

Docket: 2003-1939(EI)

BETWEEN:

ACTECH ELECTRICAL LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Grace Bunting* (2003-1940(EI)), *Action Electrical Ltd.* (2003-1941(EI)) and *Blake Bunting* (2003-1942(EI)) on February 18, 2004, at Edmonton, Alberta,

By: The Honourable Justice M.A. Mogan

Appearances:

Counsel for the Appellant: Deryk Coward

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* for the period January 1, 2001 to December 31, 2001, is dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 92 of that *Act* is confirmed.

Signed at Ottawa, Canada, this 19th day of August, 2004.

"M.A. Mogan"

Mogan J.

Docket: 2003-1940(EI)

BETWEEN:

GRACE BUNTING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Actech Electrical Limited* (2003-1939(EI)), *Action Electrical Ltd.* (2003-1941(EI)) and *Blake Bunting* (2003-1942(EI)) on February 18, 2004, at Edmonton, Alberta,

By: The Honourable Justice M.A. Mogan

Appearances:

Counsel for the Appellant: Deryk Coward

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* for the period January 1, 2001 to December 31, 2001, is dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 91 of that *Act* is confirmed.

Signed at Ottawa, Canada, this 19th day of August, 2004.

"M.A. Mogan"

Mogan J.

Docket: 2003-1941(EI)

BETWEEN:

ACTION ELECTRICAL LTD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Actech Electrical Limited* (2003-1939(EI)), *Grace Bunting* (2003-1940(EI)) and *Blake Bunting* (2003-1942(EI)) on February 18, 2004, at Edmonton, Alberta,

By: The Honourable Justice M.A. Mogan

Appearances:

Counsel for the Appellant: Deryk Coward

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* for the period January 1, 2001 to December 31, 2001, is dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 92 of that *Act* is confirmed.

Signed at Ottawa, Canada, this 19th day of August, 2004.

"M.A. Mogan"

Mogan J.

Docket: 2003-1942(EI)

BETWEEN:

BLAKE BUNTING,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeals of *Actech Electrical Limited* (2003-1939(EI)), *Grace Bunting* (20003-1940(EI)) and *Action Electrical Ltd.* (2003-1941(EI)) on February 18, 2004, at Edmonton, Alberta,

By: The Honourable Justice M.A. Mogan

Appearances:

Counsel for the Appellant: Deryk Coward

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* for the period January 1, 2001 to December 31, 2001, is dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 91 of that *Act* is confirmed.

Signed at Ottawa, Canada, this 19th day of August, 2004.

"M.A. Mogan"

Mogan J.

Citation: 2004TCC572

Date: 20040819

Docket: 2003-1939(EI), 2003-1940(EI)
2003-1941(EI), 2003-1942(EI)

BETWEEN:

ACTECH ELECTRICAL LIMITED, GRACE BUNTING,
ACTION ELECTRICAL LTD. and BLAKE BUNTING,

Appellants,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Mogan J.

[1] The appeals of *Actech Electrical Limited v. Minister of National Revenue* (Court File 2003-1939), *Grace Bunting v. Minister of National Revenue* (Court File 2003-1940), *Action Electrical Ltd. v. Minister of National Revenue* (Court File 2003-1941) and *Blake Bunting v. Minister of National Revenue* (Court File 2003-1942) were heard together on common evidence. The appeals of Actech Electrical Limited ("Actech") and Grace Bunting are connected because (i) at all relevant times Grace was employed by Actech; and (ii) their common issue is whether Grace's employment by Actech was insurable for purposes of the *Employment Insurance Act* (the "*EI Act*"). Similarly, the appeals of Action Electrical Ltd. ("Action") and Blake Bunting are connected because (i) at all relevant times Blake was employed by Action; and (ii) their common issue is whether Blake's employment by Action was insurable for purposes of the *EI Act*.

[2] Actech and Action are both wholly-owned subsidiaries of Bunting Holdings Limited ("BHL"). The issued shares of BHL are owned 67% by Donald Bunting and 33% by his wife Grace Bunting. Donald and Grace have three sons: Damon, Brad and Blake. Actech and Action are both engaged in the electrical contracting business. Grace has worked in the family business for many years. Blake has worked for Action since 1996. Prior to 2001, Grace and Actech assumed that her employment was insurable under the *EI Act* and premiums were paid accordingly. Also, Blake and Action assumed that his employment was insurable under the *EI Act* and premiums were paid accordingly. Commencing in 2001, the four Appellants (Grace, Actech, Blake and Action) took the position that neither Grace nor Blake was engaged in insurable employment for purposes of the *EI Act*.

