Docket: 2007-2479(EI)

BETWEEN:

BRENDA REGULAR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

REGULAR ENTERPRISES LIMITED,

Intervener.

Appeal heard on October 30, 2007,
at St. John's, Newfoundland and Labrador
Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Keri-Lynn Power
Counsel for the Respondent:	Devon Peavoy
Counsel for the Intervener:	Keri-Lynn Power

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 June 19, 2006 to September 22, 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 Ottawa, Ontario, this 8th day of November 2007.

"Wyman W. Webb"

Webb J.

Citation: 2007TCC664
Date: 20071108
Docket: 2007-2479(EI)

BETWEEN:

BRENDA REGULAR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

REGULAR ENTERPRISES LIMITED,

Intervener.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the decision of the Respondent that the employment of Brenda Regular by Regular Enterprises Limited ("Company") during the period from June 19, 2006 to September 22, 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 the Company were held by Robert Regular (who held a controlling interest) and two of his brothers, Terry Regular and Allister Regular. The Appellant is married to Terry Regular. The Appellant and the Company were therefore related for the purpose of the *Income Tax Act* as a result of the provisions of paragraph 251(2)(b) of that *Act* and are 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 Brenda Regular and the Company 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] The Company carried on a logging and trucking operation in rural Newfoundland in or near Hampden, Newfoundland and Labrador. The logging operations for the Company would generally start around the first of June and continue until the first or middle of October. The starting and ending dates for this

operation were dependant upon the weather. The Company had only one customer for its logs and that was the pulp mill in Corner Brook.

[7] The Company also owned two trucks. The trucking operation would generally start around the last of March and run until December of each year. There were two truck drivers. The busy time of the year for the Company was when both operations were being carried on with the logging operation requiring more of the Appellant's time.

[8] The Appellant was the office manager responsible for the office administration. She would answer telephones and respond to e-mails or any other correspondence the Company had received. She was also responsible for looking after the accounts payable, accounts receivable, payroll, HST returns and other bookkeeping activities. She would use the accounting software "Simply Accounting" to prepare financial statements from time to time. The year-end financial statements and income tax returns were prepared by an external accountant.

[9] The one customer for the logging operation would automatically send payment to the Company based on the logs that were delivered to the mill in Corner Brook. The Company had 12 loggers that were working in the woods.

[10] The Appellant would work 40 hours per week during the busy season and she was paid $466 per week. No issue was raised with respect to the amount that was paid to the Appellant for the time that she was on the payroll.

[11] The Appellant did have some flexibility with respect to when she would work. Sometimes she would work in the evenings or on weekends but in general it was 40 hours per week.

[12] The office for the Company was in the home of the Appellant. No direct compensation was paid to the Appellant for the use of the office in her home. The Appellant did testify that she felt that she was being indirectly compensated for the use of the home as the Company was paying for the insurance on her vehicle.

[13] The Respondent relied upon three main factors in determining that the Appellant and the Company would not have entered into substantially similar terms of employment if they would have been dealing with each other at arm's length. These factors are as follows:

1. the work that was performed by the Appellant for the Company during the period while she was not on the payroll and hence was not being paid by the Company;

2. the lack of compensation for the use of the office in the home;

3. the circumstances related to the termination of the employment of the Appellant (including the fact that she was terminated after working the minimum number of weeks to qualify for the maximum employment insurance benefits based on her rate of pay).

[14] The evidence related to the work that Brenda Regular did following the termination of her employment (which she did in each year after she was laid off) was that these were minimal bookkeeping activities that were done mainly to ensure that the Company complied with its statutory obligations in relation to payroll and HST remittances. The Appellant indicated that these activities would take approximately one hour per week. Since she was paid $466 per week when she was on the payroll, this would mean that her hourly rate of pay would be $11.65. Therefore for the one hour that she did some work for the Company following the termination of her employment she would only be entitled to $11.65. Assuming that she worked this one hour per week for each of the other 38 weeks in the year following her employment for 14 weeks, she would only have been entitled to receive $442.70, if she would have been paid separately for this. Since she was paid $6,524 for the 14 weeks that she was on the payroll, this extra amount would be less than seven percent of that total.

[15] In interpreting the phrase “all or substantially all” for the purposes of the *Income Tax Act*, the Canada Revenue Agency (“CRA”) has consistently maintained the position that this phrase means 90% or more. This is reflected in several Technical Interpretations of the CRA and in paragraphs 18 and 24 of Interpretation Bulletin IT-151R5 and paragraph 1 of Interpretation Bulletin IT-507R. When the Minister is evaluating whether the terms and conditions of an employment arrangement are “substantially similar” to those that would have been entered into if the parties had been dealing at arm’s length, it seems to me that the Minister should not adopt a more restrictive meaning of “substantially” than the CRA has adopted in interpreting “all or substantially all”.

