Dockets: 2008-197(EI)

BETWEEN:

MICHELLE M. RAMBEAU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 30, 2008, at Dieppe (Moncton), New Brunswick
Before: The Honourable Justice Wyman W. Webb

Appearances:

Agent for the Appellant:	Lloyd J. A. Petrie
Counsel for the Respondent:	Lindsay D. 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 April 30, 2007 to July 21, 2007 is dismissed.

Signed at Ottawa, Ontario, this 18th day of June 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC375
Date: 20080618
Dockets: 2008-197(EI)

BETWEEN:

MICHELLE M. RAMBEAU,

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 the Appellant, Michelle M. Rambeau, by her spouse, George J. Rambeau, during the period from April 30, 2007 to July 21, 2007 was not insurable employment for purposes of the *Employment Insurance Act* ("*Act*") was reasonable. The only provisions of the *Act* relied on by the Respondent are paragraphs 5(2)(i) and 5(3)(b) of the *Act*.

[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] Since the employer was (and still is) the Appellant's spouse, the Appellant and her employer were related for the purposes of the *Income Tax Act* as a result of the provisions of paragraph 251(2)(a) of the *Income Tax 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 the Appellant and her spouse 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] George J. Rambeau worked as a lobster fisherman. For 18 years prior to 2007, the Appellant worked as a deckhand on her spouse's boat. However in 2007, she had back problems and found that the work as a deckhand was too hard and therefore she was no longer able to continue to do this work.

[7] In 2007, the Appellant's spouse hired her to perform various bookkeeping and housekeeping duties. The Respondent agrees that the Appellant was employed by George J. Rambeau in 2007 but disagrees that the employment was insurable employment for the purposes of the *Act*.

[8] The estimate of the Appellant was that she spent 40% of her working time on the bookkeeping work and 60% of her working time doing the housekeeping work. She was paid $400 per week based on an average of 48 hours per week.

[9] The Appellant's estimate of the time she spent doing the bookkeeping work was that she would spend about 10 minutes working on the Department of Fisheries and Oceans ("DFO") logbook, about an hour to review the invoices and do the accounting entries, about one hour to one and one-half hours every Thursday to do the payroll and about two hours once a week to do the banking.

[10] Assuming that the Appellant worked on the DFO logbook for 10 minutes each day, and that she worked on the invoices and accounting entries for one hour each day (she did a total of 90 entries during the 3 months of employment), the total number of hours that she would spend during a six-day week would be as follows:

Task	**Estimated Hours per Week**
DFO Logbook	1.0
Invoices – accounting entries	6.0
Payroll	1.5
Banking	2.0
Total:	10.5

[11] The total estimated amount of time spent on these duties, based on the estimates as provided by the Appellant, is only 10.5 hours per week. The Appellant stated that these activities represented 40% of the Appellant's time performing her duties of employment. If this represented 40% of such time, the total amount of time that she would work on all of her duties each week would only be 26.25 hours. Since she was paid based on working 48 hours per week, it does not seem unreasonable to conclude that the Appellant and George J. Rambeau would not have entered into substantially similar contract of employment if they would have been dealing with each other at arm's length.

[12] The other major concern raised by the Respondent is related to the nature of the work that the Appellant was performing in 2007 and whether George J. Rambeau would have entered into any contract at all with the Appellant to perform the

housekeeping duties if she was not his spouse. The housekeeping duties included various housekeeping duties and tasks related to the property of the Appellant and George J. Rambeau such as cooking breakfast and supper for George J. Rambeau, packing a lunch can for George J. Rambeau, washing clothes for George J. Rambeau, fixing the holes in the driveway, mowing and raking the lawn, and staining the deck. No one was hired to perform any of these duties before the period during which the Appellant was employed nor was anyone hired to perform these duties after the Appellant's employment was terminated. Therefore the position of the Respondent that George J. Rambeau and the Appellant would not have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length does not seem unreasonable.