[3] Section 5 of the *EI Act* is the principal provision concerning "insurable employment". I will set out those parts of section 5 which I regard as most relevant to decide these four appeals.

5(1) Subject to subsection (2), insurable employment is

- (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
- (b) ...

5(2) Insurable employment does not include

- (a) employment of a casual nature other than for the purpose of the employer's trade or business;
- (b) the employment of a person by a corporation if the person controls more than 40% of the voting shares of the corporation;
- (c) ...
- (i) employment if the employer and employee are not dealing with each other at arm's length.

5(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 parties are in agreement that, at all relevant times, Grace and Actech did not deal at arm's length; and Blake and Action did not deal at arm's length. The Appellants rely on paragraph 5(3)(b) to argue that neither Grace nor Blake was engaged in insurable employment during 2001.

The Facts – Grace Bunting

[5] The only witness who testified at the hearing was Donald Bunting, husband of Grace, father of Blake and controlling shareholder of BHL. Donald was born in 1943. Under the Alberta apprenticeship program, he registered with a qualified electrician; worked for a number of years; and became a journeyman electrician in 1968. He qualified as a master electrician in 1970. Donald and Grace were living in Sherwood Park (a suburb of Edmonton) in 1973 when he decided to go into business for himself. He caused Action to be incorporated and started working from his home. Grace was involved from the beginning doing the paperwork while Donald did the electrical work.

[6] Action was successful from the start. Donald built up the business over the years until 2001 when Action and Actech together employed between 60 and 65 persons. When Donald decided to expand into British Columbia, he incorporated Actech in that province to carry on the same business as Action in Alberta. Action and Actech do not work in the area of houses and individual residences. They do electrical contracting for commercial, industrial, institutional, hotel and apartment building operations. Although Actech operates only in British Columbia, it is managed and administered from Action's corporate facility at 7931 Coronet Road in Edmonton, Alberta. In Donald's view, this is the head office of his corporate activities and any reference to "the office" or any similar facility is a reference to 7931 Coronet Road.

[7] I will first consider the employment of Grace by Actech. Her corporate title is "secretary/treasurer" but her business card shows "administrative assistant". She has her own office on the main floor at 7931. Donald is president of both Action and Actech and serves as office manager at 7931. Faye Atkinson was controller of Action and Actech in 2001 but she left in September 2002, and a woman whom Donald referred to as "Betty" was the new controller at the time of the hearing. There are four administrative support staff who work under Donald and Betty, all women, whom Donald referred to as Grace, Audrey C, Linda and Audrey K. It is necessary to describe briefly, in a general way according to Donald's evidence, the services performed by the women referred to in this paragraph.

[8] Although Grace is currently on the payroll of Actech, she has been working in Donald's business since he started on his own in 1973. As stated above, she started doing the paperwork (billing customers, paying suppliers, banking, etc.) while he did the electrical work. In 2001, she was paid a salary of approximately \$600 per week based on a rate of \$15.00 per hour for 40 hours. It is a fact, however, that Grace did not work a 40-hour week in 2001 because she did not come to the office on Wednesdays. She worked Mondays, Tuesdays, Thursdays and Fridays and she had flexibility as to when she would arrive and leave. Donald stated that Grace would generally come to the office by 9:30 a.m. and leave around 5:00 p.m. Because she was on salary, she was not required to record her hours. She has signing authority on all cheques which can be issued by Action and Actech. She does some banking and will pick up drawings from the engineering firm on her way to work. Grace and Donald would each call in if they were going to be late on a day when they would otherwise be expected at the office. She drives a 1993 model car which she owns personally but Action pays for its gas and maintenance.

[9] Grace is away from the office three weeks each summer to work at a church camp, and she takes three weeks at some other time of the year to vacation with her husband, Donald. When she is at the office, Grace shares administrative duties with Audrey C, Linda and Audrey K. This involves typing quotations and contracts; storing and retrieving business information on the computer; answering the telephone; photocopying; and replacing any of the other three administrative assistants when they are absent or on lunch break. Linda Schofield does the payroll and is responsible for the apprenticeship program. When Linda goes on vacation, Grace does the payroll and would do it for a week or two before Linda leaves to make sure that she has the correct rates of pay and source deductions.

