Docket: 2007-643(EI)

BETWEEN:

KAREN LENOVER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with the appeal of *Margaret VanderEnde* (2007-711(EI)) on August 30, 2007 at Windsor, Ontario

Before: The Honourable Justice Patrick Boyle

Appearances:

| | |
|---|---|
| Agent for the Appellant: | Daniel Lenover |
| Counsel for the Respondent: | Frédéric Morand |

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**JUDGMENT**

The appeal is allowed and the Minister's decision is varied to reflect that the Appellant was not in insurable employment.

Signed at Ottawa, Canada, this 5th day of October 2007.

"Patrick Boyle"

Boyle, J.

Docket: 2007-711(EI)

BETWEEN:

MARGARET VANDERENDE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appearances:

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| Agent for the Appellant: | Harold VanderEnde |
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Signed at Ottawa, Canada, this 5th day of October 2007.

"Patrick Boyle"

Boyle, J.

Citation: 2007TCC594
Date: 20071005
Dockets: 2007-643(EI)
2007-711(EI)

BETWEEN:

KAREN LENOVER,
MARGARET VANDERENDE,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

**REASONS FOR JUDGMENT**

Boyle, J.

[1] The Appellants in these proceedings, Mrs. Lenover and Mrs. VanderEnde, are appealing the Minister's determination that they are in insurable employment for purposes of the *Employment Insurance Act*. It is their position they were not in insurable employment because either (i) they dealt at arm's length with their employer Handy Bros. Climatecare Inc., or (ii) if they did not deal at arm's length with their employer, their employment arrangements were also not on arm's length terms. These two cases were, by agreement of the parties, heard together on common evidence.

Standard of review

[2] The standard of review in such a case is whether the Minister's conclusion was properly arrived at and is reasonable in light of the evidence before her as supplemented before the Court. See, for example, the decisions of the Federal Court

of Appeal in *Légaré v. Canada*, [1999] F.C.J. Nº878 and in *Pérusse v. Canada*, [2000] F.C.J. Nº310 as well as this Court's 2005 decision in *Birkland v. Canada*, [2005] F.C.J. Nº195.

Facts

[3] Handy Bros. Climatecare Inc. ("Climatecare"), the Appellants' employer, is a heating and cooling business run by two families, the Lenovers and the VanderEndes. Each family indirectly owns 50% of the company.

[4] At the relevant time, the shares of Climatecare were wholly-owned by Handy Bros. Ltd.. Mr. and Mrs. Lenover owned 50% of the shares of Handy Bros. Ltd. Mr. Lenover owned 26% and Mrs. Lenover owned 24%. The other 50% of Handy Bros. Ltd. was held by the VanderEndes. Initially, they were owned as to 26% by Mr. VanderEnde and as to 24% by Mrs. VanderEnde. Part way through 2005, the VanderEndes reorganized their shareholdings and their 50% of Handy Bros. was thereafter owned by VanderEnde Investments Inc. which was in turn owned as to 52% by Mr. VanderEnde and 48% by Mrs. VanderEnde.

[5] Each of the VanderEndes and the Lenovers were directors of Climatecare and officers of Climatecare. Mr. Lenover was the President and his principal day-to-day responsibility was for generating residential sales. Mrs. Lenover held the office of Treasurer and her day-to-day responsibility was primarily that of Payroll and Human Resources manager. She was also responsible for Marketing and Advertising as well as Credit and Collections. Mr. VanderEnde was the Secretary of the company and his primary day-to-day responsibility was for securing commercial sales. Mrs. VanderEnde held the office of Vice-President and her primary day-to-day responsibility was for accounts receivable and for warranty administration (i.e.: ensuring they were paid by manufacturers for repairs done on units still under warranty).

[6] Climatecare employed almost 30 people in its business, including the four owners. All of the employees other than the four owners were paid on an hourly basis, that is, their hours were recorded as was their sick time and vacation time. In contrast, Mrs. VenderEnde and Mrs. Lenover were salaried employees whose hours were not recorded, whose sick time was not recorded and who were not paid overtime.

