Docket: 2010-3585(EI)

BETWEEN:

KIM JOHNSTON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 12, 2011 at Edmonton, Alberta

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Marla Teeling Kurtis Streeper (student-at-law)

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the *Employment Insurance Act*, that the appellant was not engaged in insurable employment with Jay Dee Aviation Maintenance Inc. during the periods from February 10 to October 31, 2008 and from May 1 to November 23, 2009, is dismissed, and the decision is confirmed.

Signed at Ottawa, Ontario this 20th day of April 2011.

"J. M. Woods"

Woods J.

Citation: 2011 TCC 222
Date: 20110420
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BETWEEN:

KIM JOHNSTON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] In this appeal under the *Employment Insurance Act*, Kim Johnston challenges a decision of the Minister of National Revenue that he was not engaged in insurable employment with Jay Dee Aviation Maintenance Inc. (the "Payor").

[2] The periods at issue are from February 10 to October 31, 2008 and from May 1 to November 23, 2009.

[3] The appellant's father, John Johnston, is the sole shareholder of the Payor. Because of this relationship, the appellant is deemed not to have insurable employment unless the Minister is satisfied that a substantially similar contract of employment would have been entered into if the parties had been dealing at arm's length.

[4] The Minister was not satisfied that this requirement was met and concluded that the employment was not insurable.

[5] The relevant legislative provision, paragraph 5(3)(*b*) of the *Act*, provides:

> **5(3)** 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.

[6] Since the legislation gives the Minister some discretion to determine whether the contract of employment satisfies this test, this Court has a limited right to intervene.

[7] Essentially, the question is whether the Minister's conclusion is reasonable, taking into account the evidence presented at the hearing: *Légaré v MNR*, [1999] FCJ No 878 (FCA), para. 4. The relevant passage is reproduced below.

> [4] The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.

Application to present case

[8] The appellant's father is an aircraft mechanic who has operated his own business through the Payor since 1978. It is a small company and the father has been active in all parts of its operation.

[9] The appellant commenced working for the Payor as an apprentice mechanic while he was finishing high school. He continued to work for the company for about 10 years.

[10] This appeal concerns periods in 2008 and 2009 in which the appellant worked for the Payor.

[11] The appellant testified on his own behalf at the hearing and the father was called as a witness by the respondent.

[12] It is relevant to this appeal to note that the working relationship was a difficult one. Inevitably, the employment relationship terminated, and this occurred twice during the periods at issue. The employment first terminated on or around October 31, 2008, it was rekindled in 2009 and it terminated again on or around November 23, 2009. Father and son had not spoken since the last termination until the father was cross-examined by the appellant at the hearing.

[13] The Minister's conclusion that the employment terms were not arm's length appears to be based on three main factors, that the rate of pay was excessive, that the appellant was allowed to continue working for the Payor even though his performance was substandard, and that the Payor provided special treatment by paying for tools and training courses.

[14] The Minister's assumption regarding the rate of pay has been satisfactorily rebutted by the appellant.

[15] The appellant was paid $26 per hour during the relevant periods. The Minister's conclusion that this pay was excessive was based on the understanding that arm's length remuneration for aircraft mechanics would be adjusted for slow periods during the winter.

[16] The problem with this assumption is that the Payor did not have slow periods. The company remained busy year round.

[17] The father's testimony did include a vague suggestion that the rate of pay was high. Based on the limited evidence, I would conclude that the remuneration was in the ballpark of reasonable pay given the appellant's experience.

[18] The Minister assumed that the appellant was given special treatment because he routinely came to work late, left early, spent time on personal matters during working hours, took long lunches, and refused to follow instructions. It was also assumed that the appellant was not replaced after the employment terminated.

[19] The testimony of the father supported all of these assumptions except for the last one.

[20] The appellant, not surprisingly, had a different view of matters. According to his testimony, he did not take advantage of the relationship by coming in late, he did not take long lunches except when business-related, he only took time off with prior approval, he did not spend time on personal matters during work hours, he followed all reasonable instructions, and any bad conduct on his part was provoked by abusive behaviour on the part of his father.

[21] In the context of testimony given by two individuals who feel very aggrieved by the other, it is impossible to know the true situation. Common sense would suggest that the truth lies somewhere in between. It is likely that the father expected the appellant to work under strict employment terms, and that the appellant had a slightly different view of what the employment terms should be.

[22] In this case, I cannot say that the Minister was wrong to take this factor into account in assessing whether the terms were arm's length or not.

[23] Finally, the Minister assumed that the appellant received special treatment in that the Payor paid for training courses and tools. I accept that this would not generally be part of an arm's length contract of employment of an aircraft mechanic.

[24] The appellant submits that this factor is not relevant because his father had a history of charging personal items to the Payor.

[25] I disagree with the appellant's submission on this issue. The point is that these are personal items. With the exception of a course in Texas, the tools and the courses were provided by the Payor as an employment perk to the appellant. They do not reflect an arm's length relationship.

[26] Where does this leave us? In my view, the case is close to the line, and the Minister's decision was a reasonable one to make. Since deference must be given, I would conclude that the decision should be confirmed.

[27] I have commented previously that it is difficult for individuals who work for family members to have insurable employment. The reason for this is that the personal relationship almost inevitably manifests itself in some way in the employment relationship. My conclusion is that it has done so in this case.

[28] The appeal will be dismissed, and the decision of the Minister will be confirmed.

Signed at Ottawa, Ontario this 20th day of April 2011.

"J. M. Woods"

Woods J.

CITATION:	2011 TCC 222
COURT FILE NO.:	2010-3585(EI)
STYLE OF CAUSE:	KIM JOHNSTON and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	April 12, 2011
REASONS FOR JUDGMENT BY:	Hon. J.M. Woods
DATE OF JUDGMENT:	April 20, 2011

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Marla Teeling Kurtis Streeper (student-at-law)

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For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Ontario