[10] Donald, Grace and Betty (controller) are the only persons in the office who do not have a timesheet. Betty is on a salary which is based on a rate of \$15.00 per

hour for a 40-hour week. Donald said that the office computer takes any salary and converts it to an hourly rate over 80 hours being the two-week pay period. The other three administrative staff (Audrey C, Linda and Audrey K) were all paid at the rate of \$12.00 per hour. Audrey C processed supplier invoices while Audrey K (a part-time employee) did the accounts receivable and payable. Audrey K was paid an extra \$10.00 every two weeks to reimburse her for trips to the bank.

[11] Exhibit A-2 is a copy of a loan agreement between Action and the Alberta Treasury Branches ("ATB") dated October 4, 2001 in which Donald Bunting and Grace Bunting each offer a limited continuing guarantee in the amount of \$200,000 with respect to a loan and line of credit extended to Action. In my view, Grace's guarantee to ATB is not a term and condition of her employment (within the meaning of paragraph 5(3)(b) of the *EI Act*) but arises from her being Donald's wife and her owning one-third of the shares of BHL, the parent company of Action.

Analysis

[12] The appeals of Grace and Actech are based on their common claim that she was not engaged in insurable employment in 2001. As stated in paragraph 4 above, it is agreed that Grace and Actech did not deal at arm's length. Therefore, on the plain meaning of paragraph 5(2)(i), Grace's employment by Actech is not insurable. But under paragraph 5(3)(b), Grace and Actech are "deemed to deal with each other at arm's length" if the Minister of National Revenue (the "Minister") is satisfied that, having regard to certain facts, "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".

[13] It has long been established that the Minister may determine under paragraph 5(3)(b) whether certain employment is insurable in a particular case where the non-arm's length employer and employee share the view that the employment is insurable and premiums are remitted accordingly. The character of the Minister's determination under paragraph 5(3)(b) is described as "ministerial discretion" but it is still a determination based on fact and law. See *Attorney General of Canada v. Jencan Ltd.*, [1998] 1 F.C. 187 and cases cited therein. In some recent appeals to this Court, the Appellants have asked if the Minister may determine under paragraph 5(3)(b) whether certain employment is insurable where the non-arm's length employer and employee share the view that the employment is not insurable and no premiums are remitted. This is the precise question raised in these appeals.

[14] Appellants' counsel referred to the legislative history of paragraph 5(3)(b) to argue that it is purely remedial in the sense that it permits a worker (related to her employer) to demonstrate to the Minister's satisfaction that her employment should be insurable notwithstanding the relationship. To support his argument, he quoted the following passage from the judgment of Marceau J.A. in *Perusse v. Canada*, (2000) F.C.J. No. 310:

5 When in 1999 (*sic*) Parliament decided to moderate the fundamental and "irremediable" rule that excluded from insurable employment any employment of a person by his or her spouse (the former s. 3(2)(c)), it chose to do so by altering its legislative technique to make the fundamental exclusion remediable. ...

[15] In a recent decision of this Court (*C&B Woodcraft Ltd. v. M.N.R.*, 2004TCC477), my colleague, Judge Woods, summarized the legislative history of paragraph 5(3)(b):

10 The legislative history suggests that paragraph 5(3)(b) was enacted as a relieving measure so that persons would not be denied employment insurance benefits unless the denial could be justified on a basis other than the relationship between the parties. Prior to the enactment of paragraph 5(3)(b) in 1990, a person who was employed by a spouse was simply excluded from the employment insurance scheme. In the case of *Canada v. Druken*, [1989] 2 F.C. 24 (F.C.A.), this exclusion was held to be discriminatory and contrary to the *Human Rights Act*. As a result, the provision was struck down and held to be unenforceable. The *Druken* decision led to an amendment to the legislation shortly thereafter. The new provision, now in paragraph 5(3)(b), ensures that a person will not be denied employment insurance benefits if the employment terms are essentially arm's length terms.

