

Docket: 2008-2566(EI)

BETWEEN:

NAOMI KINDEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 16, 2009, at Gander, Newfoundland

By: The Honourable Justice B. Paris

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Jill Chisholm

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the determination of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* for the period September 10, 2007 to November 20, 2007 is confirmed.

Signed at Vancouver, British Columbia, this 5th day of August, 2009.

“B. Paris”

Paris J.

Citation: 2009 TCC 387
Date: 20090805
Docket: 2008-2566(EI)

BETWEEN:

NAOMI KINDEN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Paris, J.

[1] This is an appeal from a determination by the Minister of National Revenue (the Minister) that Cory Kinden's employment from September 10, 2007 to November 30, 2007 with the Appellant, his grandmother, was not insurable under the *Employment Insurance Act* (the *Act*).

[2] The Minister held that the Appellant and Mr. Kinden were not dealing at arm's length and that Mr. Kinden's employment was therefore excluded from insurable employment by virtue of paragraph 5(2)(i) of the *Act* which provides:

5(2) insurable employment does not include

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

[3] In addition, paragraphs 5(3)(a) and (b) of the *Act* state:

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] It is not disputed that the Appellant and Mr. Kinden were related for the purpose of the *Income Tax Act*. The only issue in this appeal is the reasonableness of the Minister's decision that the Appellant and Mr. Kinden would not have entered into a substantially similar contract of employment if they had been dealing at arm's length.

[5] In an appeal of a determination by the Minister under paragraph 5(3)(b) of the *Act*, the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, to consider all the facts in evidence before the Court, including any new facts, and to assess whether the Minister's decision is reasonable (see *Porter v. The Minister of National Revenue*, 2005 TCC 364).

[6] The facts relied upon by the Minister are set out in paragraph 5 of the Reply to Notice of Appeal and read as follows:

- (a) the Appellant is in the business of renting residential apartments;
- (b) the Appellant owns an 11 unit apartment building and 5 additional rental units contained in other buildings;
- (c) the Appellant is the Worker's grandmother;
- (d) the Worker purportedly worked for the Appellant 5 days per week for 10 hours per day during the period under appeal;
- (e) the Worker's remuneration from the Appellant was \$10 per hour during the period under appeal;
- (f) the Appellant paid the Worker weekly by cheque;

- (g) at least one paycheque from the Appellant to the Worker was deposited into the Appellant's bank account;
- (h) the Worker was hired to perform repair and maintenance work which included painting apartments, painting apartment patios, painting window and door trim, cleaning carpets and installing laminate flooring (the "Duties");
- (i) with the exception of exterior painting, most of the Duties are not restricted to a particular season;
- (j) the Appellant did not purchase exterior paint during the period under appeal;
- (k) the supplies required to complete the Duties were purchased on various dates between January and August 2007;
- (l) there were no other employees engaged by the Appellant to perform the Duties or any similar work before, during, or after the period under appeal;
- (m) exterior painting was done in April, May, and June of 2007;
- (n) the period under appeal began on the Monday following the expiry of the Worker's previous Employment Insurance Claim (the "Previous Claim");
- (o) the Worker performed the Duties for the Appellant before, during and after the period under Appeal;
- (p) the Worker performed the Duties for the Appellant while he was in receipt of Employment Insurance Benefits from the Previous Claim;
- (q) the Worker received a \$500 cheque from the Appellant (the "Cheque"), dated December 19, 2007 and marked "C Labour" in the memo field; and
- (r) the Cheque was not recorded in the Appellant's payroll records.

[7] The Appellant admitted that the facts in subparagraphs (a) to (h), (j), (k), (l), (q) and (r) were true.

[8] The Appellant testified that although she did not hire anyone else before or after the period under appeal to perform duties similar to those carried out by Mr. Kinden, some work was done for her by her husband and by her son, without pay. She recalled that her husband may have painted some patio furniture in April 2007 and may have done exterior painting at the rental units in May and June, 2007. The Appellant was adamant that Mr. Kinden only did occasional odd jobs for

her outside of the period under appeal, that he did them as a favour to her and was not paid for them, and did not work for her while he was collecting employment insurance benefits.

[9] The Appellant said she was unaware of whether Mr. Kinden's employment with her commenced immediately after the expiry of his employment insurance claim, but this was confirmed by a Canada Revenue Agency (CRA) witness, the appeals officer in the file. Mr. Kinden's previous claim ended on September 8, 2007.

[10] At the hearing, the Appellant insisted that the payment was for work done by Mr. Kinden to decorate the rental buildings for Christmas and for setting up Christmas trees for some tenants. She said this was more like casual work and was not recorded by her as payroll.

[11] Central to the Respondent's case was the issue of whether the Appellant had employed anyone in the period before or after Mr. Kinden to perform the duties that he carried out for her. The Respondent maintained that since the Appellant did not hire anyone else before or after the Appellant there was no need for her to hire Mr. Kinden to work 50 hours per week from September 10 to November 30, 2007, and that he was only employed because of the non-arm's length relationship between the parties.

[12] While the Appellant admitted that she did not pay anyone to do the same tasks carried out by Mr. Kinden before or after the period under appeal, she said the work was done either by her husband or by her son, depending on who was available to do the work. She said that her husband was working part-time up until August 2007 and so was able to do the painting and repairs at the rental properties up to that time. She said she did not pay him for the work he did for her because he was family.

