

Docket: 2002-4259(EI)

BETWEEN:

NEERALTA WELDING & SALES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeals of *John Wierenga* (2002-4261(EI)) and *Robert Wierenga* (2002-4260(EI)) on March 24, 2004 at Edmonton, Alberta

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Dawn Taylor

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the Employment Insurance Act is allowed and the decision that John and Robert Wierenga were engaged in insurable employment by Neeralta Welding & Sales Ltd. is vacated.

Signed at Ottawa, Canada, this 29th day of June 2004.

"J.M. Woods"

J.M. Woods J.

Docket: 2002-4261(EI)

BETWEEN:

JOHN WIERENGA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeals of *Neeralta Welding & Sales Ltd.* (2002-4259(EI)) and *Robert Wierenga* (2002-4260(EI)) on March 24, 2004 at Edmonton, Alberta

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Dawn Taylor

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the Employment Insurance Act is allowed and the decision that John Wierenga was engaged in insurable employment by Neeralta Welding & Sales Ltd. is vacated.

Signed at Ottawa, Canada, this 29th day of June 2004.

"J.M. Woods"

J.M. Woods J.

Docket: 2002-4260(EI)

BETWEEN:

ROBERT WIERENGA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard together on common evidence with the appeals of *Neeralta Welding & Sales Ltd.* (2002-4259(EI)) and *John Wierenga* (2002-4261(EI)) on March 24, 2004 at Edmonton, Alberta

By: The Honourable Justice J.M. Woods

Appearances:

Counsel for the Appellant: Deryk W. Coward

Counsel for the Respondent: Dawn Taylor

JUDGMENT

The appeal of the decision of the Minister of National Revenue made under the Employment Insurance Act is allowed and the decision that Robert Wierenga was engaged in insurable employment by Neeralta Welding & Sales Ltd. is vacated.

Signed at Ottawa, Canada, this 29th day of June 2004.

"J.M. Woods"

J.M. Woods J.

Citation:2004TCC475
Date:2004/06/29
Docket: 2002-4259(EI)

BETWEEN:

NEERALTA WELDING & SALES LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent;

and

Docket: 2002-4261(EI)

AND BETWEEN:

JOHN WIERENGA,

Appellant,

THE MINISTER OF NATIONAL REVENUE,

Respondent;

Docket: 2002-4260(EI)

AND BETWEEN:

ROBERT WIERENGA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] These are appeals by John Wierenga, his brother Robert Wierenga and their employer Neeralta Welding & Sales Ltd. from rulings in which the Minister of National Revenue decided that the brothers were engaged in insurable employment for purposes of the *Employment Insurance Act* during the period January, 2001 to March 22, 2002. The appeals were heard together on common evidence.

[2] The shares of Neeralta Welding are owned by the brothers' parents, Bert and Tena Wierenga. The corporation, based in a small town near Edmonton, Alberta, was started by Bert Wierenga, who is a journeyman welder by trade. The corporation does a combination of manufacturing, custom fitting and sales, all connected in some fashion with welding. At the relevant time, the corporation employed the father, the two sons and three or four arm's length employees. The father was the manager of the business. John, 29 years of age, was also a journeyman welder and was involved in all aspects of the business including marketing, supervising, welding and office work. Robert, 23 years of age, is not a welder and at the relevant time was in charge of the office.

[3] For purposes of determining whether a person is engaged in insurable employment under the *Employment Insurance Act*, the employment of a person who is related to the employer, as the two Wierenga brothers were, is excluded unless the Minister is satisfied that the terms of employment are substantially similar to arm's length terms.

[4] These appeals arose as a result of an application for a refund of employment insurance premiums. The Minister concluded that the terms and conditions were substantially arm's length and ruled that the employment was insurable.

Statutory provisions

[5] The relevant statutory provisions are contained in paragraphs 5(2)(i) and (3)(b) of the *Employment Insurance Act* which read:

(2) Insurable employment does not include

...

i) employment if the employer and employee are not dealing with each other at arm's length.

(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.

(emphasis added)

[6] This case was one of four appeals that I heard in Edmonton, Alberta over a one week period. In the reasons in one of the other cases, *C&B Woodcraft Ltd.*, I commented generally on the scope of these provisions. I will not repeat that discussion here.