[16] Returning to the argument of Appellants' counsel, there is no doubt in my mind that paragraph 5(3)(b) was intended by Parliament to be remedial following the decision of the Federal Court of Appeal in *Druken*. It does not necessarily follow, however, that paragraph 5(3)(b) is a one-way street permitting the Minister to determine that a non-arm's length employee is engaged in insurable employment when the employee wants that result but prohibiting the Minister from determining that a non-arm's length employee is engaged in insurable employment when the employee does not want that result. In my view, the *EI Act* is unusual because, on the one hand, it may be regarded as a taxing statute collecting premiums to create a fund (see sections 67, 68, 82 to 85, 92 and 103) while, on the other hand, it may be regarded as social legislation paying benefits to unemployed persons (see sections

7 *et seq*). Regarding the *EI Act* as a taxing statute, I am influenced by the following provisions:

- 67 Subject to section 70, a person employed in insurable employment shall pay, by deduction as provided in subsection 82(1), a premium equal to their insurable earnings multiplied by the premium rate set under section 66, 66.1 or 66.2, as the case may be.
- 68 Subject to sections 69 and 70, an employer shall pay a premium equal to 1.4 times the employees' premiums that the employer is required to deduct under subsection 82(1).
- 82.(1) Every employer paying remuneration to a person they employ in insurable employment shall
- (a) deduct the prescribed amount from the remuneration as or on account of the employee's premium payable by that insured person under section 67 for any period for which the remuneration is paid; and
 - (b) remit the amount, together with the employer's premium payable by the employer under section 68 for that period, to the Receiver General at the prescribed time and in the prescribed manner.
- 85(1) The Minister may assess an employer for an amount payable by the employer under this *Act*, or may reassess the employer or make such additional assessments as the circumstances require, and the expression "assessment" when used in this *Act* with reference to any action so taken by the Minister under this section includes a reassessment or an additional assessment.
- 92 An employer who has been assessed under section 85 may appeal to the Minister for a reconsideration of the assessment, either as to whether an amount should be assessed as payable or as to the amount assessed, within 90 days after being notified of the assessment
- 103(1) The Commission or a person affected by a decision on an appeal to the Minister under section 91 or 92 may appeal from the decision to the Tax Court of Canada in accordance with the *Tax Court of Canada Act* and the applicable rules of court made thereunder within 90 days after the decision is communicated to the Commission or the person, or within such longer time as the Court allows on application made to it within 90 days after the expiration of those 90 days.

[17] Paragraph 5(3)(b) clearly authorizes the Minister to make a determination (which the Courts have characterized as "ministerial discretion") when the

employer and employee do not deal with each other at arm's length; but I find nothing in the language of that paragraph which restricts the circumstances in which the Minister may make a determination if the fundamental condition is present: i.e. the employer and employee are not at arm's length. Accordingly, I reject the Appellants' argument that there is some impediment to the Minister concluding, in particular circumstances, that certain employment between a non-arm's length employer and employee is insurable when one or both of the parties regard such employment as not insurable.

[18] I come back to Grace's employment by Actech. The dominant fact is that, in 2001, she had worked in the business for 28 years, since its inception. She is the wife of the founder and a one-third owner. She is experienced, trustworthy and responsible. Her son, Blake, is employed in the business as an heir apparent. Although she did not testify, I conclude that she has a deep and abiding interest in the prosperity and survival of the family business. Her remuneration of approximately \$30,000 per year is not unreasonably high or low having regard to the other administration staff. Her privileges with respect to car maintenance and flexible hours are the kind of privileges that could be earned by any long-term, arm's length employee of a family business if that employee were experienced, trustworthy and responsible. In terms of the duration and importance of her work, Donald stated that if Grace stopped working, he would have to hire a replacement worker.

[19] In a family business, there will frequently be minor variances between the terms of employment of a family member and the terms of a stranger doing comparable work, but any responsible family member would have a more vested immediate interest and a greater long-term equity in the success of the business than a stranger. None of Grace's terms of employment were outrageously, or even unreasonably, beneficial with respect to her status in the business. There is not sufficient evidence to persuade me that the Minister exercised his/her discretion under paragraph 5(3)(b) in a manner contrary to the law with respect to Grace.

