

Docket: 2006-738(EI)

BETWEEN:

SANG DON MOON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MYONG-RAE MOON
o/a JIMMY'S PLACE RESTAURANT,

Intervenor.

Appeal heard on August 24, 2006 at Vancouver, British Columbia

Before: The Honourable Justice G. Sheridan

Appearances:

| | |
|-----------------------------|---------------|
| Agent for the Appellant: | Jung Moon |
| Counsel for the Respondent: | David Everett |
| For the Intervenor: | Jung Moon |

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue is vacated on the basis that the Appellant was engaged in insurable employment pursuant to paragraph 5(1)(a) of the *Employment Insurance Act* for the period February 1, 2003 to January 31, 2005 in accordance with the attached Reasons for Judgment.

Signed at Prince Albert, Saskatchewan, this 3rd day of November, 2006.

"G. Sheridan"

Sheridan, J.

Citation: 2006TCC582

Date: 20061103

Docket: 2006-738(EI)

BETWEEN:

SANG DON MOON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

MYONG-RAE MOON
o/a JIMMY'S PLACE RESTAURANT,

Intervenor.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellant, Sang Don Moon, is appealing the decision of the Minister of National Revenue that he was not engaged in insurable employment at a restaurant operated by his wife, Myong-Rae Moon, under the name "Jimmy's Place" for the period February 1, 2003 to January 31, 2005. Mrs. Moon was the Intervenor in the appeal.

[2] There is no dispute that the Appellant performed his duties as an employee working under a contract of service. The Minister's decision that his work was not insurable stems from his non-arm's length status as the husband of his employer; applying paragraph 5(3)(b) of the *Employment Insurance Act*, the Minister, having considered the circumstances of the Appellant's employment, was not satisfied that a person dealing at arm's length would have entered substantially the same contract.

[3] The Appellant and Mrs. Moon immigrated to Canada from Korea. Since her arrival, Mrs. Moon has worked in food service and in 1993, started her own restaurant. They both testified at the hearing with the assistance of an interpreter. Mrs. Moon was an impressive witness who struck me as an honest, hard-working person. Mrs. Moon's inability to explain completely how a particular cheque had

come into being did not overshadow the credibility of the rest of her testimony. As for the Appellant, he had difficulty with the language and often could not remember details of his employment. The Respondent called Ms. Nasim Kara, the Canada Revenue Agency rulings officer in charge of the Appellant's file. Ms. Kara gave her answers in a careful and thoughtful manner.

[4] The Appellant has the onus of proving wrong the assumptions upon which the Minister based his determination. The disputed assumptions have mainly to do with the Appellant's hours of work and his salary. Ms. Kara testified that the factors underpinning her decision were that the Appellant was paid a monthly salary when the other employees were paid hourly wages, that he received an unusually large raise in pay and that he sometimes delayed cashing his pay cheques. These topics are considered below under their respective headings.

Hours of Work

[5] The relevant assumptions are set out in paragraph 7 of the Reply to the Notice of Appeal:

- j) the restaurant's hours of operation were from 7 am to 5 pm;
- k) Moon required the Appellant to perform the Duties during the restaurant's hours of operation;
- l) the Appellant also put in time before and after the restaurant's business hours;
- ..
- q) the non-related workers worked only for those hours scheduled by Moon;
- r) the non-related workers were not required to put in hours before and after the restaurant's business hours; ...

[6] Jimmy's Place was a small restaurant whose clientele tended to be people working during normal weekday business hours. It was less busy on the weekend but the restaurant was open to the public from 7:00 a.m. to 5:00 p.m. The Jimmy's Place employees also worked before and after normal business hours doing preparation and clean up.

[7] The Appellant worked primarily as the cook with usually one or two other employees helping in the kitchen or serving. He and Mrs. Moon have only one vehicle. This meant that he sometimes stayed at the restaurant after his shift until Mrs. Moon was able to leave. As the manager and bookkeeper, Mrs. Moon's responsibilities also included cleaning and as is the case with many small business owners, generally doing anything else that was needed. Although their hours of work and duties were set by Mrs. Moon, all of the employees (including the Appellant) did what was necessary to keep the business going. They were less concerned with strict adherence to their schedules and job descriptions than those employed in a more formalized work environment might be. Mrs. Moon attributed their willingness to help to their Korean work ethic.