[16] The other important circumstances in this case are, in my opinion, the nature of the operation of the Company and the location of the operation of the Company. This is a small family-owned business operating in rural Newfoundland and

Labrador. There would not be a lot of other job opportunities for the Appellant in or near Hampden nor presumably would there be a lot of opportunities for the Company to find someone else to do these activities for it. To do activities that would only take one hour per week, does not seem so unreasonable that an arm's length person would not also do the same for an arm's length employer in an area where employment opportunities are very limited.

[17] In the case of *Samson v. Minister of National Revenue*, 2005 TCC 383, Little J. dealt with a situation in which an individual performed services while they were not on the payroll and determined that this was a significant factor in determining whether or not the individual was engaged in insurable employment. In particular Little J. made the following comments in paragraph 22:

> **22** When I apply the approach outlined above to the facts before me I am convinced that the primary evidence that justifies the position adopted by the Minister is the extensive work carried out by the Appellant for the Payor while she was not on the Payor's payroll. As is noted above during those days when the Appellant was not on the Payor's payroll she made a total of 135 separate bank deposits in 1996, 1997 and 1998. In addition the Appellant prepared and signed a total of 623 cheques for the Payor in 1996, 1997 and 1998 while she was not on the Payor's payroll. Finally, the Appellant signed a number of invoices for the Payor while she was not on the Payor's payroll. The extensive activities performed by the Appellant for the Payor while she was not on the payroll are clear evidence that a person who was at arm's length with the Payor would not have performed activities of this magnitude and nature. I have therefore concluded that the Minister was correct when he made his decision.

[18] The activities in the *Samson* case were much more substantial than in the present case. As noted, the activities performed by the Appellant in the present case while she was not on the payroll would only take about one hour per week. Assuming this continued for the entire period when she was not on the payroll and assuming it was 38 weeks before she was put back on the payroll, this would only be 38 hours worth of work spread out over a 38 week period in a rural area where employment opportunities are limited and there would be limited opportunities for the Company to find someone else to do the small amount of work that had to be done. If she would have been paid at the same hourly rate for the few additional tasks that she performed while she was not on the payroll, she would have only been entitled to additional pay of less than seven percent of her total pay while she was on the payroll. Based on CRA's interpretation of "all or substantially all", this additional entitlement of the Appellant for the extra work performed when she was not on the payroll would not affect a determination of whether she had received all or substantially all of the amount to which she was entitled for the year; and

therefore, is not significant in determining whether the terms of her employment, in relation to the amount that she was paid for the work that she performed throughout the entire year were substantially similar to those that would have been agreed upon if she were dealing at arm's length with the Company.

[19] With respect to the issue of the compensation for the use of the office in the home, it seems to me that there now may be many situations, with modern means of communication, where arm's length employees may choose to work from their own home without receiving compensation from their employer for the use of their home. Since the Company only had one customer in relation to the logging operation there was no indication that the office in the home was used to meet any customers or for any activity other than the bookkeeping activities. It does not seem unreasonable that the Appellant could work from her home without being directly compensated whether she was dealing at arm's length or non-arm's length with her employer.

[20] The termination of the Appellant after 14 weeks of work was also a significant factor for the Respondent in finding that the terms and conditions were not the same as would have been reached in an arm's length relationship. In particular the Respondent assumed that the Appellant was laid off before the end of the busy season while the other person who was hired as a bookkeeper (a spouse of one of the other shareholders) was kept on as an employee. However both the Appellant and Robert Regular testified that the Company was having a difficult time in 2006. The Company was experiencing a lot of problems with its equipment and Robert Regular testified that he had to inject further funds into the Company. It therefore appears that the termination of the Appellant was based on financial needs.

[21] The appeals officer testified that she based her information on the review of the HST returns that had been filed for the Company. However the HST returns can only identify the sales and do not accurately disclose the expenses of the Company. Therefore it is not possible to tell from an HST return whether the Company is making a profit or losing money. In particular it should be noted that wages are not subject to HST and therefore no input tax credit would arise in relation to wages that have been paid. Therefore analyzing the input tax credits would not give an accurate indication of all of the expenses that the Company was incurring. As well, the HST returns were filed quarterly and therefore the total revenue would cover a period of three months. Again, it cannot be determined based on HST returns whether the revenue was all earned in the first month, second month, or third month or equally in all three months, or otherwise.

[22] As well, the Appellant testified that in other years she would have worked for longer periods of time when things were going better for the Company.

[23] Counsel for the Respondent also noted that the Company had employed two individuals who were identified as bookkeepers. However the evidence indicated that their duties did not exactly overlap and bookkeepers may not have been the correct terminology. In particular Mae Regular, the other "bookkeeper" would help to deliver parts and run errands for the Company.

[24] 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 under the *Act* 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 Ottawa, Ontario, this 8th day of November 2007.

"Wyman W. Webb"

Webb J.

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APPEARANCES:

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Counsel for the Respondent:	Devon Peavoy
Counsel for the Intervener:	Keri-Lynn Power

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