The Minister's determination

[7] The Minister concluded that John and Robert Wierenga were engaged in insurable employment because the terms and conditions of their employment were substantially similar to arm's length terms. The facts upon which the Minister relied are set out as assumptions of fact in the pleadings and are attached as an appendix to these reasons.

[8] The father and the two sons all testified at the hearing. Based on their testimony, I conclude that the Minister did not take into account several facts that should have had a bearing on the decision. Some of these are:

- The Minister failed to appreciate the number of hours that John Wierenga put into the business. The Minister assumed that he worked 40 hours per week and attended some elk conventions. I conclude based on the testimony that John Wierenga worked substantially more than that. He testified that he worked about 60 hours per week. While an individual's estimate of hours worked might be viewed with some caution because it is not based on a written record, I accept that John Wierenga worked close to that number of hours per week based on the duties that he described.

- The Minister failed to appreciate that the brothers were not paid for all of their work. John Wierenga was paid on an hourly basis for his time recorded. He recorded approximately 42 to 45 hours per week which was generally the time that the shop was open. There was a substantial number of hours worked for which he was not compensated. Robert Wierenga was also paid on an hourly basis for his recorded hours. These hours were approximately 25 to 30 hours per week, which corresponded to the hours that he worked in the office. Robert performed a number of miscellaneous duties away from the office for which he did not record his time and for which he was not paid.

- The Minister was aware of the hourly rates paid to the two brothers but failed to appreciate that the wages earned by Robert Wierenga were based in part on his financial need. Robert Wierenga has a physical disability that restricts the type of work and hours that he can work. Because he was only being paid for his recorded hours of 25 to 30 hours per week, his remuneration was quite low. Bert Wierenga testified that he increased the wages substantially in order to help his son out.

- The Minister appreciated that John Wierenga assisted with some financing for the business on one occasion but assumed that this was an isolated incident. There were two other occasions that John Wierenga financially participated in projects that the Minister did not consider.

- The Minister failed to appreciate that many of Robert Wierenga's duties probably would not be performed by an arm's length employee. During the relevant period Robert performed various miscellaneous tasks such as picking up supplies and cleaning the shop. More recently, Robert Wierenga has cut back on the work performed for Neeralta and now only does the bookkeeping which takes about 10 hours per week. There has been no replacement for the other duties that he had performed. Because of this, I conclude that Neeralta Welding would not have hired an arm's length employee to do the tasks that Robert Wierenga was doing other than the bookkeeping. A small welding shop would generally not be in a position to hire someone to do miscellaneous jobs such as picking up supplies and cleaning. Robert Wierenga's terms of employment were clearly motivated by the father trying to help out his son.

- The Minister acknowledged that John Wierenga was entitled to four weeks vacation but did not appreciate that he only took two weeks.
- The Minister failed to appreciate that not all the expenses incurred by the brothers in performing their duties were reimbursed by the corporation. The brothers incurred business related expenses for cell phones and travel to conventions. On the other hand, all business related expenses incurred by the arm's length employees were reimbursed.
- The Minister did not appreciate that John Wierenga used the shop for an upholstery business that he had on the side.
- The Minister did not appreciate that Robert Wierenga took a computer course to help the business and was not paid for the time spent at the course.

[9] Taken together, these factors indicate that the employment terms that the Minister considered were quite different from the actual terms and conditions of employment for each of John and Robert Wierenga. For this reason, I have concluded that the Minister's decision is not supportable.

Are employment terms arm's length

[10] The arm's length test in paragraph 5(3)(b) requires a comparison of the actual terms and conditions of employment to what they might be if the Wierenga brothers were dealing at arm's length with Neeralta Welding. This appeal is similar to others that I heard the same week involving businesses managed by the fathers of the appellants where the employment relationship was substantially affected by this relationship. It would be surprising if this were not the case. Generally, children working in a small family business tend to put in extra hours for which they are not paid, they tend to be less rigorous in requesting reimbursement of employment related expenses and they tend to blur the distinctions between ownership of equipment by the employer and the family personally. The fathers, on the other hand, tend to show more trust of family members and give them greater responsibilities than they would assign to arm's length employees and involve them more in important business decisions and financial matters. The fathers might also be more lenient with taking time off for personal matters and the compensation paid to the children might be affected by their personal situation.