The Facts – Blake Bunting

[20] I will now consider the employment of Blake by Action. Blake graduated from university in 1996 with a degree in business. He is not a qualified electrician but he started to work for Action in 1996 immediately after graduation and has worked there ever since. In 2001, he did the invoicing on all matters and progressive billing on the large contracts. By 2001, Action had developed four separate departments which may be summarized as follows:

- (i) Electrical contracting: bidding on large projects; designing and installing for a particular owner when the work is not put out to tender e.g. Grand Okanagan Resort.
- (ii) Electrical service: motors and data lines; fire alarms; all services other than lighting.
- (iii) Lighting retrofit: regular ongoing contracts to change all the lights in particular buildings like schools, hospitals, etc.
- (iv) Lighting maintenance: contacts with particular buildings to maintain and repair the lighting on scheduled calls.

[21] In 2001, Blake was manager of the lighting maintenance department, and he was responsible for the office computer system. His hours were approximately 7:30 a.m. to 5:30 p.m. which works out to about 45 hours over a five-day week. In 1996, when Blake started work, he was paid at the rate of about \$15.00 per hour and, by 2001, his remuneration was based on a rate of about \$23.00 or \$24.00 per hour. At that time (in 2001), the managers of the other three departments were also paid in the range of \$22.00 to \$24.00 per hour. An employee whom Donald referred to as "Boyd" was the chief estimator and was paid the same as or a little more than Blake in 2001.

[22] Donald stated that he regards himself as a humane owner/manager in the sense that he is able to retain competent employees within the business over a long period of time. Donald also stated that Blake had to earn the respect of the other employees and managers, and he (Blake) could do so only if he was treated more or less on the same terms. In cross-examination, Donald acknowledged that he does not want the other employees or managers to look at Blake and think "he's the prince". In Donald's view, respect has to be earned.

[23] Donald relies on Blake to promote the family business because Donald prefers to do other things within the business. The Company had Edmonton Oiler hockey tickets and promotes a golf tournament by making a contribution to charity. Blake uses the hockey tickets more than other managers and attends the golf tournament on behalf of the business. Blake would also invite clients to lunch and a golf game more often than Donald and the other managers. Some persons might regard those duties as perks of Blake's job but Donald does not regard them as perks because he (Donald) prefers to build the business in other ways.

[24] Blake has more latitude with respect to time off and vacations because he does not have to ask for a particular time but makes his own plans and then

informs Donald. Blake has employee benefits with the office staff under the "clerical plan" which probably has a few more benefits than the plan for hourly-rated workers. A new employee is entitled to two weeks' vacation while a senior employee is entitled to three or more weeks. Donald states that Blake could take more than three weeks' vacation but Donald could not recall if Blake ever had.

[25] In paragraph 19 above, I stated that in a family business, there will frequently be minor variances between the terms of employment of a family member and the terms of a stranger doing comparable work. Those variances exist in the circumstances of Blake's employment by Action but, in my view, they are only minor variances. Looking at the big picture, I see Blake as a full-time employee in constant attendance at the family business, with managerial responsibilities and having to earn the respect of all employees and other managers. Blake has a business degree which he uses to earn his place in the business.

[26] Donald has built a substantial business since 1973 with more than 60 employees; well beyond the "mom and pop operation". Blake's hours seem normal and there is no evidence that he is not a dedicated and responsible employee. In a dispute under paragraph 5(3)(b) where the non-arm's length employee is or was engaged in genuine full-time and responsible employment, I will not be distracted by only minutiae which attempt to make the non-arm's length employee appear different from the arm's length employee. If the Minister was concerned only with minutiae, then it was easier to conclude that the contract of employment was "substantially similar" to an arm's length contract. There is not sufficient evidence to persuade me that the Minister exercised his/her discretion under paragraph 5(3)(b) in a manner contrary to the law with respect to Blake.

[27] The four appeals of Actech, Grace, Action and Blake are dismissed.

Signed at Ottawa, Canada, this 19th day of August, 2004.

"M.A. Mogan"

Mogan J.

CITATION: 2004TCC572

COURT FILE NOS.: 2003-1939(EI), 2003-1940(EI),
2003-1941(EI) and 2003-1942(EI)

STYLE OF CAUSE: Actech Electrical Limited, Grace Bunting,
Action Electrical Ltd. and Blake Bunting
and The Minister of National Revenue

PLACE OF HEARING: Edmonton, Alberta

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REASONS FOR JUDGMENT BY: The Honourable Justice M.A. Mogan

DATE OF JUDGMENT: August 19, 2004

APPEARANCES:

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Counsel for the Respondent: Mark Hesletine

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