[13] Even if I were to accept that up to August 2007, the Appellant's husband performed the same work done by Mr. Kinden, I am not satisfied that the amount of time worked by the Appellant's husband was anywhere near 50 hours per week. In fact, the Appellant did not suggest that this was the case, but instead said that there was more work to be done at the rental units during the Summer and Fall than at other times of the year. However, this would appear to support the Respondent's position, in that the work in the summer was done by the Appellant's husband while working *part-time*. Also, it does not appear from the evidence that the amount of work at the rental units increased substantially from the period from September 10 to the end of November 2007

[14] According to the Appellant, carpet cleaning and interior painting work was generally done when a tenant moved out, and to her recollection only two vacancies occurred while Mr. Kinden was working. Furthermore, Mr. Kinden said that he only worked at the complex in which 11 of the rental units were located, and did not perform any work at the remaining five units that were located elsewhere.

[15] From receipts submitted by the Appellant's purchases of building supplies for the rental properties it can be seen that from August to November 30, 2007 the Appellant purchased six gallons of paint and 30.5 square feet of laminate flooring (15 boxes containing 20.1 square feet each). This amount of material does not suggest intensive ongoing painting or floor replacement over a three-month period as was suggested by the Appellant and Mr. Kinden in their testimony. Although the Appellant said she purchased materials in advance for the work done by Mr. Kinden, no corroborating evidence was produced and it does not seem likely, given the purchases of paint and laminate flooring that were made in August of 2007. If materials had already been acquired before August 2007 for use in September, there would have been no need for additional purchases in August.

[16] I am not convinced that the Appellant delayed necessary maintenance on her rental buildings until the Fall in order to have it done by Mr. Kinden. Going by the list of the Appellant's purchases of building supplies over the year as detailed in Exhibit A-3, it appears that material was acquired frequently throughout 2007, suggesting work was done on a regular basis that year.

[17] I also note that the Appellant did not present any evidence that she hired anyone to work in the Fall of 2008, which she claimed was the busy season for maintenance along with the summer.

[18] There were a number of inconsistencies between the evidence given by the Appellant at the hearing and the answers she gave to the CRA in a questionnaire she filled out regarding Mr. Kinden's employment. This was also the case for Mr. Kinden's evidence at the hearing and the answers he gave on the questionnaire he filled out. The Appellant originally stated that Mr. Kinden did interior and exterior painting, cleaned carpets and installed flooring. Mr. Kinden, in his questionnaire, only referred to painting and carpeting repairs. At the hearing, the Appellant and Mr. Kinden expanded the list of tasks to include installation of flooring, removal and replacement of broken appliances, lawn mowing, storage of lawn furniture, replacing hot water tanks and supervision of special needs tenants.

[19] I am left with the impression that Mr. Kinden, in his testimony, exaggerated the work that was done. For example, he testified that cleaning the carpets took three or four days per apartment. He also said that carpets were replaced in eight or nine apartments. I understood him to mean that laminate flooring was used to replace the carpets, although only 300 square feet of flooring appears to have been purchased. There was no mention by the Appellant of new carpeting being installed and no receipts for carpet purchases were presented. The suggestion that carpets were replaced in eight or nine out of the 11 units at the location where Mr. Kinden worked also seems unlikely in that this work would have been very disruptive to tenants, and would likely have been done as the units were vacated.

[20] Mr. Kinden's and the Appellant's evidence regarding the supervision of special needs tenants was also inconsistent. The Appellant said that certain tenants required supervision and that she normally did it but that, Mr. Kinden would do it for her when she was away. Mr. Kinden, on the other hand said that he would just keep an eye out for the special needs tenants while he was carrying out his other duties, and that this was not really his job.

[21] Other parts of the Appellant's testimony also lead me to question her credibility. During the course of the CRA appeals officer's review of the request for a review of the Minister's ruling, she was asked to provide documents relating to Mr. Kinden's employment. The appeals officer testified that whiteout had been applied to one of the cancelled cheques made out to Mr. Kinden, dated December 19, 2007. The whiteout obscured the reference on the cheque to "C labour". The appeals officer noted that the date of the cheque was after Mr. Kinden had been laid off and that the reference to "C labour" was the same as that on certain of Mr. Kinden's paycheques from the Appellant (presented as Exhibit A-1). The Appellant first told the appeals officer that there must have been a mistake on the cheque, and then told her that she must have rehired Mr. Kinden. At the hearing, the Appellant stated she did not recall anything about the whiteout on the cheque, and that Mr. Kinden did some Christmas decorating for her and that the cheque was like a Christmas bonus. She also said that the reference to "C labour" was not on his regular paycheques, although the cancelled paycheques for Mr. Kinden's last two pay periods had this same reference on them. (Exhibit A-1)

[22] In light of all of the evidence, I find that the Appellant has not shown that the Minister's decision regarding the terms and conditions of Mr. Kinden's employment was unreasonable. It appears to me that the same work for which Mr. Kinden was paid for 50 hours per week to perform had been previously done by the Appellant's husband while he was working part-time at another job, and that the reason the

Appellant was prepared to pay Mr. Kinden this amount was because he was her grandson. The Appellant herself stated that at the time she hired Mr. Kinden he was looking for work and she felt it was her duty to give him a job.

[23] For the above reasons, the appeal is dismissed.

Signed at Vancouver, British Columbia, this 5th day of August, 2009.

“B. Paris”

Paris J.

CITATION: 2009 TCC 387
COURT FILE NO.: 2008-2566(EI)
STYLE OF CAUSE: NAOMI KINDEN AND M.N.R.
PLACE OF HEARING: Gander, Newfoundland
DATE OF HEARING: June 16, 2009
REASONS FOR JUDGMENT BY: The Honourable Justice B. Paris
DATE OF JUDGMENT: August 5, 2009

APPEARANCES:

For the Appellant: The Appellant herself
Counsel for the Respondent: Jill Chisholm

COUNSEL OF RECORD:

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Firm:

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