

Docket: 2007-4751(EI)

BETWEEN:

ARNOLD WILK TRUCKING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Dale Wilk, 2007-4753(EI)
and *Darren Wilk*, 2007-4763(EI)
on November 28, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: Kerry R. Chow

Counsel for the Respondent: Anne Jinnouchi

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 9th day of April, 2009.

“G. A. Sheridan”

Sheridan, J.

Docket: 2007-4753(EI)

BETWEEN:

DALE WILK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Arnold Wilk Trucking Ltd., 2007-4751(EI)
and *Darren Wilk*, 2007-4763(EI)
on November 28, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: Kerry R. Chow

Counsel for the Respondent: Anne Jinnouchi

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 9th day of April, 2009.

“G. A. Sheridan”

Sheridan, J.

Docket: 2007-4763(EI)

BETWEEN:

DARREN WILK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of
Arnold Wilk Trucking Ltd., 2007-4751(EI)
and *Dale Wilk*, 2007-4753(EI)
on November 28, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant: Kerry R. Chow

Counsel for the Respondent: Anne Jinnouchi

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 9th day of April, 2009.

“G. A. Sheridan”

Sheridan, J.

Citation: 2009TCC191
Date: 20090409
Docket: 2007-4751(EI)

BETWEEN:

ARNOLD WILK TRUCKING LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2007-4753(EI)

AND BETWEEN:

DALE WILK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

Docket: 2007-4763(EI)

AND BETWEEN:

DARREN WILK,

Appellant

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Sheridan, J.

[1] The Appellants, Dale Wilk and Darren Wilk, are appealing the decision of the Minister of National Revenue that their employment with the third Appellant, Arnold Wilk Trucking Ltd.¹, was excluded from the definition of “insurable employment” under paragraphs 5(2)(i) and 5(3)(b) of the *Employment Insurance Act*.

[2] Dale and Darren are the sons of Arnold Wilk, the majority shareholder of Arnold Wilk Trucking Ltd., a company based in Moose Jaw, Saskatchewan that hauls aggregate for use in road construction throughout the province. There is no dispute that Dale² and Darren³ were employees of Arnold Wilk Trucking Ltd. or that they were not dealing at arm’s length with Arnold Wilk Trucking Ltd. The only issue is whether the Minister properly exercised his discretion under paragraph 5(3)(b) of the *Employment Insurance Act*:

(3) **Arm’s length dealing** – For the purposes of paragraph (2)(i),

...

(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.

[3] Dale, who has a Class 1-A licence, was employed primarily as a truck driver but was also responsible for managing job sites and some mechanic work in the off-season. Darren is an apprentice mechanic and worked as such in the company shop. He also handled some management and administrative duties. During the relevant period, there were approximately 12 arm's length employees one of whom

¹ The appeals were heard on common evidence. At the hearing, leave was granted to the Respondent to amend paragraph 6(k) of the Reply to the Notice of Appeal for Dale Wilk to show his salary as \$5,400 per month and paragraph 6(k) of the Reply to the Notice of Appeal for Darren Wilk, \$3,600 per month.

² For the period June 1, 2005 to January 31, 2006.

³ For the periods May 15 to November 30, 2005 and June 1 to November 15, 2006.

was a journeyman mechanic; the rest worked as truck drivers. Given the seasonal nature of their work, each year all of the company's arm's length employees except the journeyman mechanic were laid off from freeze up to spring thaw.

[4] Dale and Darren were also laid off and at some point, applied for employment insurance benefits. Human Resources and Skills Development Canada sought from the Canada Revenue Agency a ruling on the insurability of their employment.

[5] Thus it was that Melodee Wells, a Canada Revenue Agency Coverage Officer, came to review the Appellants' files. Ms. Wells was called by the Respondent; she was a credible witness who gave her evidence in a straight-forward manner. In making her ruling, she reviewed the notes of the original investigating official from whom she had received the Wilks' files. She also spoke by telephone with Arnold, Dale and Darren Wilk because it is her view (one I share) that an interview provides a better opportunity for more thorough answers than does a standard form questionnaire. After recounting the statutory criteria to be applied generally in making such a ruling, Ms. Wells explained the specific factors that had formed the basis of her decision regarding Dale and Darren's employment: their remuneration, including the receipt of bonuses; loans and advances; and the circumstances of their lay offs.

[6] Before reviewing the evidence at the hearing in respect of these headings, it is useful to recall the role of the Tax Court of Canada in its review of the Minister's decision:

15 The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.⁴

⁴ *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 310 (Q.L.) (F.C.A.); *Légaré v. Minister of National Revenue*, 246 N.R. 176 (F.C.A.).

[7] It must also be borne in mind that the Appellants bear the onus of showing the Minister's assumptions to be incorrect. Arnold Wilk and the Appellants, Dale and Darren testified at the hearing; their evidence and its effect will be considered under the criteria considered by Ms. Wells to determine whether in the "new light" of the hearing, the conclusion reached by the Minister still seems reasonable.

