Docket: 2006-1519(EI)

BETWEEN:

LUANA FRUCHTER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 14, 2007, at Montréal, Québec

Before: The Honourable Justice Gaston Jorré

Appearances:

Agent for the Appellant:	Oscar Handelman
Agent for the Respondent:	Nadia Golmier (Student-at-law) Stéphanie Côté (Counsel)

JUDGMENT

The appeal with respect to the decision of the Minister of National Revenue made under the *Employment Insurance Act* is dismissed, and the decision of the Minister is confirmed.

Signed at Ottawa, Canada, this 22nd day of January 2008.

"Gaston Jorré"

Jorré, J.

Citation: 2008TCC46
Date: 20080122
Docket: 2006-1519(EI)

BETWEEN:

LUANA FRUCHTER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Jorré, J.

[1] This is an appeal[1] from a decision of the Minister of National Revenue (the "Minister") dismissing the Appellant's appeal from a ruling[2] that the Appellant's employment by Mitchco Inc. from May 1, 2003 to April 16, 2004 was not insurable employment. That decision was based on paragraph 5(2)(*i*) and subsection 5(3) of the *Employment Insurance Act* (the "*Act*").

[2] There is no dispute that the Appellant was employed under a contract of employment and that the Appellant and the employer were not dealing at arm's length. The issue is the application of paragraph 5(3)(*b*) of the *Act* which reads:

> if the employer is, …, related to the employee, they are deemed to deal with each other at arm's length if the Minister… is satisfied that, having regard to all the circumstances… it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing… at arm's length.

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1 An appeal pursuant to section 91 of the *Employment Insurance Act*.

2 A ruling pursuant to section 90 of the *Employment Insurance Act*.

[3] The Reply sets out that in making the ruling, the Minister relied on the following assumptions of fact:

a) the Payer, incorporated on July 18, 1989, operates in the sale and distribution of textiles;

b) the Appellant would have started to render services to the Payer from the very start of its operations;

c) at the beginning of her employment, the Appellant worked in the office making entries in the accounting books, to do classification and do purchasing to buy new fabrics;

d) the Appellant helped her husband's business for many years, and for some years, she worked without being paid;

e) during the period under review, the Appellant worked on the road to buy new fabrics; she especially accompanied her husband when he traveled outside;

f) the Appellant did not have any schedule of work to respect;

g) on February 14, 2006, the Appellant said to a representant of the Respondent that during the period under review, she had weeks when she did not render any service to the Payer;

h) during the period under review, the Appellant received a fixed salary of $ 750,00 per week and this, without regard to the hours really worked;

i) during the period under review, the Appellant did not work much and could not specify how many working hours she had incurred;

j) the Payer claims that the Appellant worked on call and that she worked approximately 10 hours per week;

k) if the Appellant worked only 10 hours per week, she thus received a remuneration of $ 75,00 per hour during that period;

l) based on the record of employment, the Appellant was paid for 25 hours per week, thus $ 30,00 per hour;

m) the tasks of the Appellant were tiny and nothing justifies the remuneration which the Payer paid to her.

[4] During the period in question, the Appellant was married to Mitchell Gantman who was the only shareholder of the Payor, Mitchco Inc. The Appellant and Mr. Gantman separated in May 2004 and subsequently divorced. The Appellant and Mr. Gantman have two children born in 1991 and 1993 respectively.

[5] Mitchco manufactured and sold textiles.

[6] The Appellant testified that during the years her husband was in business, she would help him in various ways. She helped him in the office with files and the computer. Most of the time, she went out on the road and would visit stores, bookstores and libraries seeking out ideas for themes or stories. She would buy garments as well. The ideas and garments would be used to make storyboards for clothing manufacturers.

[7] She also testified that she worked about 25 hours per week and earned over $30,000. (She did not qualify in what period but based on Exhibit A-1, she earned $37,043.04 in calendar year 2003 from Mitchco.)

[8] In cross-examination, she was asked and answered:

> Q. Do you recall having said to the agent that your income was a straight up salary so that your husband can pay less taxes?
>
> A. Yes, I do believe saying that. But I was receiving a salary based on my work as well.

[9] The Appellant's brief evidence of her tasks was very general. She did not describe any kind of work routine or seasonal cycle to her work.

[10] During the period in question, the Appellant also had a part-time job at a school[3] for two hours per week.

[11] The Appellant's representative filed Exhibit A-2, a document from the Internet showing a copyright of 2005 and bearing a Government of Canada logo.[4] It appears to be from the Web site Appareljobs.ca. It shows a median annual salary

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[3] See T-4 attached to Exhibit A-1 and paragraph 6 on page 3 of Exhibit R-1.

[4] It is not clear from the Exhibit what exactly the Government's role is with respect to Apparels.ca.

in Canada of $53,900 for this occupation. It has a 12-point description on page 1 of the functions of a fashion designer.[5]

[12] The Respondent called the appeals officer as a witness. Her appeal report was filed as Exhibit R-1. The record of employment was filed as Exhibit R-2.

[13] Among other things, she testified about the preparation of her report. In doing so, she spoke to the Appellant, Mr. Gantman, the Appellant's accountant and two employees of the Payor.

