

Docket: 2006-3844(EI)

BETWEEN:

HELEN WILLIAMS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 24, 2007, at Sydney, Nova Scotia.

Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant: Gordie Gosse

Counsel for the Respondent: Lindsay Holland

JUDGMENT

The Appellant's appeal under the *Employment Insurance Act* ("Act") from the decision of the Respondent that the employment of the Appellant was not insurable employment within the meaning of section 5 of the *Act* during the period from November 27, 2005 to February 17, 2006 is allowed and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the employment of the Appellant during this period was insurable employment under section 5 of the *Act*.

Signed at Halifax, Nova Scotia, this 3rd day of May 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC265
Date: 20070503
Docket: 2006-3844(EI)

BETWEEN:

HELEN WILLIAMS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the decision of the Respondent that the employment of Helen Williams by B & M Burner Services Ltd. during the period from November 27, 2005 to February 17, 2006 was not insurable employment for purposes of the *Employment Insurance Act* ("Act") was reasonable.

[2] Subsection 5(2) of the *Act* provides in part that:

Insurable employment does not include

...

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

[3] Subsection 5(3) of the *Act* provides that:

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

- (a) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and

- (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.

[4] In this case the shares of B & M Burner Services Ltd. were held by Helen Williams (17%), her husband, Frank Williams (17%), her son, Glenn Williams (33%) and her son, Gary Williams (33%). Therefore, Helen Williams and B & M Burner Services Ltd. were related for the purposes of the *Income Tax Act* as a result of the provisions of paragraph 251(2)(b) of that Act and are therefore deemed to not be dealing with each other at arm's length under paragraph 251(1)(a) of the *Income Tax Act*. As a result, the issue in this case is whether the decision of the Minister of National Revenue that Helen Williams and B & M Burner Services Ltd. would not have entered into a substantially similar contract of employment during the period in question if they would have been dealing with each other at arm's length, is reasonable.

[5] In the case of *Porter v. M.N.R.* 2005 TCC 364, Justice Campbell of this Court reviewed the decisions of this Court and the Federal Court of Appeal in relation to the role of the Tax Court in appeals of this nature. In paragraph 13 of this decision Justice Campbell stated as follows:

In summary, the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, consider all of the facts in evidence before the Court, including any new facts, and to then assess whether the Minister's decision still seems "reasonable" in light of findings of fact by this Court. This assessment should accord a certain measure of deference to the Minister.

[6] B & M Burner Services Ltd. carries on a small oil furnace service business from its premises located near Sydney Nova Scotia. The business was a seasonal business operating from the late fall to the late spring, depending on the weather. Helen Williams was employed as a secretary and her duties for the company included answering the phone, booking appointments, dispatching the workers for service calls, typing and filing. Her usual hours of work were from 8:00 a.m. to 5:00 p.m. each day but she would also deal with calls after the normal working hours from customers who were having problems with their furnaces. These calls could be at 2:00 or 3:00 a.m.

[7] The Respondent admitted in the Reply that Helen Williams had been "employed seasonally by B & M Burner Services Ltd. ("Payor") as a secretary for approximately 23 years". The Appeals Officer for the Canada Revenue Agency testified that in making the determination that the terms and conditions of the employment of Helen Williams by the Payor were not substantially the same as would have been reached in an arm's length relationship, the Appeals Officer compared the duties of Helen Williams with those of Alura Williams and the amount that each was paid. Alura Williams was the daughter-in-law of Helen Williams.

[8] Alura Williams was also employed as a secretary. Helen Williams testified that her duties and Alura Williams duties were substantially the same. They would both answer the phone and deal with customers who would come to the office. They would both take payments. Helen Williams would do more scheduling of appointments but Alura Williams was starting to schedule appointments. Alura Williams would do invoices on the computer and Helen Williams would type invoices that were done manually. Helen Williams would deal with customer problems after the regular working hours but Alura Williams did not deal with these.

[9] Helen Williams was paid \$12 per hour and Alura Williams was paid \$11 per hour. The Appeals Officer testified that she based her decision on the fact that, based on the responses that she had received, Alura Williams appeared to have more responsibilities but was paid less than Helen Williams was paid and, therefore, that Helen Williams was paid more than an arm's length employee would be paid in Helen Williams' position. The Appeals Officer testified that she did not take into account the relative seniority or experience of these two workers. Helen Williams had been working with the Payor on a seasonal basis since 1983 and Alura Williams started work in 2003. In 2006, this would have meant that the difference in the years of experience would have been 23 years of experience for Helen Williams and 3 years of experience for Alura Williams. In my opinion this is a significant factor that should have been taken into account in analyzing the different amounts paid to these two workers. In an arm's length situation it would be reasonable to expect that an employee with 23 years of experience would be paid more than an employee with three years of experience.

[10] It is also not clear that Alura Williams had more responsibilities than Helen Williams. As noted above, although Alura Williams would enter the invoices in the computer (which Helen Williams did not do), Helen Williams

would type some manually. As well Helen Williams stated that Glenn Williams would enter some invoices in the computer. Therefore Alura Williams was not the only person who was entering invoices in the computer. As well, Helen Williams did more of the scheduling of appointments than Alura Williams did and Helen Williams also dealt with customer problems after normal business hours. Alura Williams did not deal with customer problems after normal business hours.

