

1999-2715(EI)

BETWEEN:

ANNIE GAUTHIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on August 23, 2000 at Sudbury, Ontario by

the Honourable Deputy Judge J.F. Somers

Appearances

Agent for the Appellant: Robert Marier

Counsel for the Respondent: Carole Benoit

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of September 2000.

"J.F. Somers"

D.J.T.C.C.

Date: 20000908
Docket: 1999-2715(EI)

BETWEEN:

ANNIE GAUTHIER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard in Sudbury, Ontario on August 23, 2000.

[2] The Appellant is appealing from a decision made by the Minister of National Revenue (the “Minister”), that the employment held with Robert Rousseau (the “Payor”), during the period at issue, from April 1, 1998 to May 21, 1998 is excepted from insurable employment within the meaning of the *Employment Insurance Act* (the “Act”), since she and the Payor were not dealing with each other at arm’s length.

[3] The applicable law is found in subsections 5(2) and 5(3) of the *Employment Insurance Act* and section 251 of the *Income Tax Act*.

[4] Subsections 5(2) and 5(3) of the *Employment Insurance Act* read in part as follows:

"(2) Insurable employment does not include:

...

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

(3) For the purpose 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."

[5] Section 251 of the *Income Tax Act* reads in part as follows:

"Section 251. Arm's length.

(1) For the purposes of this Act,

(a) related persons shall be deemed not to deal with each other at arm's length; and

...

(2) **Definition of "related persons"**. For the purpose of this Act, "related persons", or persons related to each other, are

(a) individuals connected by blood relationship, marriage or adoption;

(b) a corporation and

- (i) a person who controls the corporation, if it is controlled by one person,
- (ii) a person who is a member of a related group that controls the corporation, or
- (iii) any person related to a person described in subparagraph (i) or (ii) . . ."

[6] The burden of proof is on the Appellant. She must show on a balance of probabilities that the Minister erred in fact and in law in his decision. Each case must stand on its merits.

[7] In arriving at his decision, the Minister relied on the following allegation of facts which she admitted or denied:

- “(a) the Payor operates a dairy farm known as South Bay Farm; (admitted)
- (b) the Appellant was the common-law spouse of the Payor’s son during the period in question and got married on March 15, 1999; (denied)
- (c) the Appellant did some work for the Payor on a need basis under a verbal agreement; (admitted)
- (d) the Appellant performed duties like light housekeeping, paperwork, preparing meals, answering the telephone and tending to flowers and gardens; (admitted)
- (e) the Appellant was free to decide not to report for work or when she would report for work; (admitted)
- (f) the Appellant was paid \$10.25 per hour which is more than what an arm’s length employee would receive to perform the same duties; (denied)
- (g) the Appellant was paid by cheque, on a monthly basis; (admitted)
- (h) when called in, the Appellant worked approximately 2 hours per day, generally in the afternoon since she was also working as teacher’s aids in the morning for another Payor; (admitted)

- (i) the Appellant chose her hours of work which is not common in an arm's length contract of employment; (denied)
- (j) the Appellant's work was a favour to the Payor; (denied)
- (k) the Appellant's work was no integral to the Payor's business; (denied)
- (l) before and after the period in question, the Payor's spouse performed these duties; (admitted)
- (m) the Payor would not have hired a non-related person to perform these tasks under the same conditions of employment; (denied)
- (n) the Appellant's last day of work was May 21, 1998 and she gave birth on May 22, 1998; (admitted)
- (o) the Payor created the position to suit the needs of the Appellant and her employment was not based on any business consideration; (denied)
- (p) the Appellant is not related to the Payor but, in fact, the Appellant was not dealing with the Payor at arm's length; (denied)
- (q) 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 not reasonable to conclude that the Appellant and the Payor would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length." (denied)

[8] The Payor operated a dairy farm known as South Bay Farm. The Appellant did some work for the Payor on a need basis under a verbal agreement, during the period at issue. Her duties consisted of performing light housekeeping, paperwork, preparing meals for Mr. and Mrs. Rousseau, answering the telephone and tending to flowers and gardens.

[9] The Appellant was paid \$10.25 per hour and was free to decide not to report for work or when she would report for work. She was paid by cheque on a monthly basis. When called in, the Appellant worked approximately two hours per day, generally in the afternoon since she was also working as teacher's aid in the morning for another Payor.

[10] The Appellant's last day of work was May 21, 1998 and she gave birth to a son on May 22, 1998. Before and after the period in question, the Payor's spouse performed the same duties.

[11] The Appellant denied that she had a common-law relationship with the Payor's son. She stated that she was going to college in 1997 and lived in a rented three-room house. She admitted that the Payor's son visited her once in a while.

[12] She does not recall if the father of the child moved in with her after the baby was born. She added as well that the future husband lived with his parents during the pregnancy. However in her testimony, she stated that she prepared meals for two people, Mr. and Mrs. Rousseau. There was no mention that she prepared meals for a third person.

[13] The Appellant gave birth to a baby on May 22, 1998 after a difficult pregnancy. In her application for unemployment insurance benefits, she indicated that she was not available for work due to illness, being pregnant. As a result of this application, the Department of Human Resources Development Canada (HRDC) informed her that she did not have sufficient hours to qualify for benefits. On June 8, 1998, she submitted a new application, indicating Robert Rousseau as her employer.

[14] Finally, she married the Payor's son, father of the child, on March 15, 1999. The Ruling Officer for the HRDC stated that the Appellant told him on two occasions that she cohabited with the Payor's son, during the period in question. The Appellant signed her income tax return, on March 26, 1998, for the 1997 taxation year stating that she lived in common-law for that year. By coincidence, the Appellant's common-law spouse signed his income tax return also on March 26, 1998, stating that he had a common-law relationship.

[15] It is a question of fact if the couple had a common-law relationship during the period in question. Despite her denial of this common-law relationship, the Court must conclude, without hesitation, that there existed such a relationship. Her testimony was not credible.

[16] Her testimony was not credible as well for the legitimate employment she professed to have with the Payor. The Payor nor the Payor's son testified to corroborate her evidence.

[17] The Appellant was a related person, by virtue of subsection 252(4) of the *Income Tax Act*, because she had a common-law relationship with the Payor's son during the period in question.

[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*.

[20] The appeal is dismissed.

Signed at Ottawa, Canada, this 8th day of September 2000.

"J.F. Somers"

D.J.T.C.C.

COURT FILE NO.: 1999-2715(EI)

STYLE OF CAUSE: Annie Gauthier and M.N.R.

PLACE OF HEARING: Sudbury, Ontario

DATE OF HEARING: August 23, 2000

REASONS FOR JUDGMENT BY: Honourable Deputy Judge J.F. Somers

DATE OF JUDGMENT: September 8, 2000

APPEARANCES:

Agent for the Appellant: Robert Marier

Counsel for the Respondent: Carole Benoit

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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