[14] She testified that the Appellant stated to her that:

a) she did not remember her hourly rate;

b) she had no fixed work schedule and no minimum or maximum hours;

c) she would work when her husband told her there was something to do and she would fit that work into the time she had available taking into account the needs of the children;

d) she could not estimate her average number of hours.

[15] In her report on the appeal (Exhibit R-1), she wrote that:

a) the Appellant had told her that in the period in issue she did not work very much;

b) the Appellant had admitted that her salary was paid to split income and save taxes for her husband and the Appellant stated that she thought this was normal and referred the appeals officer to her accountant for further information.

[16] She also wrote in her report that Mr. Gantman stated to her that:

a) he opened the company in 1998 with three or four employees and had 20 employees when it closed;

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[5] When one looks at the description of the functions of a fashion designer on page 1, of Exhibit A-2, the tasks the Appellant described herself as doing only cover part of the tasks described and she did not establish that what she did was comparable to the work of a fashion designer.

b) he employed the Appellant to do research and development of new styles because of her experience in fashion and that in doing so she was almost always out of the office;

c) if he was starting a new collection, she would go around stores to buy fabrics and clothing after he gave her an idea of what he wanted. On her return, she would report to him and show him what she had bought;

d) he estimated her work at 10 hours per week and could not explain why the record of employment showed 25 hours per week.

[17] In cross-examination, the appeals officer stated that she considered the hourly rate to be too high although she did not offer a basis for that statement such as some data on salaries for comparable work. She did add that there were periods for which the Appellant was paid even though not working and that a salary paid when someone was not working was necessarily too high.

[18] The appeals officer's decision was based on a number of factors including what she considered as too high a rate of remuneration,[6] the fact that she had worked very little in the period, the Appellant's complete control of her schedule and the admission that the salary was for income-splitting purposes.

[19] In *Birkland v. M.N.R.*[7], Bowie J. reviewed the law relating to paragraph 5(3)(*b*) of the *Act*. He set out the test as follows:

> 4 … This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment…

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6 Which she took to be $30 per hour for the purpose of her decision based on the 25 hours per week shown in the record of employment.

7 2005 TCC 291, paragraphs 1 to 4.

[20] There is one aspect of the evidence that stands out. In paragraph 9)g) of the Reply, it states that the Minister assumed that there were weeks where the Appellant rendered no services to the Payor although the Appellant continued to be paid.[8] Given that the Appellant's evidence simply did not deal with this, I must proceed on the basis that there were such weeks. Apart from sick leave or vacation leave, employers do not normally pay employees for not working. This goes beyond flex time arrangements. This feature by itself is so clearly contrary to an arm's length arrangement that the Minister could reasonably have reached the conclusion that he did even if all the other terms and conditions were arm's length conditions.[9]

[21] I should note that I do not regard the statement made by the Appellant during cross-examination that she worked an average of 25 hours per week as dealing with the issue of whether there were weeks where she did not work at all — a matter squarely in issue as a result of paragraph 9)g) of the Reply.

[22] Given this, it is not strictly necessary for me to deal with other factors but I will make the following additional comments.

[23] I accept that there was an income-splitting motivation. Such a motivation by itself is not necessarily decisive but it certainly is a reason to carefully scrutinize the terms and conditions of employment.

[24] With respect to whether the rate of pay is consistent with an arm's length relationship, that cannot be determined without establishing how many hours were worked in total during the period. In itself, $750 for 25 worked hours may very well be consistent with arm's length terms of work. An amount of $750 for not working is not. Further, if the Appellant worked substantially less than 25 hours during working weeks, then $750 would not be consistent with arm's length terms.

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[8] This was no doubt based on statements made by the Appellant to the appeals officer (see paragraph 6, page 3, Exhibit R-1).

[9] I would also note there was no evidence that, in the absence of a requirement to work a fixed number of hours every working week, there was a requirement on the Appellant to produce a given amount of services measured by the end product of her work.

[25] While the Appellant testified that she worked an average of 25 hours, she had previously said to the appeals officer that she could not provide an estimate and that she had worked very little in the period. As a consequence, I do not accept the statement of a 25-hour average and conclude that in the period the actual hours were significantly less.[10]

[26] I conclude that the Minister could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. Accordingly, the appeal will be dismissed.

Signed at Ottawa, Canada, this 22nd day of January 2008.

"Gaston Jorré"

Jorré, J.

[10] The Appellant's statement that she worked an average of 25 hours per week was made in cross-examination. She was not challenged as to her prior inconsistent statements. Clearly, it would have been much preferable if she had been.

Although this point was not raised, I considered whether for this reason I should disregard the prior inconsistent statements and simply accept the 25-hour average. In all the circumstances, I decided that I would not ignore the prior statements.

CITATION:	2008TCC46
COURT FILE NO.:	2006-1519(EI)
STYLE OF CAUSE:	LUANA FRUCHTER AND M.N.R.
PLACE OF HEARING:	Montréal, Québec
DATE OF HEARING:	March 14, 2007
REASONS FOR JUDGMENT BY:	The Honourable Justice Gaston Jorré
DATE OF JUDGMENT:	January 22, 2008

APPEARANCES:

Agent for the Appellant:	Oscar Handelman
Agent for the Respondent:	Nadia Golmier (Student-at-law) Stéphanie Côté (Counsel)

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