Docket: 2010-2792(EI)

BETWEEN:

KIMBERLY JOHNSON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 20 and July 21, 2011, at Ottawa, Ontario

Before: The Honourable Justice C.H. McArthur

Appearances:

Counsel for the Appellant:	Robert Doran
Counsel for the Respondent:	Jonathan Wittig

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed, and the decision of the Minister of National Revenue that the Minister is confirmed.

Signed at Ottawa, Canada, this 1st day of November 2011.

"C.H. McArthur"

McArthur J.

Citation: 2011 TCC 501
Date: 20111101
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BETWEEN:

KIMBERLY JOHNSON,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

McArthur J.

[1] This appeal is from a decision of the Minister of National Revenue (the "Minister") that the Appellant and her husband's Corporation, Kimberly Transport Ltd. (Transport) were not deemed to be dealing with each other at arm's length within the meaning of paragraph 5(3)(*b*) of the *Employment Insurance Act* (the "*Act*").

[2] The Minister's position is that, having regard to all of the circumstances of her employment, a similar contract of employment would not exist between parties dealing with each other at arm's length during the period from July 17, 2008 to July 17, 2009.

[3] The Appellant submits in part:[1]

> 1. Kimbely Johnson was employed by Kimberly Transport Ltd. (the "Company") continuously for the period between inter alia, April 2006 and July 17, 2009, save and except for a period of maternity leave between April 2006 and April 2007.

[1] Taken from the Notice of Appeal.

2. The Company is owned and operated by the Appellant's husband, Thomas Johnson.

Duties performed

3. Kimberly Johnson performed the following duties for the Company, namely, banking, auditing, payroll, posting invoices, accounts receivable, cheque processing, cheque preparation, correspondence with accountant and/or lawyers, completing correspondence with Canada Revenue Agency and Work Safe BC, preparation and design of letters and administrative tasks.

4. [. . .] 60% of her duties at home, 25% of her duties at the office of the Company and 15% of the time she was travelling.

5. Daily time sheets [were kept] on a regular basis and in the usual course of business.

[. . .]

Employment History

7. April 27, 2006 – Kimberly Johnson gave birth to her second child.

8. April 2007 – Kimberly Johnson returned to work.

9. April 2007 – July 17, 2009 – Kimberly Johnson worked for the Company.

[. . .]

11. The business records of the Company indicate that between 2005 and 2008 the revenues of the Company more than doubled (2005 - $1,801,799, 2008-$3,987,353). The substantial increase in the Company revenues support the fact that Kimberly Johnson was required to work on a full time basis for the Company. [. . .]

12. [. . .] At the end of Kimberly Johnson's maternity leave in April 2007, she was trained to complete the detailed work and auditing. It took her about 6 months for her to learn and master the work. At the same time, she also took on the work that she had done previously for the Company prior to her maternity leave in April 2006.

13. [. . .] Kimberly Johnson was able to work from home to allow her to get the work done and it was more efficient for her to work from home compared to the high stress that would have occurred if she had worked at the Company office. At the same time, she completed some of her work from the office.

[. . .]

17. [. . .] until the birth of her third child, completed ROEs, RG remittances, WCB remittances and the like. The accountant completed the PST and GST returns.

18. Kimberly Johnson gave birth to her third child in July 2009. She applied for maternity benefits.

[. . .]

25. Kimberly Johnson kept an accurate record of her time in the same manner as all employees have done for the Company. Drivers for the Company keep a drivers summary sheet, the staff at the office location use a punch card and clock system.

[4] The following assumptions of fact are taken from the Minister's Reply to the Notice of Appeal:

a) the Payor's (Transport) business provided long haul trucking and related transport services;

b) the Appellant is married to Tom Johnson, the sole shareholder of the Payor;

c) the Appellant began working for the Payor in 2005;

d) the Appellant alleged that her duties included banking, auditing and processing invoices, posting invoices, processing payments, auditing and processing payroll, dealing with employees on payroll related issues, correspondence with the accountant, correspondence with department of transportation, WCB, CRA and other business contacts, design and preparative of letters, filing, attending to phone calls, reviewing of driver log books cleaning the office and other administrative duties;

e) the Appellant was paid at the rate of $17.00 per hour during the Period;

f) the Payor's office hours were from 7:00 a.m. to 5:00 p.m. Monday to Friday;

g) the Appellant recorded her hours manually while the unrelated office workers used a punch clock located at the Payor's office;

h) the Appellant's record of hours of work show the Appellant working from 3 to 9 hours per day, from 29 to 41 hours per week;

i) the majority of the Appellant's duties were performed from the family home;

j) the Appellant was not required to work a defined number of hours in a given time period;

k) the Payor did not schedule the Appellant's hours;

l) the Appellant had two young children at home during the Period;

m) the Payor submitted t4's for the Appellant for the 2008 and 2009 taxation year as EI exempt;

n) the Appellant did not work the number of hours as reported in the record of employment;

o) the Payor implemented a new software package for the business in November 2008 which significantly reduced administration through efficiencies in audit, billing, preparation of billings and payments; and

p) the Appellant was not replaced when she went off on maternity leave with her third child.

