (e) the Worker is the son of the Shareholder and Lorraine Craig;
- (f) the Worker and the Appellant are related to each other within the meaning of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended (the "Act");
- (g) the Worker was hired as a manager;
- (h) the Worker's duties included overseeing the day-to-day operations and supervising the buyers, sales, production and warehouse staff;
- (i) the Worker earned a set salary of \$51,000.00 per year;
- (j) the Worker was paid \$2,125.00 on a semi-monthly basis;
- (k) the Appellant set the Worker's rate of pay;
- (l) the Worker's wage was reasonable;
- (m) contributions, premiums and tax were withheld from the Worker's wages;
- (n) the Worker was paid on a regular and consistent basis;

(o) the worker did not provide unpaid services during the period under review;

(p) the Worker also received bonuses as follows:

2000	\$ 8,000
2001	\$23,000
2002	\$31,000

(q) the Appellant's arm's length managers were also eligible for bonuses;

(r) the Appellant made the decisions with regards to bonuses;

(s) the Worker's T4 earnings from the Appellant were as follows:

2000	\$63,706
2001	\$73,422
2002	\$82,639

(t) the Worker received paid vacation leave;

(u) the Appellant provided a benefit plan for their employees, including the Worker;

(v) the Appellant had set business hours of 8:00 AM to 4:30 PM, Monday to Friday;

(w) the Worker normally worked during the Appellant's business hours;

(x) the Worker worked an average of 40 hours per week;

(y) the Worker's hours and days were dictated by the business and the industry;

(z) the Appellant expected the Worker to work whatever hours were required to get the job done;

(aa) the Worker could come and go as he pleased;

- (bb) the freedom to come and go was also given to the Appellant's arm's length managers;
- (cc) the Worker was not supervised;
- (dd) the Shareholder was the president of the Appellant;
- (ee) the Shareholder was the president of the business;
- (ff) the Shareholder, Lorraine Craig and the Worker were all involved in major decisions;
- (gg) the Shareholder had the final say on major decisions;
- (hh) the Shareholder was available to the Worker for questions or guidance;
- (ii) the Worker regularly met with the Shareholder to discuss business decisions;
- (jj) the Worker had signing authority for the Appellant's bank account;
- (kk) the Worker has not signed business loans or guarantees for the Appellant;
- (ll) the Worker has not borrowed money to or from the Appellant;
- (mm) the Worker notified the Appellant of any leave required;
- (nn) the Worker's personal service was required;
- (oo) the Worker performed his services at the Appellant's premises;
- (pp) the Appellant provided all of the tools and equipment required including a computer, phone, office and work location;
- (qq) the Appellant provided the Worker with a company credit card for business expenses;
- (rr) the Appellant reimbursed the Worker for any significant expenses incurred;

- (ss) the Appellant stated that Worker was treated differently than other employees because he was included in all decisions and the Appellant would not have replaced the Worker;
- (tt) the Minister considered all of the relevant facts that were made available to the Minister, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed, and
- (uu) the Minister was satisfied that it was reasonable to conclude that the Worker and the Appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

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PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: March 26, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

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APPEARANCES:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Dawn Taylor

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