[7] The Minister is not challenging whether the Appellants really worked in the business. Clearly they did and they worked very hard in significant and responsible positions. The basis of the Minister's challenge is that it would have been reasonable for Climatecare to employ arm's length people on a similar salaried basis to do their work. The Minister did not take the same position with respect to the Appellants' husbands and this is what is of concern to the four owners and their company.

[8] The Appellants did testify and provide corroborating evidence of their base salaries. The Minister's assumption and the evidence is that they were also in receipt of employment bonuses. However, neither of the Appellants nor the Crown entered those amounts in evidence. Given that the amount of remuneration for the employment is one of the specifically enumerated considerations for purposes of paragraph 5(3)(*b*) of the *EI Act* in considering whether the terms of employment were arm's length, this makes it difficult if not impossible for me to conclude whether or not the Minister's determination on that point was reasonable. This may prove problematic if not fatal to whoever has the onus of satisfying me that the Minister's determination was appropriate or inappropriate as the case may be.

[9] All four owners described the Climatecare business and corporation being run in an entirely consensual manner. Each of the four owners managed their particular sphere of responsibility on a day-to-day basis. Whenever any differences arose on any bigger picture aspect of the business or the corporation, consensus was actively developed and a decision supported by all four was made.

[10] The evidence is that within the office and among the staff Mrs. VanderEnde and Mrs. Lenover were regarded by the other employees as owners involved in key decision-making areas. At the very least, they certainly had management and supervisory roles within the organization that none of the other employees fulfilled.

[11] Each of the four owners put their personal financial covenants and their personal assets at risk in order for Climatecare to qualify for surety bonds needed in certain of its commercial contracts. There was also evidence that they each supported the CIBC bank lines personally.

The Minister's assumptions

[12] Were the Minister's assumptions in fact correct? Daniel Lenover, Climatecare's President, testified that the assumptions pleaded by the Minister in Mrs. Lenover's case were generally correct except as regards to:

Paragraph 10(l): Mrs. Lenover's duties were not what are set out by the Minister in the Reply but are as generally described above;

Paragraph 10(o): the Appellants each worked two-and-a-half days a week not two days;

Paragraph 10(q): the Appellants' hours were not recorded by the employer;

Paragraph 10(t): no vacation pay was paid or received nor were vacations or vacation entitlements recorded;

Paragraph 10(v): the Payer did not provide dental, eye prescription or like benefit plans to the Appellants. Neither Appellant's coverage was as employee but as the spouse of a covered employee; and

Paragraph 10(x): the Appellants were not supervised by the Payer's managers. They were the Payer's managers and each of the four owners managed themselves within their own spheres of responsibility.

[13] The corresponding corrections to the Minister's assumptions came out in evidence in Mrs. VanderEnde's case as well.

[14] In the VanderEnde Reply, the Minister made an additional assumption:

> "Paragraph 8(j): the VanderEndes and the Lenovers controlled the day-to-day operations of the business and made the major business decisions for the business."

[15] Given this assumption, which was entirely supported by the evidence, it is difficult to see how the Minister could reasonably have reached different conclusions as regards to the wives than as regards to the husbands (except as regards to Mr. VanderEnde for the latter half of the year following the VanderEnde Investments reorganisation). This assumption is inconsistent with the Minister's assumptions in 10(x) and 8(z) and the Crown's position that the husbands supervised the wives and the wives' work.

[16] The Minister relied significantly in argument on the Appellants' answers to Question 10 in the Non Arm's Length Worker's Questionnaire (Exhibit A-4). This question asks "Who supervised you?" Mrs. VanderEnde wrote "Management". Mrs. Lenover wrote "Dan Lenover and Harold VenderEnde". In fact, the fuller picture which emerged clearly at trial was as described above.

[17] I should add that notwithstanding the Appellants' Notice of Appeal, the Appellants conceded at trial that they were employed by Climatecare under an oral contract of service. This was the only reasonable interpretation of the evidence in any event.

