Dockets: 2011-485(EI)

BETWEEN:

EWA KRAWCZYK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 27, 2011, at London, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Tamara Watters

JUDGMENT

The Appellant's appeal under the *Employment Insurance Act* (the "*EI Act*") from the decision of the Respondent that the employment of the Appellant by Lake Stars Corp. during the period from July 1, 2009 to July 31, 2010 was not insurable employment within the meaning of section 5 of the *EI Act*, is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 3rd day of November 2011.

"Wyman W. Webb"

Webb J.

Citation: 2011TCC506
Date: 20111103
Dockets: 2011-485(EI)

BETWEEN:

EWA KRAWCZYK,

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 by Lake Stars Corp. (the "Company") during the period from July 1, 2009 to July 31, 2010 was not insurable employment for purposes of the *Employment Insurance Act* (the "*EI Act*") was reasonable.

[2] Subsection 5(2) of the *EI 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 *EI 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] The shares of the Company throughout the period in question were held by the Appellant's spouse. The Appellant and the Company were therefore related for the purposes of the *Income Tax Act* as a result of the provisions of paragraph 251(2)(*b*) of that *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 the Company would not have entered into a substantially similar contract of employment for 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 this 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] The Company operated a gas bar, convenience store and, commencing in September 2009, a restaurant. The business is located in Tobermory, Ontario. The Appellant stated that there were two seasons in Tobermory – the high season from July 1 to the Thanksgiving weekend and the off season which was the rest of the year. The businesses were busy during the high season but there were not a lot of people around during the off season and the businesses were not nearly as busy.

During the high season the businesses were open from 8:00 a.m. to 8:00 p.m. seven days per week. During the off season the store and gas station were open about four to five hours per day for five days a week until January 2010 and then from 8:00 a.m. to 6:00 p.m. seven days per week. The Appellant stated that during the first year the restaurant was also open but she did not recall the hours that it was open. It seems more likely than not that for the first year the restaurant was open for the same periods of time as the store and gas station.

[7] The Appellant had various duties including:

(a) operating the cash register;

(b) selling groceries and lottery tickets;

(c) renting out movies;

(d) pumping gas and filling propane tanks;

(e) cleaning washrooms;

(f) ordering and receiving supplies;

(g) bookkeeping;

(h) preparing and cooking food for the restaurant;

(i) serving food and beverages to customers of the restaurant; and

(j) cleaning the dishes and the restaurant premises.

[8] The duties related to the restaurant were performed after the restaurant opened in September 2009. The Appellant stated that she was not paid for her bookkeeping services.

[9] It seems to me that the most significant fact indicating that the Appellant and the Company would not have entered into a substantially similar contract of employment for the period in question if they would have been dealing with each other at arm’s length, is the amount that the Appellant was paid. It seems clear that during the high season the Company had other employees who were dealing at arm’s length with the Company and that many of the duties that the Appellant was

performing were performed by these arm's length employees during the high season. These other workers were paid from $10.25 per hour to $15.00 per hour.

[10] The Respondent also introduced a printout from the website for Human Resources and Skills Development Canada indicating wages for different jobs in 2009. For 2009, a food and beverage server in the Stratford – Bruce Peninsula area could expect to earn from $9.00 per hour (the low wage) to $12.00 per hour (the high wage) with the average wage being $10.15 per hour. The low wage for cashiers in Ontario for 2009 was $10.25 per hour and the high wage was $13.45 per hour. The low wage for service station attendants in Ontario for 2009 was $10.25 per hour and the high wage was $15.00 per hour.

[11] The following table shows the amount that the Appellant was paid for each month during the period under appeal:

Month	**Amount Paid**	**Number of Hours Worked**	**Amount Paid per Hour**
July 2009	$500	20	$25.00
August 2009	$1,000	40	$25.00
September 2009	$500	20	$25.00
October 2009	$500	20	$25.00
November 2009	$850	34	$25.00
December 2009	$1,000	66	$15.15
January 2010	$2,500	200	$12.50
February 2010	$2,500	200	$12.50
March 2010	$2,500	200	$12.50
April 2010	$3,000	120	$25.00
May 2010	$3,000	120	$25.00
June 2010	$4,000	160	$25.00
July 2010	$5,000	200	$25.00

[12] The Appellant's hourly wage fluctuated from a low of $12.50 to a high of $25.00. The Appellant's explanation was that during the off season there was no one available to work so she had to perform the jobs of more than one person. Her rationale was that if the Company would have had to pay two employees $12.50 each per hour, then since she was doing the work that otherwise would have been done by these two workers (for example pumping gas and looking after the store) she should be paid $25.00 per hour. Even if I were to accept this explanation (which I do not) it does not explain why she was paid $25.00 per hour during the

high season when there were other people available for work and when other employees were working. Also, for three months during the off season (when presumably she was doing the jobs that two other people would have done) she was paid $12.50 per hour and for another month during the off season she was paid $15.15.

[13] It does not seem to me that an employer, who is paying (during a slow time of the year) one employee with whom the employer is dealing at arm's length to perform the tasks that during busier times of the year would be performed by two persons, would add together the hourly rates for the two positions and pay that person the aggregate hourly rate of the two positions. The employee can only be in one place at one time. If the employee is pumping gas the employee cannot also at the same time be serving customers in the store. It seems to me that a more reasonable agreement could be that the employer would pay the higher of the two rates of pay for each position or the average of the two rates of pay, but not both rates of pay.

[14] The Appellant also indicated that she was acting as a manager. However she also indicated that her husband made all of the decisions related to the business and therefore it seems to me that her responsibilities as a manager were minimal and would not justify her receiving $25 per hour when the other arm's length employees were being paid from $10.25 to $15.00 per hour.

[15] It seems to me that the significant fluctuations in the hourly wage paid to the Appellant and the fact that for most months the Appellant was paid at least $10 more per hour than the other arm's length employees and the amounts that other workers in Ontario were receiving for similar positions, strongly indicate that the Appellant and the Company would not have entered into a substantially similar contract of employment for the period in question if they would have been dealing with each other at arm's length.

[16] As a result, the facts that were presented do not lead to a conclusion that the Minister's decision was unreasonable in determining that the terms and conditions of employment would not have been substantially similar if the Appellant and the Company would have been dealing with each other at arm's length. Therefore the appeal is dismissed.

Signed at Halifax, Nova Scotia this 3rd day of November 2011.

"Wyman W. Webb"

Webb J.

CITATION:	2011TCC506
COURT FILE NOS.:	2011-485(EI)
STYLE OF CAUSE:	EWA KRAWCZYK AND M.N.R.
PLACE OF HEARING:	London, Ontario
DATE OF HEARING:	October 27, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	November 3, 2011

APPEARANCES:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Tamara Watters

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

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