

Docket: 2008-3660(EI)

BETWEEN:

MICHELLE CLARKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on August 26, 2009 at Saskatoon, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Cam Regehr

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is allowed on the basis that Ms. Clarke was engaged in insurable employment for the period January 3 to December 20, 2007.

Signed at Ottawa, Canada this 1st day of September, 2009.

“G. A. Sheridan”

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Sheridan J.

Citation: 2009TCC417  
Date: 20090901  
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MICHELLE CLARKE,

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Respondent.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] Michelle Clarke is appealing the decision of the Minister of National Revenue that she was engaged in excluded employment under paragraph 5(3)(b) of the *Employment Insurance Act*.

[2] Paragraph 5(3)(b) reads as follows:

(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] There is no question that By-Son Enterprises Ltd. and Ms. Clarke are "related" as she is the spouse of the company's principal. Based on the facts before him, the Minister was not satisfied that it was reasonable to conclude By-Son

Enterprises Ltd. and Ms. Clarke would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[4] The case law has established that judicial deference must be shown to the exercise of the Minister's discretion under paragraph 5(3)(b)<sup>1</sup>. It is not for this Court merely to substitute its judgment for that of the Minister; rather, the Court must be satisfied that the facts presented to the Minister were misunderstood or incomplete. In the present case, I am satisfied that the Minister did not have a complete picture of all of the circumstances of Ms. Clarke's employment.

[5] To understand the true nature of the Appellant's work in 2007, it is important to put it in context: Ms. Clarke and her husband Byron, the principal of By-Son Enterprises Ltd., live near Denzel, a small rural community in western Saskatchewan.

[6] At all times relevant to this appeal, By-Son Enterprises Ltd. was engaged in providing secondary services to companies working in the Alberta oilfields. The pressures of the industry required By-Son Enterprises Ltd. to be available in the field "24/7"; as a result, Byron and two or three employees worked shifts in rotation between the field and the company's base in Saskatchewan: typically, 21 days in "camp" in the oilfield followed by four or five days "out".

[7] From January to April 2007, Ms. Clarke was employed by By-Son Enterprises Ltd. shuttling employees, equipment and supplies between the company's Saskatchewan headquarters and the Alberta oilfields. At that time, she was also working on a casual basis at the doctor's office and two co-ops in the local community. Meanwhile, her husband was working far from home in the Alberta oilfields, focused on making a success of his company.

[8] Because By-Son Enterprises Ltd. was in the process of establishing its Alberta operation and Ms. Clarke had not done such work before, it was difficult for them to enunciate precisely what her duties would be and the exact amount of her remuneration. However, both Ms. Clarke and By-Son Enterprises Ltd. understood the general nature of the job she was undertaking; they were also able to estimate the costs to Ms. Clarke of such employment: wear and tear on the vehicle, fuel expenses and repairs, and lost opportunities for local work. With these variables in mind, she and By-Son Enterprises Ltd. reached a verbal agreement that she would be paid a

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<sup>1</sup> *Pérusse v. Canada* (Minister of National Revenue - M.N.R.), [2000] F.C.J. No. 310, (F.C.A.); *Porter v. Canada*, [2005] T.C.J. No. 266.

reasonable amount for the time actually devoted to carrying out her shuttle work and would be reimbursed for her expenses. For reasons that will be discussed below, By-Son Enterprises Ltd. did not pay Ms. Clarke her wages for the period January to April 2007 until November 2007.

[9] In May 2007, the bank with which By-Son Enterprises Ltd. was dealing encountered certain difficulties not relevant to this appeal. This event, together with the company's desire to get its records in better order and the fact that the former bookkeeper was located in another community some 45 minutes from Denzel, caused By-Son Enterprises Ltd. to offer Ms. Clarke a new position as an administrator. Around the same time, By-Son Enterprises Ltd. turned its books and records over to its accountant for revision and updating. These were not returned until November 2007.

[10] In her new position, Ms. Clarke took over the duties of the company's former part-time bookkeeper but had the additional responsibility of setting up a new financial records-keeping system for the company, transferring the existing records to it and entering current data. When sometime later Ms. Clarke discovered she was pregnant, she had the further task of training Byron to look after the new bookkeeping system.

[11] Ms. Clarke had a diploma in Business Administration<sup>2</sup> and was qualified to handle basic bookkeeping duties. Because she lacked specialized training in payroll, however, By-Son Enterprises Ltd. hired a consultant to provide some training and to assist her with the initial set up. While working to improve her payroll skills and reorganizing the company's administrative function, Ms. Clarke met twice with the former bookkeeper for assistance with the transition.