## Legislation

[18] The relevant provisions of the *EI Act* are as follows:

> 5.(1) Subject to subsection (2), insurable employment is:
>
> > (*a*) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
>
> 5.(2) Insurable employment does not include:
>
> > (*b*) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
>
> […]
>
> > (*i*) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5.(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.

[19] The definition of insurable employment for purposes of the *EI Act* is set out in section 5. Paragraph 5(2)(*i*) excludes employment if the employer and the employee are not dealing with each other at arm's length. Paragraph 5(3)*(a)* says arm's length is to be determined in accordance with the *Income Tax Act*.

[20] The definition of arm's length in section 251 of the *Income Tax Act* provides that (i) related persons are deemed not to deal at arm's length and (ii) it is a question of fact whether or not non-related persons deal at arm's length.

[21] Paragraph 5(3)(*b*) of the *EI Act* adds a further deeming rule to the meaning of arm's length in addition to its meaning and the deeming rules in the *Income Tax Act*. By its opening words, the paragraph 5(3)(*b*) rule only applies if the employer is related to the employee within the meaning of the *Income Tax Act*. If an employee related to the employer does not deal at arm's length with the employer for purposes of the *Income Tax Act* (which will always be the case given the definitions of arm's length and related), they will nonetheless be deemed to deal with each other at arm's length for EI purposes if the Minister 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. Paragraph 5(2)(*i*) looks at whether the *relationship* of the employer and the employee is such that they are not dealing with each other at arm's length. In contrast, paragraph 5(3)(*b*) looks at the *terms of employment* to determine if those employment terms reflect an arm's length arrangement notwithstanding the non-arm's length relationship.

[22] I need also refer to paragraph 5(2)(*b*) of the *EI Act*, since that is relevant to Mr. VanderEnde, even though his EI matters are not before the Court. Paragraph 5(2)(*b*) excludes from insurable employment the employment of a person who controls more than 40% of the voting shares of the corporation. While this section

had used to look to the shares controlled by the person and his or her spouse, for the year in question it only looks at the employee's holdings.

Analysis and Conclusion

[23] In *Canada (Canada Employment and Immigration Commission) v. Gagnon*, [1988] 2 S.C.R. 29, the Supreme Court of Canada (at page 47) described the language of the employment insurance legislation as not being a model of clarity. Those who have to deal with it regularly might consider that to have been a judicious understatement. The dispute in this case arises because the definition of insurable employment incorporates the arm's length and related concepts and definitions from the *Income Tax Act*. The interpretation of the concept of factual non-arm's length for purposes of the *Income Tax Act* is normally made in an income tax setting. It is certainly not the norm to consider minority shareholders, even those holding approximately 25%, to not deal with the corporation at arm's length for income tax purposes. See for example CRA's Interpretation Bulletin IT-419R2 "Meaning of Arm's Length" at paragraph 32.

Was the Appellants' relationship with Climatecare arm's length?

[24] I had anticipated that the Crown's position would be that the employer Climatecare and each of Mrs. VanderEnde and Mrs. Lenover were factually arm's length and that their employment was therefore not excluded employment described in paragraph 5(2)(*i*). That appeared to me to have been the basis of the Minister's decision on the Appellants' administrative appeal of the CRA ruling. It reads "it has been determined that Karen Lenover and Handy Bros. Climatecare Inc. were dealing with each other at arm's length, as a matter of fact and, therefore, Karen Lenover was not excluded from insurable employment." Mrs. VanderEnde's determination letter is similar. However, the Crown's position is that the wives did not deal at arm's length with Climatecare for purposes of the *Income Tax Act*. The Crown's position is that the Minister's reason in her decision letters, although ambiguous, was intended to communicate that the wives were dealing at arm's length with Climatecare only as a result of the application of the paragraph 5(3)*(b)* deeming provision. The Minister's clarified position is consistent with paragraph 5 of the Lenover Reply and paragraph 3 of the VanderEnde Reply. That is, it is the Minister's position that each of Mrs. Lenover and Mrs. VanderEnde did not deal at arm's length with Climatecare for purposes of paragraphs 5(2)*(i)* and 5(3)*(a)*. If so, they are non-arm's length for EI purposes unless paragraph 5(3)*(b)* of the employment insurance legislation deems them to be arm's length nonetheless.