[5] Paragraph 5(2)(*i*) of the *Act* provides that insurable employment does not include "employment if the employer and employee are not dealing with each other at arm's length." It is conceded that the Appellant was not dealing with Transport at arms length because her husband was the sole shareholder. There is an exception in paragraph 5(3)(*b*).

[6] The Appellant's position is that she meets the criteria in paragraph 5(3)(*b*) which states the following:

(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 regarding 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.

[With emphasis]

[7] Bowie J. of this Court provided a helpful clarification and summary of the somewhat convoluted case law with respect to the function of this Court in an appeal from the Minister's determination under subsection 5(2) and 5(3) of the *Act*.

[8] In *Birkland v. Minister of National Revenue*[2] he stated in paragraph 4:

> This Court's role, as I understand it now, following these decisions,[3] 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. . . . 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.

[9] Having heard all of the evidence of both parties, I must assess whether the Minister's conclusion was reasonable.

Analysis

[10] Without doubt there was an oral contract of employment between the Appellant & Transport. The question is whether, having considered all of the evidence, I can reasonably conclude that Transport would have entered into a similar contract with a non-related worker.

[11] I will deal with the following circumstances of the Appellant's employment:

a) her remuneration;

b) the work she performed;

c) the terms and conditions; and

d) the duration and nature and importance of the work performed.

[12] The Respondent did not seriously contest the Appellant's $17.00 per hour. The Appellant's duties of employment required a high level of trust and maturity, and there is no evidence presented to conclude that $17 an hour is not a fair rate for administrative tasks of a sensitive nature. There are no submissions regarding the

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[2] 2005 TCC 291.

[3] *Légaré v. Minister of National Revenue*, [1999] F.C.J. No. 878 and *Pérusse c. Ministre du Revenu national*, [2000] F.C.J. No. 310.

hourly wages received by arm's length employees for similar work from the same employer.

[13] The Appellant argues that several remuneration–related elements wrongfully influenced the Minister's assessment. First, although the original 2008 and 2009 T4s were marked as non-insurable, this was merely an error on the part of the company accountant, and she presented evidence of amended T4s. The Respondent does not dispute that the errors on the T4s were rectified and the appropriate deductions taken. The Respondent added that the Appellant was the only employee who logged her hours manually rather than using a punch-clock like the arm's length employees. The accuracy of this is inconclusive.

[14] Significantly, the Minister found that the Appellant was paid during a period when she was not working, and worked during a period that she was not getting paid. The Appellant concedes that she was mistakenly paid for the week of July 20, 2009 when her maternity leave actually began on July 17, 2009, but submits that it was the payroll company's mistake, and the employer honestly reported the Appellant's true last day of work on her record of employment. This may be correct, yet in arranging one's records to take advantage of the exception in 5(3)(*b*) one must act scrupulously.

[15] During the appellant's maternity leave, she contacted the Canada Revenue Agency on her employer's behalf. She rationalized that she was merely doing her employer a favour, and urges me to recognize the marketplace reality of small companies, where the same norms as those found in larger companies are not applicable, and employees are occasionally willing to undertake such favours. While simply performing a task without pay on behalf of her employer is hardly enough to show that parties at arm's length would not have agreed to a substantially similar contract, it is a significant factor that most be considered in the larger employment context.

[16] In *Fruchter v. The Minister of National Revenue*,[4] Jorré J. stated the following in paragraph 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

[4] 2008 TCC 46.

> 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]

[17] Here, unlike *Fruchter*, there are not weeks of pay without work, but rather just one week, which the Appellant attributes to an honest mistake by their payroll company. There is, however, no evidence of the employer requesting the extra pay returned, a fact that seems strikingly particular to a non-arm's length employment context. The quantity of her work without pay is somewhat insignificant. In *Samson v. Minister of National Revenue*,[5] the Appellant had made 135 bank deposits and prepared and signed a total of 623 cheques during a period that she was not on the payor's payroll and, because of the magnitude and nature of the work, Little J. concluded the Minister was correct in deciding the employment of that Appellant was not insurable. The work performed by the Appellant in the current appeal following the termination of her employment was not to the same extent as in *Samson*.

[18] While the work performed by the Appellant may have been minimal and her pay without work may have been an error, it cannot be ignored. The Minister's decision was strongly influenced by the flexible hours and home work location available to the her which did not match the employer's usual office hours and location for work conducted. This is the strongest of the Minister's submissions.

[19] The Appellant submits that all employees at the company could follow such a schedule and these accommodations reflect a general trend in job places to allow employees flexibility to accommodate their family responsibilities. I accept the Respondent's answer that no evidence was provided of other employees in the office actually having such an arrangement for their schedules. The evidence of the Appellant and her husband suited their present day needs and I do not give it the weight of an unrelated witness.

[20] Without corroborating evidence, I do not accept that other employees could also work away from the office at times nor do I accept the example of company truck drivers, who, one assumes, would have an entirely different set of tasks with out of office work being the norm. I conclude that the Appellant's terms and conditions relating to her work location and schedule were built around her childcare needs. There was no corroborated evidence of other employees making similar arrangements.

