

Docket: 2010-564(EI)

BETWEEN:

GULZAR PANNU,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on common evidence with the appeal of
A.D.S. Construction Ltd. 2010-942(EI)
on September 27, 2010 at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant: Tejinder Singh Gill

Counsel for the Respondent: Zachary Froese

JUDGMENT

The appeal is dismissed and the decision of the Minister of National Revenue is confirmed, in accordance with the attached Reasons for Judgment.

Signed at Calgary, Alberta this 3rd day of November 2010.

“D. W. Rowe”

Rowe D.J.

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Gulzar Pannu *2010-564(EI)*
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Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

Agent for the Appellant: Dashmesh Singh Pannu

Counsel for the Respondent: Zachary Froese

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Citation: 2010 TCC 562
Date: 20101103
Dockets: 2010-564(EI)
2010-942(EI)

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REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant, Gulzar Pannu (“Gulzar”) appealed from a decision by the Minister of National Revenue (the “Minister”) – dated December 1, 2009 – wherein the Minister determined that his employment with A.D.S. Construction Ltd. (“ADS”) from January 1, 2008 to June 30, 2008 and from December 16, 2007 to December 31, 2007 and from July 1, 2008 to December 26, 2008, was not insurable employment pursuant to paragraph 5(2)(i) of the *Employment Insurance Act* (the “Act”). The Minister, after considering all of the terms and conditions of said employment, was not satisfied the contract of employment between the Appellant and ADS would have been substantially similar if they had been dealing with each other at arm’s length.

[2] Gulzar was represented by his agent, Tejinder Singh Gill (“Gill”).

[3] ADS filed a separate appeal – 2010-942(EI) and its agent – Dashmesh Singh Pannu (“Dashmesh”) and counsel for the Respondent and Gill agreed this appeal could be heard - on common evidence - with the Gulzar appeal.

[4] The parties agreed that only the employment from July 1 to December 26, 2008 was in dispute.

[5] Dashmesh Singh Pannu testified in the Punjabi language and the questions and answers and other aspects of the proceedings were interpreted by Ravinder Aggarwal, a certified court interpreter fluent in English and Punjabi.

[6] Dashmesh testified he is President and sole shareholder of ADS, a construction company operating out of Surrey, British Columbia. Gulzar is his father and was born on September 1, 1925. ADS operates on a year-round basis during the hours from 9 a.m. to 5 p.m., Monday to Friday. Dashmesh agreed the following assumptions of fact as stated in subparagraphs 8(g) to (k) and also in subparagraphs 8(m) to 8(r) of the Reply to the Notice of Appeal (“Reply”) were correct, as follows:

8. In determining that the Appellant was not employed in insurable employment with the Payor during the Period, the Minister relied on the following assumptions of fact:

...

g) the Appellant’s main duties were to clean up at the work site, hammer nails, help co-workers with their tools, and serve snacks and tea;

h) the Appellant’s duties also included keeping an eye on the Payor’s employees when the Payor was off-site;

i) the Appellant was paid at the rate of \$9.50 per hour by cheque;

j) the Appellant’s cheques were not cashed on a regular basis;

k) the Appellant’s cheques were deposited into a shared bank account with Dashmesh and Dashmesh’s wife;

...

m) the Appellant did not provide services to the Payor during the months of January to June of 2008;

- n) the Appellant was not laid off due to a shortage of work during the months of January to June 2008;
- o) the Appellant was visiting his sister in Abbotsford and his daughter and nephew in England during the months of January to June of 2008;
- p) the Payor's record of revenues for January to December 2008 show a consistent level of income with no slow period;
- q) the Payor did not keep timesheets recording the Appellant's hours;
- r) the Appellant did not work on Saturdays;
- ...