[11] Helen Williams testified that the Payor had other arm's length office staff over the years who performed substantially similar duties to those performed by Helen Williams and these individuals were paid more than she was being paid.

[12] Based on the duties of Helen Williams and Alura Williams as described by Helen Williams and based on the number of years of experience of each employee, in my opinion, it is not reasonable to conclude that Helen Williams was overpaid.

[13] Counsel for the Respondent had also argued that there were delays by Helen Williams in cashing her pay cheques. Helen Williams was issued a total of 12 pay cheques for the period in question. In each case the cheque was issued less than one week following the week for which the payment was being made. Eight of the 12 cheques were cashed within 4 days of the date that the cheques were issued. The cheques dated February 3, 9, and 15, 2006 were not cashed until March 20, 30 and May 2, 2006. It appears that the cheque dated February 21, 2006 was not cashed.

[14] Helen Williams testified that this was an exceptionally mild winter which had a negative impact on the business of the Payor. If the weather is mild, there is less demand for servicing furnaces. The bank statements for the Payor showed that the Payor was struggling financially. When Helen Williams was hired in the fall of 2005, the Payor would not know that the winter would be mild and that the business would suffer. Counsel for the Respondent argued that the delays in cashing the cheques (and not cashing the last one) support a reasonable conclusion that an arm's length employee would not have entered this arrangement.

[15] Counsel for the Respondent referred to the case of *Kadziolka v. R.*, [1999] 2 C.T.C. 194 (FCA). However in that case the delay in cashing the cheques was several months and was only one of several factors considered by the Court including the fact that the employee in that case was paid twice the amount of the best paid of the other employees. That was not the case here.

[16] In the case of *Camilleri v. Minister of National Revenue*, 2005 TCC 602, the delays were described as follows:

6 In my view, the substantial delays in the payment of the remuneration is a sufficient reason to justify a determination that Ms. Camilleri's terms of employment were not substantially similar to arm's length terms. The Reply of the Minister summarizes the date that cheques were issued for the pay periods. It shows a consistent pattern of delay in issuing the cheques. Some of the delays were a short period of time but in many cases the delay was for a period of months. For example, the pay cheques for the periods from February to July, 2003 were not issued until August and the pay cheques for the periods August to December, 2003 were not issued until December. The delays continued on throughout the relevant period although the delays were shorter as time went on.

7 Ms. Camilleri explained the delays by saying that there were cash flow issues with the business and that she had difficulties with the accounting system which her father did not have time to attend to with his busy schedule. In my view, these are not circumstances under which arm's length employees would generally work. Ms. Camilleri introduced evidence to show that other employees suffered delays in pay due to cash shortages. However these delays were not regular and did not last for lengthy periods. In my view, the delays in Ms. Camilleri's case go beyond what I believe most employees would tolerate.

[17] In the *Camilleri* case there was evidence that other employees had suffered delays in receiving their pay because of cash shortages. However the rather lengthy delays of several months for Ms. Camilleri were longer than would be expected in an arm's length relationship.

[18] If the employer is experiencing financial difficulties and is unable to meet its payroll, then it does not matter whether the employee is arm's length or non-arm's length – if the employer cannot pay the employee, the employee will have to wait to be paid. In areas of high unemployment there are limited options for arm's length employees to seek alternate employment and therefore in my opinion, it would be reasonable to expect that an arm's length employee who had worked on a seasonal basis for an employer for 23 years would be willing to wait a few weeks before cashing his or her paycheque when that employer is experiencing financial problems due to circumstances beyond their control and the employee is in an area of high unemployment. Cape Breton has unfortunately been an area of high unemployment for several years.

[19] The Payor could not control the weather and would not know when Helen Williams was hired in the fall of 2005 that the winter would be a mild

winter. In this case it is only four cheques for which there was a delay of more than four days and three of these were cashed within three months. The Respondent stated that the last cheque dated February 21, 2006 was not cashed and Helen Williams could not explain why it was not cashed. It should be noted that Helen Williams suffered a nervous breakdown in the summer of 2006 and cashing this cheque for \$336.77 was probably not of significant concern to her at that time.

[20] As a result I am unable to conclude that the delays in cashing cheques were sufficient to justify a finding that Helen Williams and the Payor would not have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length.

[21] The Appeals Officer had also indicated that a factor that had been taken into account was the number of weeks that Helen Williams worked versus the number of weeks that she had to work in order to claim employment insurance benefits. The evidence indicated that this operation was only a seasonal operation and that she was laid off when it became evident that because of the mild winter, business was slower than usual. There was nothing to indicate that an arm's length person would have worked for any fewer weeks in this situation.

[22] As a result, I am unable to conclude that the Minister's decision still seems "reasonable" in light of the evidence that was presented and therefore the appeal of Helen Williams under the *Act* is allowed.

Signed at Halifax, Nova Scotia, this 3rd day of May 2007.

"Wyman W. Webb"

Webb J.

CITATION: 2007TCC265
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STYLE OF CAUSE: HELEN WILLIAMS v. M.N.R.
PLACE OF HEARING: Sydney, Nova Scotia
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APPEARANCES:

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