

Docket: 2008-2264(EI)

BETWEEN:

THUY PHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 9, 2010, at Edmonton, Alberta.

Before: The Honourable Justice Robert J. Hogan

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Gregory Perlinski

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue is vacated in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 7th day of June 2010.

"Robert J. Hogan"

Hogan J.

Citation: 2010 TCC 311

Date: 20100607

Docket: 2008-2264(EI)

BETWEEN:

THUY PHAM,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Hogan J.

[1] The Appellant filed an appeal from a decision of the Minister of National Revenue (the “Minister”) whereby the Minister determined that the Appellant’s employment with 1115006 Alberta Ltd. (the “Payor”) was not insurable employment within the meaning of the *Employment Insurance Act* (the “EIA”).

[2] Paragraph 5(2)(i) of the *EIA* provides that employment is not insurable where the employer and the employee do not deal with each other at arm’s length. The Minister concluded that the Appellant was related to the Payor, which was owned by the Appellant’s sister. A finding that the employer and employee are related does not in and of itself lead to a conclusion that the employment is not insurable. Paragraph 5(3)(b) of the *EIA* deems related parties to be dealing at arm’s length with each other if, having regard to all of the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work, it is reasonable to conclude that the parties would have entered into a substantially similar contract of employment if they had been dealing at arm’s length (the “Factual Arm’s Length Exception”). The evidence shows that the Minister’s delegates in this matter, namely David Sadoway initially and Christopher Dayman on appeal, found that the Appellant’s employment with the Payor did not fall within the Factual Arm’s Length Exception. Their finding was based on the fact that the cheques issued in payment of the Appellant’s salary were often cashed late. They believed that the delay in payment of the Appellant’s wages was due to the business being in financial difficulty. They suspected that the Appellant was asked to defer payment until financial circumstances allowed her salary to be paid. I note that

the Minister's delegates would have concluded that the Factual Arm's Length Exception applied to the Appellant's case if her salary had been paid promptly.

[3] The Appellant offered a different explanation for the tardiness in the payment of her salary and wages. She alleged that her pay cheques were cashed late because she did not have a bank account with a financial institution where funds could be deposited as savings. She delayed cashing her cheques as an alternative way to accumulate savings. The witness explained that she also asked the Payor to consolidate payment of her wages in cheques that covered more than one pay period in order to lower the fees she paid to cash her pay cheques. I believe the Appellant's explanation that she deferred cashing her pay cheques to build savings and avoid administrative charges. While she had difficulty with the English language, her demeanour at trial demonstrated her desire to be fully truthful. It is not uncommon for new arrivals to Canada from developing nations to use saving techniques which do not involve simply depositing cheques in a bank account. In addition, because the Payor was owned entirely by the Appellant's sister, whom undoubtedly she trusted completely, the Appellant did not have the same level of mistrust that she might otherwise have had if the Payor had been unrelated to her. The Appellant should not be deprived of her employment benefits simply because she deferred cashing her pay cheques for the purpose of accumulating savings.

[4] The provision that defines the Factual Arm's Length Exception makes it clear that the terms and conditions of the Appellant's employment must meet an arm's length standard. In the case at bar, payment of the Appellant's salary was delayed because of the Appellant's unilateral decision to defer receipt of payment. This was done as an alternative means for the Appellant to accumulate savings. It had nothing to do with the terms of her employment with the Payor. I am confident that if the Minister had been properly informed of this fact he would have concluded that the Factual Arm's Length Exception applied.

[5] For these reasons the Appellant's appeal is allowed.

Signed at Ottawa, Canada, this 7th day of June 2010.

"Robert J. Hogan"

Hogan J.

CITATION: 2010 TCC 311

COURT FILE NO.: 2008-2264(EI)

STYLE OF CAUSE: THUY PHAM v. THE MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: April 9, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Robert J. Hogan

DATE OF JUDGMENT: June 7, 2010

APPEARANCES:

For the Appellant: The Appellant herself

Counsel for the Respondent: Gregory Perlinski

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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