[7] Dashmesh stated that with respect to Gulzar's duties (8(g)), he also removed nails from lumber. During the period at issue, ADS had 5 employees including himself and Gulzar. Dashmesh agreed Gulzar did not cash his cheques on a regular basis because he did not have any of the usual identification documents. Gulzar lived with Dashmesh and his wife and went to the bank with them occasionally where he had equal signing authority on the shared account. Dashmesh disagreed with the assumption at subparagraph 8(l) and stated framers were paid only \$14 to \$16 per hour, not \$18. With respect to the assumptions at subparagraphs 8(s) and 8(t), respectively, Dashmesh disagreed that the wage range for helpers/labourers in the construction industry is approximately \$15 per hour and stated Gulzar's replacement – Rahdhi Hothi ("Hothi") – was not paid \$18 per hour. Dashmesh stated he was able to hire workers at a beginning wage of \$9 per hour and increased their rate in accordance with their experience gained over time. As for Hothi, he earns only \$13 per hour currently and in August, 2009, was paid \$9 per hour as there was an abundance of labour available due to the recession which affected the construction industry. Hothi was a young man, newly-arrived from India and had no construction experience. Dashmesh stated all workers recorded their own time and reported to him the hours worked. Gulzar did so verbally and Dashmesh was aware of the time spent on the job since he drove Gulzar to and from work from their shared residence. Dashmesh stated Gulzar had served 24 years in the Indian Army as an Engineer and came to Canada in April, 2002. Dashmesh arrived in Canada in September, 1998 and went to school for only two or three months and the majority of his construction clients are Punjabi-speaking and he does his banking in that language. As a result, his English is limited when required to deal with matters requiring an expanded vocabulary in matters not related to his business. Dashmesh stated Gulzar picked berries in 2009 but is currently not employed due to ill health. In the course of operating ADS, Dashmesh stated he had recently informed the Workers

Compensation Board that he would re-hire a worker – now able to return from an injury – to perform light duties of the sort carried out by Gulzar during the relevant period. The work carried out over the past 12 years by ADS is mainly in residential construction and 4 workers were laid off in 2009 due to a slowdown. Dashmesh stated, it is usual to have a worker – sometimes young, sometimes older – on site to perform light duties but the responsibilities and duties of a younger person will increase with the passage of time as experience is gained and the hourly wage will be raised accordingly. When Dashmesh had to leave a work site – for periods between one and four hours, two or three times a week – to search for additional work for ADS, Gulzar carried on with his own duties and also “kept an eye on the workers” none of whom related to him or Gulzar.

[8] The agent for Gulzar did not cross-examine.

[9] In cross-examination by counsel for the Respondent, Dashmesh agreed he made all business decisions for ADS. Gulzar is now 85 and was 83 when working during the relevant period and earned \$9.50 per hour which was not much above the minimum wage. ADS had 4 or 5 workers prior to hiring Gulzar and the duties later performed by him had been done by one or other of the workers who was a framer and earned \$13 per hour. Trainees were paid only \$9 an hour and were expected to learn the framing trade and could earn a higher hourly wage upon gaining experience since 4 workers were required to frame a house. In the case of Gulzar, he was not expected to perform any other duties except the ones referred to earlier and would not have been subject to layoff even if work had slowed down. ADS bids for a framing job based on a price per square foot. Dashmesh stated that although ADS had work available, Gulzar did not want to work from January to June, 2008 and visited family and friends, during which period he was not paid by ADS. Gulzar returned to work on July 1, 2008. Counsel referred Dashmesh to 3 pages of payroll information for Gulzar – Exhibit R-1. The statement pertaining to the pay period ending July 31, 2008 indicated under the column headed “YTD” that Gulzar had earned gross pay of \$9,573.72 to that point in 2008. Dashmesh stated he had not known that YTD meant “Year-to-Date” and stated ADS had not paid Gulzar any money in 2008 between January 1 and July 1, the date he started back to work. Dashmesh produced a bundle of photocopies of pay stubs relating to Gulzar – Exhibit A-1 – together with a T4 slip – Exhibit A-2 – which indicated Gulzar’s total income in 2008 earned from his employment with ADS was a total of \$9,573.72. Dashmesh stated that it was obvious that YTD entry – supposedly effective as at July 31 – was incorrect. Dashmesh acknowledged that ADS had – on occasion – paid an experienced framer up to \$18 an hour. All workers were picked up at their homes and driven to and from work.

[10] Dashmesh advised the Court the case for ADS was closed.