[11] The terms and conditions of employment of John and Robert Wierenga were certainly influenced by a number of these factors that are not typical of arm's length employment. These factors are listed above and it is not necessary to repeat them. For these reasons, I conclude that John and Robert Wierenga's terms and conditions of employment are not substantially similar to what they would be if they had been dealing at arm's length with their employer.

Conclusion

[12] The appeals are allowed and the decision of the Minister that John and Robert Wierenga were engaged in insurable employment is vacated.

Signed at Ottawa, Canada, this 29th day of June 2004.

"J.M. Woods"

J.M. Woods J.

APPENDIX
Assumptions of Fact

In deciding as he did, the Minister relied on the following assumptions of fact:

- (a) Bert Wierenga and Tena Wierenga each own 50% of the voting shares of the Appellant;
- (b) Bert Wierenga and Tena Wierenga are married to one another;
- (c) the Workers are the sons of Bert Wierenga and Tena Wierenga;
- (d) the Workers and the Appellant are related to each other within the meaning of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1, as amended (the "Act");
- (e) the Appellant operates a welding shop;
- (f) the business of the Appellant includes:
 - (i) manufacturing and installing gates, panelling, squeezers and handlers for farmers in the elk industry;
 - (ii) manufacturing and installing dozer blades, bitch forks and other products for farmers; and
 - (iii) prefabricating and installing conveyor belts and other products for sawmills;
- (g) the Appellant has been operating for about 17 years;
- (h) the Appellant's business is located in Neerlandia, Alberta;
- (i) the Appellant's business generally operates from 8:00 a.m. to 5:00 p.m., Monday to Friday;
- (j) Bert Wierenga is generally available to supervise the business;
- (k) Bert Wierenga, Tena Wierenga and the Workers are all involved in the decision making of the Appellant;

- (l) during the period in issue, the Appellant employed between 6 to 7 employees, including the Workers;
- (m) 2 of the employees work in the front of the shop and look after repairs and do sawmill work;
- (n) John Wierenga works in the back with the other employees doing work related to the elk industry;
- (o) Robert Wierenga performs most of the office duties, including bookkeeping, ordering parts and supplies, answering the telephone and other minor office duties;
- (p) Robert Wierenga also cleans shop and fixes equipment on some weekends or on days off;
- (q) Robert Wierenga's authority in the business is increasing as Bert Wierenga and Tena Wierenga decrease their involvement in the business;
- (r) Robert Wierenga started working for the Appellant in April, 2000;
- (s) Robert Wierenga convinced his parents to install a computer for the business of the Appellant;
- (t) initially, Robert Wierenga worked part-time to get the computer system working;
- (u) the job of bookkeeping became Robert Wierenga's as his mother, Tena Wierenga, could not do the bookkeeping on the computer;
- (v) although Robert Wierenga taught himself how to do the bookkeeping on the computer, he Appellant also paid him to take a computer course;
- (w) Robert Wierenga works without supervision for he most part since he is the only one that knows how to do the work that he does;
- (x) Robert Wierenga has signing authority on the business bank account of the Appellant and he signs the payroll cheques;

- (y) Robert Wierenga was paid \$9.00 per hour when he started working for the Appellant, but he is currently being paid \$12.00 per hour;
- (z) Robert Wierenga is expected to be at work from 9:00 a.m. to 5:00 p.m., Monday to Friday;
- (aa) Robert Wierenga also works on some Saturdays for a couple of hours, if necessary;
- (bb) Robert Wierenga currently works about 30 to 40 hours per week;
- (cc) if Robert Wierenga was not available to perform his duties, his work would not get done;
- (dd) if Robert Wierenga was away for a long period of time, the Appellant would have to train someone else to perform his duties;
- (ee) Robert Wierenga only has one leg;
- (ff) although Robert Wierenga uses crutches to get around, he is able to drive without difficulty;
- (gg) Robert Wierenga is limited in his ability in that he cannot perform hard physical labour;
- (hh) as both Robert Wierenga and the Appellant needed a truck, they each paid 1/2 of the cost of a truck that was used by both of them;
- (ii) John Wierenga's duties include:
 - (i) being responsible for supervising, quality control and welding in the shop. and
 - (ii) working in the office performing such tasks as material ordering, sales, preparing quotes and helping out where needed;
- (jj) John Wierenga started working for the Appellant when he was 11 1/2 years old, making \$5.00 per hour;
- (kk) John Wierenga is a journeyman welder;