[25] Was the Minister's determination that each of Mrs. Lenover and Mrs. VanderEnde did not deal at arm's length with Climatecare for purposes of the *Income Tax Act* properly arrived at and reasonable? There is no evidence to conclude it was not properly arrived at. While it is not obvious that a significant non-controlling shareholder of a corporation will not be dealing at arm's length with the corporation for the purposes of the *Income Tax Act*, it was a determination reasonably open to the Minister. Whether or not this Court would have reached the same conclusion is not the test. I note that the Minister reached a similar conclusion on this point for the husbands as well, notwithstanding that she went on to conclude that the paragraph 5(3)*(b)* deeming rule did not apply to deem the husbands to be arm's length for EI purposes.

Were the Appellants' related to Climatecare?

[26] Having concluded that the Minister's initial determination that Mrs. Lenover and Mrs. VanderEnde did not deal at arm's length with Climatecare for *Income Tax Act* purposes was a reasonable determination properly arrived at, the next question is whether the Minister's determination that the paragraph 5(3)*(b)* deeming rule nonetheless then deemed the wives to be dealing at arm's length with Climatecare for EI purposes was also properly arrived at and reasonable.

[27] Paragraph 5(3)(*b*) can only apply by its wording if Mrs. Lenover and Mrs. VanderEnde are each *related* to their employer Climatecare for purposes of the *Income Tax Act*. The Crown argued that Climatecare and each of the Appellants were related to each other by virtue of subparagraph 251(2)(*b*)(ii) of the *Income Tax Act* dealing with related groups that control a corporation. Neither the VanderEndes nor the Lenovers controlled the corporation as each couple only had a 50% interest. The VanderEndes and the Lenovers were not related to each other. The definition of related group in subsection 251(4) of the *Income Tax Act* requires that each member of the group be related to every other member of the group. This cannot be met and the Appellants are therefore successful in their appeals.

[28] At the hearing, I agreed to the Crown's request for an additional 30 days to make written submissions in support of its position that each of Mrs. VanderEnde and Mrs. Lenover were related persons and therefore paragraph 5(3)*(b)* of the *Employment Insurance Act* could apply. In those written submissions, the Crown conceded that paragraph 5(3)*(b)* was not applicable to these appeals. To the extent the Crown's written submissions go beyond the issue of related for purposes of paragraph 5(3)*(b)*, and seek to argue that the Appellants were arm's length for

purposes of paragraph 5(2)*(i)*, I am not considering them. The written submissions were "to be limited to the related issue". This limitation was chosen by the Crown when offered the chance to make only written submissions on paragraph 5(2)*(i)* and paragraph 5(3)*(b)* in their entirety or to proceed with oral argument except only as regards the question of being related for purposes of paragraph 5(3)*(b)*. It would be procedurally unfair in the case of self-represented Appellants to allow the Crown to make written submissions contrary to the extensive substantive argument made by the Crown at the hearing, contrary to concessions expressly made at the hearing and, according to the Crown, contrary to the Minister's assumptions and the basis for her decision.

Is the Appellants' employment on arm's length terms?

[29] Since neither of the Appellants is related to their employer Climatecare, it is not necessary to review the terms of their employment to see if their employment is nonetheless on arm's length terms. The provision in paragraph 5(3)*(b)* is not applicable to all non-arm's length employees, only to employees who are non-arm's length because they are related to the employer. It does not by its terms, and its interaction with the definitions in the *Income Tax Act*, extend to employees who are found to be factually non-arm's length with the employer. The reason for this is not apparent. However, it is clear that the Minister's decision that the two wives are in insurable employment was not properly arrived at since on a plain reading of paragraph 5(3)*(b)* it cannot apply.