[11] Tejinder Singh Gill testified he is an insurance broker living in Surrey. He knows Gulzar and is an acquaintance of Dashmesh. He was involved in the paperwork pertaining to the appeal to the Minister from the ruling. He stated Gulzar provided him with a calendar - Exhibit A-3 – a copy of which he provided to the Appeals Officer. There are no entries in the calendar until July 1, when Gulzar returned to work at ADS. Gill stated Gulzar had a heart attack in November, 2009 and was advised not to attend Court for his appeal.

[12] Neither Dashmesh nor counsel for the Respondent cross-examined Gill.

[13] Gill advised that the case for Gulzar was closed.

[14] Rosemary Basha (“Basha”) testified she has been employed by Canada Revenue Agency (“CRA”) as an Appeals Officer for 5 years. She received the files pertaining to Gulzar and ADS and reviewed the material. She read the Questionnaire – Exhibit R-5 – submitted by Dashmesh, as well as the one prepared on behalf of Gulzar, an extract from which was filed as Exhibit R-6. Basha prepared a CPT 110 – Report On An Appeal (“Report”) – Exhibit R-2 – dated November 30, 2007 – in which she recommended the Minister decide the employment of Gulzar was not insurable employment within the meaning of the *Act* for the reasons stated therein. Basha stated she knew Gulzar was the father of Dashmesh and that his pay was \$9.50 per hour. However, she understood from a response contained in a Questionnaire that other employees were earning \$18 per hour. She relied on research at *Job Futures* website which indicated the average hourly pay for construction workers was \$15.17 and the industry was paying from \$21.78 to \$23.23 per hour for supervisors. The print-outs were filed as Exhibit R-3 and R-4, respectively. Basha stated she relied on this information and concluded Gulzar’s hourly pay was too low even though he was not performing any framing work. On page 5 of her Report, Basha analyzed a series of what she considered were contradictions and conflicting information between what was provided to the Rulings Officer and subsequently for the purpose of the appeal to the Minister. In Basha’s opinion, Gulzar had not been laid off from January to June, 2008 due to any slowdown in ADS business but because he wanted to visit his sister in Abbotsford, British Columbia and some relatives in England. Basha was satisfied Gulzar did not have to wait to cash his pay cheques and the explanation offered concerning the irregular deposits was acceptable. However, she did not consider the calendar – Exhibit A-3 - used to record hours as reliable since it did not indicate Gulzar had worked any Saturdays but on his application for Unemployment Benefits, he indicated he had worked some and the same information had been

provided to her as Appeals Officer. Basha stated that hourly workers must keep track of their hours for pay and remittance purposes. Despite lack of mention in the Questionnaires concerning any supervisory duties performed by Gulzar, Basha was satisfied he had exercised that function – on occasion – as part of his duties. Basha was satisfied no contract of service existed between January 1 and June 30, 2008 and that during this period Gulzar did not receive any remuneration from ADS. In her Report, Basha dealt with certain factors, as follows:

Arm's Length:

[15] The parties were related since Gulzar was the father of Dashmesh, the sole shareholder of ADS.

Remuneration:

[16] The hourly pay of \$9.50 was not reasonable for Gulzar's duties as a worker on a construction site even in the limited role of helper and occasional supervisor of other workers in the absence of Dashmesh. Even in that reduced role, the remuneration should have been higher since the average hourly pay for construction workers was \$15.17. The low pay was indicative of a non-arm's length relationship.

Terms and Conditions:

[17] Although Gulzar may have worked some Saturdays, he did not maintain a proper record of his total hours worked which is required within the industry and this default was considered to be indicative of a non-arm's length relationship.

Duration:

[18] ADS operated on a year-round basis and Gulzar worked from July 1 to December 31, 2008 but was laid off in January, 2009 after ADS experienced a slowdown in business. This factor indicated an arm's length relationship.

Nature and Importance of Work Performed:

[19] Gulzar did not work for ADS from January 1 to June 30, 2008 even though ADS was operating at normal business volume. Non-related workers who performed his duties before and after his employment were receiving \$18 per hour and were framers who were not hired specifically to perform Gulzar's duties which demonstrated that his duties were not sufficiently important to the ADS business

operation that a replacement was required to perform that limited function. This factor was considered to indicate a non-arm's length relationship.

[20] As a consequence of the analysis performed in the preparation of the Report, Basha formed the opinion it was not reasonable to conclude that ADS and Gulzar would have entered into a substantially similar contract of employment if they had been dealing at arm's length. She recommended the Minister decide Gulzar was not employed in insurable employment with ADS during July 1 to December 26, 2008, the period at issue in the within appeals.

[21] Basha stated she had not seen the payroll information sheets – Exhibit R-1 – prior to Court.

[22] In cross-examination by Dashmesh – agent for ADS – Basha stated she assumed all workers were paid \$18 per hour since that was the response provided to Q. 22 in the Questionnaire – Exhibit R-5 – signed by him. The extent of the supervision carried out by Gulzar was as stated in subparagraph 8(h) of the Reply in that it was limited to keeping watch over ADS employees when Dashmesh was off-site.

[23] In cross-examination by Gill – agent for Gulzar – Basha stated she had no way of ascertaining that the \$18 per hour stated in the Questionnaire was intended to convey a maximum hourly pay for framers and that no other information was provided to indicate there was a range of pay for that specific function.

[24] Counsel advised the case for the Respondent was closed.

[25] On behalf of ADS, Dashmesh submitted the evidence supported his contention that a non-related worker would have been paid the same wage for performing the limited duties carried out by Gulzar.

[26] Gill, agent for Gulzar did not make any submission.

[27] Counsel for the Respondent submitted the remuneration paid to Gulzar was too low even taking into account the nature of the duties performed in the sense he did no framing work and was not expected to learn that trade in view of his advanced age. Counsel pointed out that Gulzar was permitted to take off work during the first 6 months of 2008 even though the ADS business continued at the same rate which indicates this exception was based on their father-son relationship. Prior to hiring Gulzar, his duties had been performed by other workers who were either framers or trainees who were expected to progress to the point where they could join the main

four-person framing crew. Counsel submitted the decision of the Minister in each case should be confirmed.

[28] The relevant provisions of the *Act* are paragraphs 5(1)(a) and 5(2)(i) and subsection 5(3) which read as follows:

5. (1) Subject to subsection (2), insurable employment is
- (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
 - ...
- (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),
- (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.

[29] In *Quigley Electric Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 1789; 2003 FCA 461 (F.C.A.), the Federal Court of Appeal heard an application for judicial review of a decision issued by a judge of the Tax Court of Canada confirming the decision of the Minister that the Appellant's employment with a related employer was not insurable. Malone J.A., writing for the Court - at paragraph 7 and following – stated:

7 A legal error of law is also said to have been committed when the Judge failed to apply the legal test outlined by this Court in *Légaré v. Canada (Minister of National Revenue)* (1999) 246 N.R. 176 (F.C.A.) and *Perusse v. Canada* (2000) 261 N.R. 150 (F.C.A.). That test is whether, considering all of the evidence, the Minister's decision was reasonable.

8 Specifically, it is argued that the Judge circumscribed the scope of his review function when, after finding that the Minister clearly did not have all the facts before him he stated:

... That is not to say that on reviewing new information, I am then precluded from finding that the Minister did not have, after all, sufficient information to exercise his mandate as he did without my interference. This would simply mean that I have found that the new factors not considered were not relevant.

9 According to the applicant, the proper question was not whether the Minister had sufficient information to make a decision, notwithstanding the evidence of Mrs. Quigley; rather the question was whether, considering all the evidence, the Minister's decision still seemed reasonable. Instead, the applicant asserts that the Judge carried out an irrelevant examination of whether Mrs. Quigley was a "principal" or a "subordinate" of Quigley Electric Ltd.

10 In my analysis, the Judge correctly followed the approach advanced by this Court in *Canada (A.G.) v. Jencan Ltd.* [1998] 1 F.C. 187 (C.A.), namely, that the Minister's exercise of discretion under paragraph 5(3)(b) can only be interfered with if she acted in bad faith, failed to take into account all relevant circumstances or took into account an irrelevant factor.

11 Bad faith on the part of the Minister is not an issue in this case.

12 While the reasons for decision are lengthy, it is clear that the Judge was analysing the oral evidence of Jean Quigley in conjunction with paragraph 5(3)(b); namely, whether 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 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. After reviewing other authorities in the Tax Court, the Judge rejected any suggestion that Mrs. Quigley could be termed a principal of Quigley Electric Ltd. and in turn dismissed her examples of special treatment within the company as arising from her personal relationship with the controlling shareholder and not to her employment contract.

13 He concluded by indicating that the factors considered by the Minister, as set out earlier in his reasons, were the relevant factors for his consideration. That, in the context of this case, can only mean that the Minister's decision was reasonable considering all of the evidence. I can discern no legal error in this analysis or conclusion.

14 I would dismiss the application for judicial review with costs.

[30] In his testimony, Dashmesh stated most framers earned less than \$18 per hour particularly when they did not have much experience. The worker hired to perform Gulzar's duties was paid only \$13 per hour – not \$18 – as alleged by the Minister and a trainee was hired in 2009 at \$9.50 per hour because construction jobs were scarce due to economic conditions. That information was not available to the Appeals Officer. Gill testified he received the calendar – Exhibit A-3 - from Gulzar and provided it to the CRA office for perusal. An examination of the pages of the calendar from July to December indicates some corrections were made to entries by marking over certain numbers or names and there are entries made in different ink or styles of pen or marker. I am satisfied the calendar was maintained by Gulzar to record his working hours but the only Saturday work recorded during the relevant period was 6 hours on December 20. In any event, it is not significant because Gulzar lived with Dashmesh and his wife and rode to and from work with him every day so it would not take a sophisticated computer and elaborate software to record the hours worked.

[31] In the case of *Birkland v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 195; 2005 TCC 291, Bowie, J. provided a summary of the state of the jurisprudence and commented as follows at the end of paragraph 4 of his Judgment:

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. That, as I understand it, is the degree of judicial deference that Parliament's use of the expression "... if the Minister of National Revenue is satisfied ..." in paragraph 5(3)(b) accords to the Minister's opinion.

[32] The evidence established the culture of the workplace where the making and serving of tea is important and the nature of the duties performed by Gulzar, although they did not include framing and were never intended to include that function, were valuable to the operation of the business. The Minister was satisfied the employment

during the period at issue was genuine. The Minister took into account the nature of Gulzar's duties including certain supervisory functions on occasions when Dashmesh was absent. In so doing, the Minister concluded the pay of \$9.50 per hour for that work performed on a construction site was too low and was indicative of a non-arm's length relationship. The Minister also considered the leave granted to Gulzar for the purpose of taking a long holiday for the first 6 months of 2008 and also the nature of the special position Gulzar occupied before and after his return to work. The Minister took into account certain information to indicate the employment had been created – and tailored throughout – specifically for Gulzar because Dashmesh was his son and the sole shareholder of ADS. Gulzar was 83 years old in 2008 and had a long, successful career in the Indian Army. He was a man who wanted to work and thereby contribute to the operation of his son's business.

[33] If I had the jurisdiction to decide the within appeals *de novo*, the result could have been different but to vary the decision of the Minister in each instance would be to substitute my own judgment. After having considered all the evidence, the decision of the Minister in each instance is still reasonable. Certain facts were considered by the Minister and a subsequent analysis was undertaken of the relevant indicia as required by the legislation. During this process, no unreasonable inferences were drawn in the course of arriving at the assumptions upon which the decision was based. Those assumptions were not invalidated by the evidence adduced on behalf of either Appellant and they remain substantially intact in every material sense.

[34] Each decision of the Minister is confirmed and both appeals are hereby dismissed.

Signed at Calgary, Alberta this 3rd day of November 2010.

“D. W. Rowe”

Rowe D.J.

CITATION: 2010 TCC 562

COURT FILE NOS.: 2010-564(EI); 2010-942(EI)

STYLE OF CAUSE: GULZAR PANNU AND M.N.R.; AND
BETWEEN: A.D.S. CONSTRUCTION
LTD. AND M.N.R.

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: September 27, 2010

REASONS FOR JUDGMENT BY: The Honourable D.W. Rowe, Deputy Judge

DATE OF JUDGMENT: November 3, 2010

APPEARANCES:

Agent for the Appellant,
Gulzar Pannu: Tejinder Singh Gill

Counsel for the Respondent: Zachary Froese

Agent for the Appellant,
A.D.S. Construction Ltd.: Dashmesh Singh Pannu

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