- (ll) John Wierenga is currently being paid \$18.00 per hour;
- (mm) John Wierenga is expected to be at work during regular shop hours, Monday to Friday, since he supervises the shop;
- (nn) John Wierenga is on call on his days off;
- (oo) John Wierenga usually works about 40 hours per week;
- (pp) as part of his duties, John Wierenga also attends elk conventions on behalf of the Appellant since his duties include selling products to the elk industry;
- (qq) John Wierenga has a lot of influence over the direction and operation of the business;
- (rr) while his parents were in Holland, John Wierenga had wanted to purchase pipe costing \$28,000.00;
- (ss) John Wierenga discussed the decision to purchase the pipe with his father and brother;
- (tt) to finance the purchase of the pipe, John Wierenga invested \$6,000.00 of his own money, in changes for 25% of the profit that was generated as a result of the acquisition of the pipe;
- (uu) the transaction involving the purchase of pipe was a one time occurrence;
- (vv) John Wierenga took out a personal loan to purchase a truck used in the business of the Appellant;
- (ww) it is the intention of the Appellant that John Wierenga be paid back in respect of the purchase of the truck;
- (xx) the Workers both decided on the type of advertising to be used for the business;
- (yy) in addition to their regular duties, the Workers also travelled to Edmonton to pick up parts for the business of the Appellant;

- (zz) the hours worked by the employees, including the Workers, were recorded;
- (aaa) the rate of pay received by the employees, including the Workers was set by the Appellant;
- (bbb) all of the employees of the Appellant, including the Workers, were paid by the hour;
- (ccc) the other employees of the Appellant were paid around \$8.00 to \$9.00 per hour to start, depending on their duties and whether they required any training;
- (ddd) the employees of the Appellant, including the Workers, receive and advance on the 15th of each month, with the balance of their wages being paid at the end of the month;
- (eee) the Workers were always paid on time;
- (fff) the highest paid employee was Charlie De Boer, who was paid \$21.00 per hour;
- (ggg) all of the employees, including the Workers, were entitled to wage increases as their duration of employment increased;
- (hhh) all of the employees, including the Workers, were paid vacation pay at increasing rates based on their length of employment;
- (iii) Robert Wierenga is paid vacation pay of 4% and is entitled to 2 weeks vacation;
- (jjj) John Wierenga is paid vacation pay of 8% and is entitled to 4 weeks vacation;
- (kkk) all of the employees of the Appellant, including the Workers, were paid overtime;
- (lll) all of the employees, including the Workers, receive a Christmas bonus;
- (mmm) both Workers are not paid if they are sick and unable to work;
- (nnn) both Workers receive little supervision;

- (ooo) both Workers and the Appellant consider the wages paid to the Workers to be reasonable;
- (ppp) although all of the employees of the Appellant could take time off, both Workers were given more leniency in that they did not have to give the Appellant advanced notice;
- (qqq) Robert Wierenga stated that an unrelated employee would:
 - (i) work from 8:00 a.m. to 5:00 p.m.;
 - (ii) not be expected to work after hours;
 - (iii) not have signing authority; and
 - (iv) not have the same scope of authority or responsibility;
- (rrr) John Wierenga stated that an unrelated employee would:
 - (i) not buy a truck for use by the Appellant;
 - (ii) not attend an elk convention;
 - (iii) not have the same scope of authority or responsibility; and
 - (iv) not be included in making major decisions;
- (sss) the Workers were each employed under a contract of service with the Appellant;
- (ttt) the Minister considered all of the relevant facts available to him, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work performed; and
- (uuu) the Minister was satisfied that it was reasonable to conclude that the Workers and the Appellant would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

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COURT FILE NOS.: 2002-4529(EI)
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2002-4260(EI)

STYLE OF CAUSE: Neeralta Welding & Sales Ltd. v. MNR
John Wierenga v. MNR
Robert Wierenga v. MNR

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: March 24, 2004

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: June 29, 2004

APPEARANCES:

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Counsel for the Respondents: Dawn Taylor

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