[12] Ms. Clarke's duties were more onerous than those of the former bookkeeper who had provided part-time bookkeeping services to several different local concerns. In addition to taking over her bookkeeping duties, Ms. Clarke was responsible for confirming the accuracy of By-Son Enterprises Ltd.'s receipts and invoices; recording and reporting to the company's insurer the inter-provincial mileage records of the vehicles used in its operations; and reconciling payments received for the company's services with the amounts billed. The former bookkeeper had been paid for her part-time services on an hourly basis; Ms. Clarke and By-Son Enterprises Ltd. had verbally agreed that she would be paid a flat salary of \$1,000 per month for her

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<sup>2</sup> Exhibit A-1.

bookkeeping and administrative work. In these circumstances, the difference between Ms. Clarke's earnings and those of the bookkeeper are understandable.

[13] As it turned out, Ms. Clarke did not receive any payment for her services in the field or as the company's administrator until November 2007. I accept her explanation that this was due, in part, to the time it took to reorganize the company's books, including waiting for the accountant to complete his review and revision of its financial records, the transfer from the old system to the new, the overlap of the company's GST periods with its year end, the unknowns associated with getting a new company established in a high-pressure economy, and her own inexperience with certain aspects of her duties. Throughout this period, however, By-Son Enterprises Ltd. offered to pay advances to Ms. Clark, as it had done for one or two of its other employees. Ms. Clarke declined this offer as she felt it would only further complicate her efforts to get the company's records in order. She was still in the process of learning the new payroll system. Finally, she had no reason to doubt the company's assurance that she would be paid in accordance with their oral agreement; in the meantime, she was content to rely on her other employment for her financial needs.

[14] Ms. Clarke did not pretend to be an expert in the economy of rural western Canada. She was entirely credible, however, in her description of her experiences as an employee and resident of that area. She said that it was "customary", in ventures as precarious as oil and agriculture, to wait to reap the rewards of one's labours. By way of example, she said that she had been employed as a bookkeeper for an arm's length agricultural business and had had to wait 8½ months to be paid. By the same token, she explained that By-Son Enterprises Ltd. had had to wait until April 2007 to be paid for services it had rendered to Alberta companies in January. Both she and Byron (as the principal of By-Son Enterprises Ltd.) were accustomed to having to wait for revenue to be realized before being remunerated themselves.

[15] In November, when the accountant's review of the company's records was completed, the books were returned to Ms. Clarke who, by that time, had the new system up and running. The company promptly issued cheques, as promised, for her past months' wages and salary. All proper deductions and remittances were made at that time<sup>3</sup>. The following month, her December salary was paid by cheque on January 9, 2008. The slight delay of what was, in all other respects, a timely payment, is understandable given the intervention of two significant events in that

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<sup>3</sup> Exhibit A-2.

month: the Christmas season and the birth of Ms. Clarke's child on December 22, 2007.

[16] According to counsel for the Respondent, it was the way in which Ms. Clarke was remunerated for her work that most influenced the Minister's decision. Not having had the benefit of a complete explanation of all the circumstances surrounding Ms. Clarke's employment, the Minister's decision is perhaps understandable. However, what is reasonable as contemplated by paragraph 5(3)(b) must be determined in light of the circumstances that existed for the employee and employer concerned. The question is whether, in those circumstances, those particular individuals would still have entered into a "substantially similar" contract of employment if they had been dealing with each other at arm's length. Having heard Ms. Clarke's credible, thorough and well-organized evidence regarding her employment, I am satisfied for the reasons set out above that it is reasonable to conclude that she and By-Son Enterprises Ltd. would have entered into a substantially similar contract if they had been at arm's length.

[17] The appeal is allowed on the basis that Ms. Clarke was engaged in insurable employment for the period January 3 to December 20, 2007.

Signed at Ottawa, Canada this 1st day of September, 2009.

"G. A. Sheridan"

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Sheridan J.

CITATION: 2009TCC417

COURT FILE NO.: 2008-3660(EI)

STYLE OF CAUSE: MICHELLE CLARKE AND THE  
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Saskatoon, Saskatchewan

DATE OF HEARING: August 26, 2009

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

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APPEARANCES:

For the Appellant: The Appellant herself

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COUNSEL OF RECORD:

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