[13] If the Appellant is correct that hiring a spouse to do housekeeping work will qualify as insurable employment in situations where no other arm's-length person was hired before or after, then this would mean that a husband and wife could create a situation where each could qualify for employment insurance benefits. For example a husband could hire his wife to perform the housekeeping work for whatever period of time was required in order for her to qualify for employment insurance benefits, and then terminate her employment. She could then hire her husband to do the housekeeping work for whatever period of time is required for him to qualify for employment insurance benefits and then terminate his employment. This alternating cycle of hiring each other to do the housekeeping could continue with each person qualifying for employment insurance benefits based only on the employment by the spouse for housekeeping duties. This does not seem to me to be a type of employment that would have been contemplated by the *Act* as insurable employment.

[14] The Supreme Court of Canada in *The Queen v. Canada Trustco Mortgage Company*, 2005 SCC 54, 2005 DTC 5523 (Eng.), [2005] 5 C.T.C. 215, 340 N.R. 1, 259 D.L.R. (4th) 193, [2005] 2 S.C.R. 601, stated that:

> 10 It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. R.*, [1999] 3 S.C.R. 804 (S.C.C.), at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must

> seek to read the provisions of an Act as a harmonious whole.

[15] In my opinion, the words:

> 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

in paragraph 5(3)(b) of the *Act* in the context of the *Act* read as a whole will include a determination of whether the employer and the employee would have entered into any contract of employment at all if they would have been dealing with each other at arm's length. If an employer would not have hired anyone with whom that employer is dealing at arm's length to do certain work, then it would be reasonable to conclude that the employer and a related employee who was hired to do that work would not have entered into a substantially similar contract of employment if they were dealing with each other at arm's length.

[16] In *Gauthier v. The Minister of National Revenue*, [2000] T.C.J. No. 583, the payor operated a dairy farm and hired his son's common-law spouse to perform various duties such as light housekeeping, paperwork, preparing meals, answering the telephone and tending to flowers and gardens. Justice Somers made the following comments in that case:

> 18 It is quite evident that this employment was an arrangement in order to have sufficient hours to qualify for unemployment insurance benefits. She was too sick to work for the school board, but she was healthy enough to work up to the day before the child's birth. She did not prove that the Payor needed her to work during the period in question. Her salary was excessive for the type of work.
>
> 19 Taking into consideration all of the circumstances, including the testimonies and documentary of evidence, I am satisfied that the Appellant has failed in her onus of establishing on a balance of probabilities that the Minister acted in a capricious or arbitrary fashion in this case. The employment is therefore excepted from insurable employment pursuant to paragraph 5(2)(i) of the Act.

[17] By referring to the appellant in that case not proving "that the Payor needed her to work during the period in question", Justice Somers appears to be saying that the payor would not have hired her at all if she would have been dealing at arm's length.

[18] In *Pike v. The Minister of National Revenue*, [1994] T.C.J. No. 973, the appellant (Helen Pike) was employed by a related person (Sarah Pike) to perform babysitting and housekeeping duties for a period of 21 weeks. Helen Pike needed 20 weeks of employment to qualify for benefits under the *Unemployment Insurance Act* as it was then. Justice Mogan made the following comments in that case:

> 9 The facts which trouble me most about this case are (i) the Appellant did not deny that she needed 20 weeks of employment to qualify for Unemployment Insurance benefits; and (ii) after just 21 weeks of work, the services performed by the Appellant were taken over by the family unit of Sarah and Gerald Pike. The Federal Court of Appeal stated in the Tignish Auto Parts decision:
>
> > The applicant, who is the party appealing the determination of the Minister, has the burden of proving its case and is entitled to bring new evidence to contradict the facts relied on by the Minister.
>
> 10 In this case, there was no evidence given by Sarah from the employer's point of view. Given the close connection between the Appellant and Sarah, I should have thought that it was the Appellant's burden to call Sarah as a witness in order to put before the Court both the employee and employer sides of the employment transaction. I would go further and suggest that whenever a person is challenging the Minister's decision under subparagraph 3(2)(c)(ii) of the Unemployment Insurance Act, it is most desirable and in many cases necessary to hear the evidence of both the employee and the employer in order to determine whether they would have entered into a substantially similar contract of employment if they had been at arm's length.