[8] In these circumstances, I am satisfied that the Appellant worked roughly the hours prescribed, depending on what was needed, in just the same fashion as his fellow employees.

Salary

[9] The relevant assumptions are set out in paragraph 7 of the Reply to the Notice of Appeal:

- n) during the Period, the Appellant's salary was \$1,500 per month up to October 2004 when the monthly salary increased to \$2,000 per month.
- o) the Appellant received two paycheques in October of 2004;
- p) the Appellant delayed cashing his paycheques until there was cash available in the restaurant's bank account;
- ...
- s) the non-related workers did not have to wait to negotiate their paycheques.

[10] The Appellant cooked at Jimmy's Place throughout the 12 year-history of the business, until its sale in January 2005. The other kitchen assistant/servers tended to be transient as is typical of such employment. Because the Appellant worked full-time during roughly the same hours each week, he was paid a monthly salary. The other employees worked part-time and split shifts and accordingly, were paid hourly. I am satisfied that it was this distinction, rather than the Appellant's status as his employer's husband, that accounted for the different methods of payment.

[11] As for the Appellant's raise in pay, he worked many years without a raise; there is no suggestion that his salary was not within the normal range for such a position. His evidence, consistent with that of Mrs. Moon, was that she watched the restaurant's finances closely. To succeed, a small business cannot spend more money than it brings in; when Mrs. Moon was satisfied that she could afford to increase the Appellant's salary, she did so. While I can understand how the percentage increase in the Appellant's salary might seem high to someone employed by a large corporation or unionized organization in which regular incremental pay increases are the norm, it must be considered in the small business context. The increase in the Appellant's salary was meant to compensate for the lack of increases in the preceding periods. Mrs. Moon also struggled to provide small increases in the hourly rate of pay of the other employees, depending on how well they performed or as an inducement to stay. In my view, these strategies reflected the economic realities of running a small enterprise: in this regard, both the Appellant and the other employees felt the effect of the fiscal restraints of the business.

[12] Finally, on occasion, the Appellant did not cash his pay cheque until he was satisfied that there were sufficient funds in the business account to cover the amount. It is not clear to me that Mrs. Moon *required* the Appellant to delay cashing his cheque. I also accept the evidence of Mrs. Moon that although she did not demand it of her other employees, they, too, sometimes had to wait a period of time before cashing their cheques. Again, I am satisfied that in the context of a small business, all of the employees did what was necessary for the general good.

[13] On the basis of the evidence presented, I am satisfied that the Minister did not have all of the relevant facts before him in respect of this aspect of his decision¹. The Appellant was employed at Jimmy's Place, his wife's business, in circumstances that were substantially the same as those an arm's length employee working in that context might have accepted.

[14] The appeal is allowed on the basis that the Appellant was engaged in insurable employment for the period February 1, 2003 to January 31, 2005.

Signed at Prince Albert, Saskatchewan, this 3rd day of November, 2006.

¹ *Perusse v. Canada (M.N.R.)*, [2003] F.C.J. No. 310 (F.C.A.); *Légaré v. Canada (M.N.R.)*, [1999] F.C.J. No. 878 (F.C.A.).

"G. Sheridan"

Sheridan, J.

CITATION: 2006TCC582
COURT FILE NO.: 2006-738(EI)
STYLE OF CAUSE: SANG DON MOON AND THE MINISTER
OF NATIONAL REVENUE AND
MYONG-RAE MOON

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: August 24, 2006

REASONS FOR JUDGMENT: The Honourable Justice G. Sheridan

DATE OF JUDGMENT: November 3, 2006

APPEARANCES:

| | |
|-----------------------------|---------------|
| Agent for the Appellant: | Jung Moon |
| Counsel for the Respondent: | David Everett |
| For the Intervenor: | Jung Moon |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada