Docket: 2010-3846(EI)

BETWEEN:

SURJIT MINHAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on June 5, 2012, at Edmonton, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Mary Anne Loney (Student-at-law) Gregory Perlinski

---

JUDGMENT

The appeal pursuant to the provisions of the *Employment Insurance Act* (the "*EI Act*") is allowed, without costs, and the decision of the Minister of National Revenue made under the *EI Act* is varied on the basis that the Appellant was engaged in insurable employment for the purposes of the *EI Act* for the period from August 15, 2009 to January 15, 2010.

Signed at Toronto, Ontario, this 21st day of June 2012.

"Wyman W. Webb"

Webb J.

Citation: 2012TCC221
Date: 20120621
Docket: 2010-3846(EI)

BETWEEN:

SURJIT MINHAS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this case is whether the Appellant was employed by 1303886 Alberta Ltd. (the "Company") in insurable employment for the purposes of the *Employment Insurance Act* (the "*EI Act*") during the period from August 15, 2009 to January 15, 2010. The Respondent had determined that the Appellant was not employed by the Company in insurable employment for the purposes of the *EI Act* during the period referred to above on the basis that the Appellant was not dealing at arm's length with the Company.

[2] The Company operated a "Tag's" convenience store in Slave Lake, Alberta and the Appellant was employed as the assistant manager from August 15, 2009 to January 15, 2010. The Company was owned equally by two holding companies. The Appellant's husband and his brother owned one of the holding companies and the other holding company was owned by two cousins of the Appellant's husband.

[3] Insurable employment is generally employment in Canada. However, paragraph 5(2)(*i*) of the *EI Act* provides that insurable employment does not include "employment if the employer and employee are not dealing with each other at arm's length". If the employer and the employee are related to each other (as determined for

the purposes of the *Income Tax Act*), then the employment will be insurable employment if the conditions as set out in paragraph 5(3)(*b*) of the *EI Act* are satisfied.

[4] At the commencement of the hearing, counsel for the Respondent stated that it was the position of the Respondent that the Appellant was related to the Company for the purposes of the *Income Tax Act* and therefore, as a result of the provisions of paragraph 251(1)(*a*) of the *Income Tax Act*, the Appellant would be deemed to not be dealing with the Company at arm's length.

[5] Section 251 of the *Income Tax Act* provides, in part, as follows:

> 251 (2) For the purpose of this Act, "related persons", or persons related to each other, are
>
> > (a) individuals connected by blood relationship, marriage or common-law partnership or adoption;
> >
> > (b) a corporation and
> >
> > > (i) a person who controls the corporation, if it is controlled by one person,
> > >
> > > (ii) a person who is a member of a related group that controls the corporation, or
> > >
> > > (iii) any person related to a person described in subparagraph (i) or (ii); and
> > >
> > > …
>
> 251 (4) In this Act,
>
> "related group" means a group of persons each member of which is related to every other member of the group;
>
> …
>
> 251 (6) For the purposes of this Act, persons are connected by
>
> > (a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

> (b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;
>
> (b.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and
>
> (c) adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

[6] The Appellant's husband is not related to his cousins (and nor is his brother) for the purposes of the *Income Tax Act*. Therefore the Company is not controlled by a related group for the purposes of the *Income Tax Act* and the Appellant is not related to the Company for the purposes of the *Income Tax Act*.

[7] Since the Appellant is not related to the Company it is a question of fact whether the Appellant was dealing at arm's length with the Company[1].

[8] In *Parrill* v. *The Minister of National Revenue*, [1996] T.C.J. No. 1680 (which was affirmed by the Federal Court of Appeal, [1998] F.C.J. No. 836), Cuddihy, J. stated that:

> 20 From these cases parties are not dealing at arm's length when the predominant consideration or the overall interest or the method used amount to a process that is not typical of what might be expected of parties that are dealing with each other at arm's length.
>
> 21 Parties will not be dealing with each other at arm's length if there is the existence of a common mind which directs the bargaining for both parties to a transaction or that the parties to a transaction are acting in concert without separate interests or that either party to a transaction did or had the power to influence or exert control over the other and that the dealings of the parties are not consistent with the object and spirit of the provisions of the law and they do not demonstrate a fair participation in the ordinary operation of the economic forces of the market place*.
>
> 22 Therefore the existence of a combination of one or several of these initiatives that would be inconsistent or interfere, in due process negotiating between employer and employee and with the object and intent of the legislation, will not survive the arm's length test.

[1] Paragraph 251(1)(*c*) of the *Income Tax Act*.

(* denotes a footnote reference that was in the original text but which has not been included)

[9] The Appellant and her husband testified during the hearing. Sometime prior to the Appellant being hired as an assistant manager, Joan Bolton had been the assistant manager. There was no dispute that Joan Bolton was dealing at arm's length with the Company. When Joan Bolton was hired as the assistant manager the Appellant was also available for work but the Company chose Joan Bolton for the position. This indicates that when the Appellant was hired later, she was not hired because her husband was one of the shareholders. If she would have been hired solely because her husband was one of the shareholders, she would have been hired earlier when Joan Bolton was hired.

[10] When the Appellant was hired as the assistant manager she was paid more that Joan Bolton was paid. Joan Bolton was paid $2,300 per month and the Appellant was paid $3,000 per month. However, the Appellant had different duties and different hours. The Appellant looked after the National Car Rental franchise which the Company did not have when Joan Bolton was working for the Company. The Appellant worked longer hours than Joan Bolton worked. The Appellant was not paid overtime and she worked about 8 to 10 hours per day. She would generally work for 6 days and then have 2 days off. Joan Bolton worked for 8 hours per day and she did not work on the weekends. If she worked more than the 8 hours per day she was paid time and a half for overtime.

[11] The record of employment indicates that the Appellant worked 1260 hours during the 5 months that she was employed by the Company (which would be 252 hours per month). The number of hours was determined by the accountant for the Company who did not testify. It is not clear how the number of hours as stated on the Record of Employment was determined. I accept the testimony of the Appellant that she worked 8 to 10 hours per day. As the Appellant was (and still is) a very diligent worker who would stay until the job was completed I find that she worked, at least, 9 hours per day. The Appellant is currently employed by Wal-Mart and is paid a fixed salary yet she continues to work extra hours to ensure that her tasks are completed.

[12] Since the Appellant worked 6 days and then had 2 days off, she would work more days in a month than Joan Bolton would work as Joan Bolton worked 5 days and then had 2 days off. Over a 56 day cycle[2], Joan Bolton would work 40 days

[2] 56 days would have 7 eight day periods and 8 seven day periods.

and the Appellant would work 42 days. Therefore the Appellant would work approximately one day more per month than Joan Bolton worked. Assuming that Joan Bolton worked 22 days in a month, the Appellant would work approximately 23 days in that month. Since Joan Bolton was paid $2,300 for 8 hours per day, assuming that she worked 22 days during the month, she was paid $13.07 per hour. Assuming that the Appellant worked 23 days in a month for 9 hours per day, since she was paid $3,000 per month she was paid $14.49 per hour. It does not seem to me that this difference of $1.42 per hour would indicate that the Appellant was not dealing at arm's length with the Company as the Appellant had more duties than Joan Bolton had to perform. The additional duties of the Appellant included doing the payroll and paying suppliers as well as the car rental franchise work that was referred to above.

[13] As well while it is clear that the number of hours that Joan Bolton worked was certain, it is not as clear that the number of hours that the Appellant worked was exactly 9 hours per day. The Appellant is required to work 8 hours per day at her current job as an assistant manager at Wal-Mart but she indicated that she works 9 to 10 hours per day. Her husband stated that she works 10 hours per day at Wal-Mart. If she worked 10 hours per day for the Company, for 23 days, her hourly rate of pay would be $13.04 which is only $0.03 less per hour than the amount that Joan Bolton was paid per hour.

[14] There was nothing to indicate that there was a common mind directing the bargaining of both sides of the transaction between the Appellant and the Company or that the Appellant and the Company were acting in concert. There was nothing to indicate that the Company had any power to influence or exert control over the Appellant or that the dealings between the Appellant and the Company were not consistent with the object and spirit of the *EI Act*. The Appellant's salary, when the number of hours the Appellant worked and her duties are taken into account, does not suggest that the Appellant was not dealing at arm's length with the Company nor do any of the other terms and conditions of her employment. That the Appellant was available on short notice to cover for other employees does not mean that she was not dealing at arm's length with the Company. She is a person who works hard and is willing to work extra hours as she continues to do now for Wal-Mart.

[15] Her employment was terminated because of a downturn in the business. She was the highest paid employee but any business facing a loss of sales and needing to reduce costs would want to determine if it could replace its highest paid employee with one of the shareholders (which the Company did as the Appellant's husband took over her job). The Appellant did not perform any services for the

Company after her employment was terminated, until she was rehired by the Company.

[16] As a result, I find that the Appellant was dealing at arm's length with the Company and therefore the appeal under the *EI Act* is allowed, without costs, and the decision of the Minister of National Revenue made under the *EI Act* is varied on the basis that the Appellant was engaged in insurable employment for the purposes of the *EI Act* for the period from August 15, 2009 to January 15, 2010.

Signed at Toronto, Ontario, this 21st day of June 2012.

"Wyman W. Webb"

Webb J.

CITATION:	2012TCC221
COURT FILE NO.:	2010-3846(EI)
STYLE OF CAUSE:	SURJIT MINHAS AND M.N.R.
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	June 5, 2012
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	June 21, 2012

APPEARANCES:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Mary Anne Loney (Student-at-law) Gregory Perlinski

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada