

Dockets: 2008-1083(EI)

BETWEEN:

FRANCIS FITZGERALD,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on September 24, 2008,
at St. John's, Newfoundland and Labrador
Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Toks C. Omisade

JUDGMENT

The Appellant's appeal under the *Employment Insurance Act* ("Act") from the decision of the Respondent that the employment of the Appellant by Fitzgerald's Convenience Limited during the period from January 22, 2006 to September 2, 2007 was not insurable employment within the meaning of section 5 of the *Act*, is dismissed.

Signed at Halifax, Nova Scotia, this 30th day of September 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC552
Date: 20080930
Dockets: 2008-1083(EI)

BETWEEN:

FRANCIS FITZGERALD,

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 Francis Fitzgerald by Fitzgerald's Convenience Limited ("Company") during the period from January 22, 2006 to September 2, 2007 was not insurable employment for purposes of the *Employment Insurance Act* ("Act") was reasonable.

[2] Subsection 5(2) of the *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 *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 were held equally by Reginald and Mildred Fitzgerald. The Appellant is Reginald Fitzgerald's brother. 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 liquor store. The business is open for approximately 364 days per year from 7 am until 9 pm each day.

[7] The Appellant and her husband were living in Ontario when they were approached by Reginald and Mildred Fitzgerald to see if they would return to Newfoundland and Labrador to work in the business. Reginald and Mildred Fitzgerald were looking for someone who could manage the business so they could have some time for themselves.

[8] The Appellant was employed as a cashier, store clerk, and general labourer. He would order supplies, clean, paint, maintain the cooler, do carpentry work, shovel snow, and complete any repairs that had to be done and which he could complete. For example, he would try to repair the fuel pump in the event that it should break down before calling the service repair company. If it was simply a broken or loose belt, then he would fix it.

[9] He stated that there were also additional duties that he had that the other arm's length employees did not have. He would refuel ambulances after hours in the event that an ambulance would need refuelling. He indicated that this would happen about once a month. For about four days in the summer of 2007 he worked on replacing approximately 100 feet of drain pipe and the septic tank. As well, when the store would close at 9 pm he would take over from the employees who would be working and balance the cash. The other employees would also consult with him before they would cash a cheque.

[10] The Appellant was paid \$16 per hour in 2006 and until February 2007 and then he was paid \$12 per hour. His pay was reduced in February 2007 because the Appellant and his spouse moved into the apartment above the convenience store and did not pay rent. The apartment was provided by the Company.

[11] The Appellant initially worked 45 hours per work but reduced his hours to 35 hours per week because he had to look after his wife. He eventually had to quit his job because his wife was not well. The Appellant's wife (Betty Fitzgerald) had been working for the Company as well and she had to quit working in 2006. Her employment with the Company was also the issue in an appeal to this Court and her appeal from a determination by the Respondent that her employment was not insurable employment for the purposes of the *Act* was dismissed (2007 TCC 665).

[12] The Appellant clearly stated that he would not have moved back from Ontario if he and his wife would have been offered anything less than \$16 per hour. However the test is whether they would have agreed upon substantially the same terms and conditions if they would have been dealing at arm's length; not whether he personally would have agreed to move if the rate of

pay would have been less. The Appellant emphasized that he was being hired to manage the business but he did not have any responsibility for hiring, scheduling or firing any of the other employees, which would have been part of managing the business. He did indicate that he was responsible for ordering supplies but Gertrude Wall, who was hired for \$8.50 per hour in October 2007 as a full time employee, also had responsibility for ordering supplies.

[13] Mildred Fitzgerald, one of the shareholders of the Company, testified. In the questionnaire that she had completed for the Respondent, the following questions were posed:

28. Was anyone hired to replace the Worker?
 - a. What is that person's rate of pay?
 - b. Please describe this person's duties compared to the Worker's.

The Worker was identified on the first page of the questionnaire as the Appellant. The answers provided by Mildred Fitzgerald on this questionnaire were as follows:

Yes, new employee was hired to replace Worker. Rate of pay for new employee is \$8.50. New employee's duties are the same as former employee.

[14] During the hearing, Mildred Fitzgerald indicated that two employees had left – the Appellant and one other full time employee. She indicated that only one person was hired to replace these two employees and that the reference to the duties of the former employee could refer to the other worker who left. However this would raise the issue of whether the Appellant would have been hired at all if he was not Reginald Fitzgerald's brother. The individual who was hired to replace the workers (Gertrude Wall) also testified during the hearing. She indicated that her duties included cleaning, shovelling snow, ordering supplies, stocking shelves, working at the cash register, running off the reports at night and locking the cash in the safe. She did not balance the cash but this did not diminish her responsibilities for the cash as she would have the control over the cash until she left the store after work.

[15] The main issue in this case relates to the amount that the Appellant was paid in relation to the amounts paid to the other employees who were dealing at arm's length with the Company. There were other arm's length employees who were working for the Company at the same time as the Appellant and these employees

were paid \$7 to \$8.25 per hour. The employee that was hired after the Appellant ceased to work for the Company was paid \$8.50 per hour.

[16] Although the cash amount paid to the Appellant decreased from \$16 per hour to \$12 per hour, the Appellant, when this cash payment was reduced, received the benefit of the accommodations provided by the Company. Providing the apartment to the Appellant and his spouse was part of the compensation paid to the Appellant and the Respondent, in my opinion, was correct in including this as part of the analysis to determine whether the Appellant and the Company would have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length.

[17] No monetary value was placed on the provision of the apartment to the Appellant and his spouse. The Appellant had stated that he had reduced the number of hours that he was working from 45 hours per week to 35 hours per week. Assuming that the Appellant worked 35 hours per week in 2007, reducing his pay by \$4 per hour would result in the Appellant receiving \$140 less per week. On a monthly basis this would mean that the Appellant was receiving approximately \$560 less per month, which would suggest that this would be the approximate monetary value of the apartment.

[18] The extra duties that the Appellant performed that the arm's length employees did not perform, were the extra duties related to the septic tank and the drainage pipe, refuelling the ambulances, repair work, balancing the cash and providing advice on cashing cheques. The work related to the drainage pipe and the septic tank only took about four days. Refuelling the ambulances would only happen once a month (and although this would be after hours would probably take less than an hour to do). There was no evidence of the amount of time that he would spend on repairs, balancing the cash or providing advice to the other employees. It does not, however, seem reasonable that the repairs would have to be done each hour of every day but it does seem reasonable to conclude that repairs would have to be completed occasionally. It also seems reasonable to conclude that balancing the cash would take some time but not enough time to justify a rate of pay for each hour that was worked (which would include many hours when the Appellant was not balancing the cash) of approximately twice as much as the arm's length employees who had many of the same duties as the Appellant. It also does not seem reasonable that any significant amount of time would have been spent in providing advice on cashing cheques or that this duty would justify a significant pay differential.

[19] It does not seem reasonable that these extra duties, which (other than balancing the cash) were done sporadically over the period of employment, would justify the Appellant being paid approximately twice the amount per hour for each hour that he worked as the arm's length employees were being paid. It would appear that the majority of his time was spent performing the same duties as the other arm's length employees including Gertrude Wall, yet he was paid almost twice as much per hour (taking into account the accommodations that were provided for no rent).

[20] As well Mildred Fitzgerald's written response that a replacement worker was hired to perform the same duties as the Appellant for substantially less pay, indicates that the Company and the Appellant would not have entered into a substantially similar contract of employment if they would have been dealing at arm's length. Her suggestion during the hearing that her responses as provided in the questionnaire referred to above, would only apply to the replacement of the other employee who left (since only one employee was hired to replace both the Appellant and another full time arm's length employee) is not of assistance to the Appellant. Since only one employee was hired to replace two employees, this would suggest that the Company and the Appellant would not have entered into any contract if the Appellant had not been Reginald Fitzgerald's brother.

[21] 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. I am unable to conclude that the decision of the Minister was unreasonable and therefore the appeal is dismissed.

Signed at Halifax, Nova Scotia this 30th day of September 2008.

“Wyman W. Webb”

Webb J.

CITATION: 2008TCC552
COURT FILE NOS.: 2008-1083(EI)
STYLE OF CAUSE: FRANCIS FITZGERALD AND M.N.R.
PLACE OF HEARING: St. John's, Newfoundland and Labrador
DATE OF HEARING: September 24, 2008
REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT: September 30, 2008

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Toks C. Omisade

COUNSEL OF RECORD:

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