[19] George J. Rambeau did not testify in this case and therefore there was no evidence from the employer of whether he would have entered into a substantially similar contract of employment with a person with whom he was dealing at arm’s length. The Appellant has the burden of proving her case and therefore would have the burden of proving that George J. Rambeau would have entered into a substantially similar contract of employment with a person with whom he was dealing at arm’s length. As well by referring to the fact that the work was taken over by the family unit following the termination of the employee’s employment, Justice Mogan also appears to be saying that the employer in that case would not have hired the employee at all if they would have been dealing at arm’s length.

[20] In *Narvie v. The Minister of National Revenue*, 2006 TCC 368, the employer was engaged in the lobster fishery and employed his son as a deckhand. The employer’s son did not replace any other worker and was not replaced when his employment ended. Justice Savoie made the following comments in that case:

REMUNERATION PAID

13 It was established that the Appellant performed services for the Payor both prior to and after the period under review without remuneration.

14 Furthermore, the evidence disclosed that the Appellant was hired as a second deckhand on the fishing boat and received a salary as such, regardless of the fact that his services were not needed. Since 2003, the Payor engaged in lobster fishing with one deckhand only. It was also proven that the Payor's gross revenue with two deckhands did not exceed the revenue earned with the help of one single deckhand.

15 This certainly supports the conclusion that the Payor would not have hired a second deckhand on those terms, or at all, if he and the Appellant had been dealing with each other at arm's length.

TERMS AND CONDITIONS

16 The Payor hired the Appellant when, as was proven, he had no need for his services. He admitted the Appellant could leave his employment after having accumulated sufficient working hours to qualify for employment insurance benefits.

DURATION

17 The period under review is from May 9 to May 21, 2005. The lobster season is from May 1 to June 30 each year. The Appellant testified that he worked for the Payor prior to and after the period in question without remuneration. The Appellant left his employment once he had accumulated sufficient working hours to qualify for employment benefits and both the Appellant and the Payor confirmed this in their statement and testimony. It was also confirmed by both the Appellant and the Payor that this was the agreement between them at the outset. It is difficult to conceive that such an arrangement would have been entered into between the Payor and the Appellant if they had been dealing with each other at arm's length.

18 The evidence made it clear that the services of the Appellant were not essential to the Payor's economic activity. It bears repeating that the economic undertaking of the Payor could be carried out quite adequately with the help of one single deckhand.

19 The nature of the arrangement under which the Appellant was employed is exactly the kind of scheme that runs contrary to the stated intention of the Employment Insurance Legislation as interpreted by the decisions of this Court and the Federal Court of Appeal.

20 The Appellant has failed to demonstrate the advisability of this Court's intervention. On the contrary, such an intervention would be ill-founded.

21 The Minister has correctly conducted his analysis under the *Act* and his conclusion, even in light of the evidence produced at the hearing, is still well founded.

[21] There was nothing in the facts that were presented that would suggest that the Minister’s decision was unreasonable in determining that the Appellant and George J. Rambeau would not have entered into a substantially similar contract of employment if they would have been dealing at arm’s length. The hours for which

the Appellant was paid were significantly greater than the hours that the Appellant was working. No one else was hired to perform the housekeeping work before or after the Appellant. The employer did not testify and therefore there is no indication that George J. Rambeau would have hired an arm's length person on substantially similar terms and conditions to perform the duties that the Appellant was performing. It therefore seems to me that the Minister's decision was reasonable in concluding that the Appellant and George J. Rambeau would not have entered into a substantially similar contract of employment if they would have been dealing at arm's length.

[22] As a result, I conclude that the decision of the Minister was reasonable and therefore the appeal is dismissed.

Signed at Ottawa, Ontario, this 18th day of June 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC375
COURT FILE NOS.:	2008-197(EI)
STYLE OF CAUSE:	MICHELLE M. RAMBEAU AND M.N.R.
PLACE OF HEARING:	Dieppe (Moncton), New Brunswick
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	June 18, 2008

APPEARANCES:

Agent for the Appellant:	Lloyd J. A. Petrie
Counsel for the Respondent:	Lindsay D. Holland

COUNSEL OF RECORD:

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