[30] If it were relevant, I am satisfied that, had the Appellants been related to Climatecare, a determination that the terms of their employment were arm's length was probably not unreasonable. The employment of arm's length managers and supervisors on a salaried basis with no payment for overtime and no formal recording of hours is not at all uncommon. This is discussed in the *Lacroix c. Canada*, [2007] A.C.I. Nº87 decision of Mr. Justice Archambault with which I concur and consider apposite here. My one qualification in the case before me is that I do not know the amount of the bonuses which the Minister was required to consider.

[31] On the issue of whether their employment was on arm's length terms, the Appellants relied heavily on the fact that each of them had put their personal financial assets and personal assets on the line for the company for bonding and banking purposes. In their submissions, this distinguished them from all of the other employees (other than their husbands). I do not believe that, at least in the circumstances of this case, those actions or considerations are relevant to a review of the terms of their employment for purposes of paragraph 5(3)*(b)*. The financial

support they gave the company was given in their capacity as shareholder and not as employee. That is why the other employees did not give it. This means that this contribution may be relevant to the determination of whether the relationship between the company and the Appellants was arm's length but is not particularly helpful in the consideration of whether the terms of their employment were arm's length.

The Appellants' Husbands:

[32] The Appellants questioned how it could have been reasonable for the Minister to determine that they were in insurable employment when their husbands were not, given that each of the four of them was an indirect minority shareholder. The Minister's decision on this point may have been reasonable in the case of the Appellants even if it was inconsistent with her decision regarding the husbands since they are not appellants.

[33] Once the VanderEndes put VanderEnde Investments Inc. in place, Mr. VanderEnde's employment was excluded by virtue of paragraph 5(2)(*b*) since he controlled more than 40% of the voting shares of the corporation. Use of the verb control in this exception is not defined by reference to the concept of control in the *Income Tax Act* nor otherwise defined in the employment insurance legislation. In contrast to the *Income Tax Act* which looks to control of corporations, this exception looks to control of the voting shares of the corporation. Prior to the amendment removing the reference to the person's spouse, this section would also have excepted Mrs. VanderEnde's employment. See for example *Dupuis v. M.N.R*, [1988] 90 N.R. 399 (F.C.A.). Given that amendment, I do not believe it is open to interpret the concept of controlling voting shares of a corporation as extending to controlling together with one's spouse more than 40% of the shares.

[34] In the early part of 2005, prior to the VanderEnde Investments reorganization, and throughout 2005 in the case of Mr. Lenover, Mrs. Lenover and Mrs. VanderEnde believe they were in a similar position in their relationship and employment with the company as their husbands. It was the Crown's explanation that the key distinction between the husbands and the wives is that the wives were supervised by the husbands. This was largely in reliance on the answer to Question 10 of the Non Arm's Length Worker's Questionnaire dealing with supervision. As detailed above, the evidence at trial was more complete and expansive. The Crown also argued that the husbands were the directing minds and principal decision-makers of the overall business except as regard those specific aspects delegated to the wives as in the areas of payroll, human resources, accounts receivable, etc. He relied also on paragraph (z)

of the assumptions in Mrs. VanderEnde's case, which is similar to assumption (x) in Mrs. Lenover's case, that "the Appellant was supervised by the Payer's managers." He clarified that the reference to the Payer's managers was to the husbands. That explanation, assumption, and position at trial are not supported by the evidence and appear completely at odds with assumption (j) in the VanderEnde Reply that "the VanderEndes and the Lenovers control the day-to-day operations of the business and made the major business decisions for the business."

[35] The appeals of each of the Appellants, Mrs. Lenover and Mrs. VanderEnde, are allowed and Minister's decision that the Appellants were in insurable employment with their employer is varied to reflect that they were not in insurable employment.

Signed at Ottawa, Canada, this 5th day of October 2007.

"Patrick Boyle"

Boyle, J.

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| DATE OF JUDGMENT: | October 5, 2007 |

APPEARANCES:

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| Agents for the Appellants: | Daniel Lenover, Harold VanderEnde |
| Counsel for the Respondent: | Frédéric Morand |

COUNSEL OF RECORD:

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| For the Appellants: | |
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