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[5] 2005 TCC 383.

[21] I accept that the Appellant was a responsible and motivated employee and that Transport accommodated her schedule and home needs to retain her. I give only minimal weight to the Minister's position that her workload should have decreased with the introduction of new booking software. Computer software rarely offers immediate efficiency.

[22] The fact that no replacement was hired when the Appellant went on leave is cogent evidence, although not conclusive. In *Lash v. Minister of National Revenue*,[6] no replacement was hired for the employee in question but the Court did not consider that factor as conclusive that the employee was benefiting from more favourable terms than would exist in an arm's length relationship.

[23] The Appellant placed considerable emphasis on her submission that the Court is presented with new evidence at trial; the company's financial statements showing a large increase in income from 2006 to 2009. She argues that these financial statements demonstrate the importance of her work and support the volume of hours she recorded. The Minister already had access to this information in another format when he made his determination.

[24] In evaluating the role of the increasing income of the company and its impact on the Appellant's employment duties, it is useful to consider *Eagle Canyon Adventures Inc. v. Minister of National Revenue*.[7] In that case, the Tax Court of Canada allowed the Appellant's appeal, noting that the employer needed someone with the employee's bookkeeping skills because the revenue of that company had increased by over 150%.[8] There, the Appellant had also set up a computer system to aid with the bookkeeping tasks. Unlike the current case, however, in *Eagle* the computer system explained what allowed her to start her work season later in subsequent years.[9] Here, the Appellant's hours did not diminish with the new system. Instead, she claims the new system had no impact on the number of hours she worked.

[25] Considering all of the factors outlined above, the role of the Court is now to decide if the Minister's decision was reasonable. The Appellant urges the Court to consider *Huang v. Minister of National Revenue*,[10] where Rowe J. recalled his

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[6] 2004 TCC 291.
[7] 2008 TCC 563.
[8] *Ibid* at para. 35.
[9] *Ibid* at paras. 25-26, 34.
[10] 2009 TCC 35.

observation in his previous decision, *Docherty v. Minister of National Revenue*,[11] as to the standard that should be applied in inquiring if the employment contract is substantively similar to one that may have arisen had the parties been operating at arm's length:

> [25] The template to be utilized in making a comparison with arm's length working relationships does not require a perfect match. That is recognized within the language of the legislation because it refers to a "substantially similar contract of employment". Any time the parties are related to each other within the meaning of the relevant legislation, there will be idiosyncrasies arising from the working relationship, especially if the spouse is the sole employee or perhaps a member of a small staff. However, the object is not to disqualify these people from participating in the national employment insurance scheme provided certain conditions have been met. To do so without valid reasons is inequitable and contrary to the intent of the legislation.

[26] This is not a case where the idiosyncrasies of a small company or related parties working together explain the aspects of the employment contract that indicate a non-arm's length relationship: the time-keeping method, the flexible schedule, the ability to work remotely, the work done without pay, the pay done without work, and the lack of a replacement. These factors combined to provide the Minister with sufficient reason to conclude that the parties were not operating at arm's length. While none of these indicators are necessarily conclusive on their own, together they point to non-arm's length conditions of employment. The Court's role in reviewing the Minister's decision is not to replace the Minister's decision with the Court's own opinion. Rather, the Court must simply decide if the Minister's conclusion was reasonable, and, in this case, it was. The factors that support this decision include:

a) By and large, the Minister's assumption of facts are accurate.
b) Upon her taking leave, she was not replaced.
c) She worked at home combining her care for her children with her employment responsibilities.
d) She had discretionary and flexible hours.
e) While possibly through error, she performed work for Transport without pay and received pay without work.

[27] On a final note, the Appellant should not misconstrue the dismissal of her appeal in this case as calling into question the reality of her employment and the value of the tasks that she performed for the company. As explained by Bowie J. in *Glacier Raft Co. v. Minister of National Revenue*:[12]

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[11] [2000] T.C.J. No. 690.
[12] 2003 TCC 559.

> 9 I should make it clear that although I am bound to dismiss the appeals, I was impressed with all the witnesses... I have no doubt that Anne and Elizabeth worked as hard as, and probably harder than, the other guides. Nor do I doubt that Mr. Murphy relied heavily on their experience, not only when he bought the company in 1995, but thereafter as well. This is certainly not a case of employment of convenience being created for the benefit of members of the family so that they could take unfair advantage of the employment insurance system. Nevertheless, the terms of the *Act* are reasonably clear, and when related parties enter into employment contracts they must be scrupulous to see that the terms do not differ from those on which the employer employs other workers, or on which the workers could find work with other employers, if they wish the employment to be insurable under the *Act*.

[28] In this case, the overall combination of evidence led the Minister to conclude that a substantively similar employment contract would not exist between arm's length parties. The Minister's conclusion was reasonable and should stand.

Signed at Ottawa, Canada, this 1st day of November 2011.

"C.H. McArthur"

McArthur J.

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