Remuneration

[8] Counsel for the Appellant submitted that the fact that the Appellants Dale and Darren were paid a set monthly salary regardless of the number of hours actually worked while the arm's length employees received an hourly wage based on their recorded hours did not justify the conclusion that they were on a different footing. While that may be theoretically true, the evidence presented by the Appellants did not provide any clear picture to explain the difference in how Dale and Darren were paid. Nor do I see what the evidence that the arm's length employees were paid at different hourly rates depending on their experience has to do with why the Appellants were paid a set salary regardless of the hours worked.

[9] It seems to me that the explanation lies in Dale and Darren's connection to the family business. I accept the Appellants' evidence that Dale and Darren often worked in excess of a forty hour week. They struck me as hard-working fellows, fully committed to the family enterprise, who (if ever they did take time off for recreational or other reasons) could be relied upon to make sure any outstanding work still got done. That is why it was unnecessary for them to log their hours like the arm's length employees. None of that is bad, quite the contrary. However, it tends to show as reasonable the Minister's conclusion that the difference in the payment of their earnings had to do with their non-arm's length relationship with their employer.

[10] As for the matter of bonuses, the Minister assumed, and the Appellants admitted, that in 2004, Dale and Darren had received bonuses of \$5,525⁵ and \$1,700⁶, respectively. Arnold Wilk testified that the arm's length employees had also received bonuses (albeit on an *ad hoc* basis) in the past and that in 2008, a more formal bonus structure had been established. As none of this information regarding bonuses pertains to the relevant periods, I do not see how they assist in the determination of the question under consideration.

⁵ Exhibit R-2.

⁶ Exhibit R-1.

Loans and Advances

[11] Ms. Wells testified that she took into account the fact that Arnold Wilk Trucking Ltd. had lent \$8,000, without interest, to Dale for the purchase of a truck and other amounts to Darren to tide him over pending the resolution of his entitlement to employment insurance benefits. Although Dale had been making monthly payments on the truck loan, those were put in abeyance while he was laid off. As for Darren, Arnold Wilk testified that he expected full repayment from Darren if he was successful in his appeal; otherwise, the amounts would be deducted from his future earnings. He also said that the company had from time to time made loans to arm's length employees; these were often repaid by deducting amounts from their wages. In at least one instance, no repayment was ever made. Ms. Wells had interpreted these "loans" as advances on salary. That does not strike me as unreasonable; at the hearing, there was no documentary evidence to corroborate any loans made to arm's length employees. Nor did the Appellants' evidence convince me that there was any reason to overturn the Minister's conclusion that, but for the family relationship, the company would have been unlikely to lend such amounts and on such generous terms to Dale and Darren.

Circumstances of Lay Off

[12] Ms. Wells testified that she had taken into account the seasonal nature of the work and the fact that the arm's length employees had no choice as to whether they would be laid off as soon as the weather made it impossible to continue roadwork. Her information with respect to Dale and Darren was that Darren preferred to be laid off and that Dale took over his shop duties in the off-season. She was also of the view that because Darren was the one with shop and management experience and was paid a lower wage, but for the family connection, the company would have been more likely to keep Darren on and lay off Dale.

[13] Counsel for the Appellant argued that that decision was a managerial one and it was not for the Minister to second guess the company. He submitted further that Ms. Wells ought to have taken into account that Dale, as a trucker with site management experience and some mechanical skills, could play a dual role and was, therefore, the better candidate for the kind of work done in the off-season. Again, this is not an unreasonable argument but there was little evidence in support of it. Darren denied that he preferred to be laid off. Dale denied that he was "replacing" his brother. But neither they nor their father could explain the rationale for the lay off plan other than to say that Dale was able to drive the trucks that were being certified in the off-season. The Minister was aware of these facts when he made his decision.

In these circumstances, I am unable to justify interfering with the Minister's conclusion.

[14] As Ms. Wells noted at the hearing, in exercising his discretion under paragraph 5(3)(b), the Minister considers the cumulative effect of the facts gathered in respect of the statutory criteria. For the reasons set out above, the Appellants have not persuaded me that it was not reasonable for the Minister to conclude that the employment of the Appellants, Dale Wilk and Darren Wilk, was excluded from insurable employment. The appeals are, therefore, dismissed.

Signed at Ottawa, Canada, this 9th day of April, 2009.

“G. A. Sheridan”

Sheridan, J.

CITATION: 2009TCC191

COURT FILE NOS.: 2007-4751(EI); 2007-4753(EI);
2007-4763(EI)

STYLE OF CAUSE: ARNOLD WILK TRUCKING LTD. AND
THE MINISTER OF NATIONAL
REVENUE AND BETWEEN DALE WILK
AND THE MINISTER OF NATIONAL
REVENUE AND BETWEEN DARREN
WILK AND THE MINISTER OF
NATIONAL REVENUE

PLACE OF HEARING: Regina, Saskatchewan

DATE OF HEARING: November 28, 2008

REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan

DATE OF JUDGMENT: April 9, 2009

APPEARANCES:

Counsel for the Appellants: Kerry R. Chow

Counsel for the Respondent: Anne Jinnouchi

COUNSEL OF RECORD:

For the Appellants:

Name: Kerry R. Chow

Firm: Chow & Co.
Moose Jaw, Saskatchewan

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada