Docket: 2023-268(EI)

BETWEEN:

ARLENE W. BINGLEY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

I'SE THE BYE FISHERIES LTD.,

Intervener.

Appeal heard on July 11, 2023, at Sydney, Nova Scotia

By The Honourable Justice Ronald MacPhee

Appearances:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Jennifer Goodhart
Agent for the Intervener:	Wallace Bingley

AMENDED JUDGMENT

In accordance with the attached Reasons for Judgment, the appeal is allowed, and the reassessment is referred back to the Minister for reconsideration and reassessment on the basis that the Minister's decision be varied to reflect that the Appellant was in insurable employment for the period from April 21, 2022 to July 2, 2022.

This Amended Judgment is issued in substitution of the Judgment dated August 10th 2023.

Signed at Sydney, Nova Scotia, this 15th day of August 2023.

"R. MacPhee"

MacPhee J.

Citation: 2023 TCC 110
Date: August 15, 2023
Docket: 2023-268(EI)

BETWEEN:

ARLENE W. BINGLEY,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

I'SE THE BYE FISHERIES LTD.,

Intervener.

AMENDED REASONS FOR JUDGMENT

MacPhee J.

I. Introduction

[1] Arlene Bingley (the "Appellant") is appealing the Minister's decision, dated December 9, 2022, which determined that she was not in insurable employment with I'se The Bye Fisheries Limited (the "Payer"). The denial by the Minister was based on the fact that the parties were related and not dealing with each other at arm's length for the period from April 21, 2022, to July 2, 2022 (the "Period"). Furthermore, the Minister determined that the terms of employment were not typical of arm's length parties in that the Appellant and her employer would not have entered into such a contract of employment if they were arm's length.

II. Facts

[2] As a result of the Appellant's application for EI benefits, Service Canada requested a ruling from the CPP/EI Rulings Division of the Canada Revenue Agency ("CPP/EI Rulings") on the insurability of the Appellant's employment with the Payer during the Period.

[3] By letters dated September 28, 2022, CPP/EI Rulings notified the Appellant, the Payer, and Service Canada that it had been determined that the Appellant was an employee; however, the Appellant and the Payer were related parties, therefore the Appellant was not in insurable employment during the Period in accordance with paragraph 5(2)(i) of the *Employment Insurance Act* (the "*EIA*") (the "Ruling").

[4] The Appellant disagreed with the Ruling and filed an appeal to the Minister.

[5] By letters dated December 9, 2022, the Minister informed the Appellant, the Payer and Service Canada that the Ruling was confirmed (the "Decision").

[6] In making the Decision, the following assumptions of fact were relied on by the Minister:

a. the Payer operated a seasonal lobster fishing business;

b. the Payer was incorporated on January 21, 2022 and acquired their license to fish in April of 2022;

c. the Payer's fishing season was from April 19, 2022 to June 20, 2022, which was then extended to June 22, 2022;

d. the Payer's sole shareholder was Wallace Bingley ("Mr. Bingley");

e. Mr. Bingley was Ms. Bingley's spouse;

f. the Payer's office was located in Mr. Bingley and Ms. Bingley's home;

g. the Payer hired Ms. Bingley as an employee to perform bookkeeping and general labour duties;

h. the Payer did not conduct a hiring process to fill Ms. Bingley's position and did not consider any other candidates;

i. Ms. Bingley performed bookkeeping tasks for the Payer's accounts payables and receivables, the scope of which were as follows:

   i. the Payer issued one invoice a week to a company who both purchased all of their catch and supplied all of their bait; and

ii. the Payer made 55 credit card purchases and wrote 50 cheques over the duration of the fishing season;

j. the Appellant performed payroll tasks which included writing pay cheques and making payroll remittances for herself and two non-related workers;

k. the two non-related workers were deckhands on the Payer's boat and hired as employees;

l. the Appellant maintained the Payer's fishing records for approximately one hour a day;

m. the Appellant performed general labour tasks such as helping to gas up the boat and painting buoys;

n. the Appellant performed most of her duties in the Payer's office;

o. the Appellant did not have signing authority on the Payer's bank account;

p. for the first two weeks of the Period, the Appellant set up the Payer's office and trained on the job with the Payer's accountant to learn how to perform her bookkeeping tasks;

q. the Payer did not directly supervise the Appellant;

r. the Payer directly supervised the non-related workers;

s. neither the Payer nor the Appellant tracked the Appellant's actual work hours;

t. the Payer tracked the actual work hours of the non-related workers;

u. the Appellant was not required to keep a set schedule and had flexibility to determine when she worked;

v. the non-related workers were required to work earlier than usual on certain days;

w. the Appellant worked every day during the Period, 7 days a week;

x. the non-related workers did not work every day during the Period;

y. the Appellant had no prior work experience in bookkeeping and was paid a rate of $25.00 an hour;

z. a bookkeeper in Nova Scotia with 1 to 2 years of experience was reported to earn the median rate of $20.25 an hour;

aa. the non-related workers were paid a rate of $35.00 an hour;

bb. the Payer paid the Appellant for a 40-hour work week;

cc. the Payer did not require the Appellant to work a 40-hour work week;

dd. the Payer paid the Appellant the fixed amount of $1,000.00 each week regardless of the actual hours worked;

ee. the Payer's first pay cheque to the Appellant was for a full week's pay even though the Appellant did not work a full week, with a start date on Thursday, April 21, 2022;

ff. the Payer paid the non-related workers a variable amount each week based on the actual number of hours worked;

gg. the Payer paid the Appellant and the non-related workers by cheque on a weekly basis, plus a vacation pay of 4%;

hh. the Payer did not pay the Appellant any bonuses;

ii. the Payer paid the non-related workers an end of season bonus of $2,500.00 each; and

jj. the Appellant issued her own Record of Employment ("ROE") with the reason for issuance as "shortage of work/end of contract or season".

[7] The Minister also noted that the Appellant needed a minimum of 420 insurable hours to qualify for EI and was reported to have 440 insurable hours on the ROE.

[8] Two witnesses testified at trial, the Appellant herself and her husband, Wallace Bingley.

[9] The year before the Court was Mr. Bingley's first year fishing on his own. The season was a successful learning experience.

[10] The Bingley's testimony focused on the day to day role of the Appellant in her employment. In doing so, the Appellant was able to show that some of the

Minister’s assumptions were incorrect. Furthermore, it also became evident that the Minister overlooked some facts that should have been considered in the ruling.

[11] The Appellant performed many tasks for the Payer. These tasks included: payroll for three employees; paying invoices; preparing daily log sheets to keep track of where lobster were caught (with numerous other details); looking after emails and telephone calls; reviewing buyers slips and entering these invoices into the accounting software; preparing payroll; balancing bank and credit card statements; calculating and remitting payroll deductions; entering over 200 journal entries; completing monthly logs for Atlantic Catch Data and filing it; ordering supplies for the boat and travelling 3.5 hours, round trip, twice a week to pick up the supplies; ensuring sufficient fuel for the boat was on hand; assisting in fueling the vessel; and painting buoys.

[12] I find the following assumptions relied upon by the Minister to be incorrect:

a. Assumption (h): the Payor did consider hiring someone else to do the company’s bookkeeping, specifically his accounting firm in Antigonish, Nova Scotia. In looking into this possibility the Payer was quoted a cost in the neighborhood of $175 an hour, which he deemed too expensive;

b. Assumption (p), stating that the Appellant was trained for two weeks at the outset in how to perform her bookkeeping tasks, This assumption is incorrect. The Appellant had vast experience and knowledge as a bookkeeper over several decades in the workforce. She was able to, and did, teach herself how to use the necessary accounting software;

c. Assumption (s): stating that the Appellant did not have her work hours tracked. The reality was that for the short lobster season, the Appellant was expected to work full days, seven days a week, for the entirety of the lobster season;

d. Assumption (y): stating that the Appellant had no prior experience in bookkeeping. The Appellant had worked in bookkeeping for various employers for decades;

e. Assumption (ee): stating that the Appellant received a full weeks pay for her first week even though she did not work a full week. The evidence at trial showed that she did not work an abbreviated week as alleged;

f. Assumption (z): The Appellant disputes that a bookkeeper in Nova Scotia is paid $21 an hour, and testified that her research, done by way of a Google search, indicated that $28 an hour is a more accurate estimate. Furthermore, the Minister's determined pay of $21 an hour based upon one to two years' experience as a bookkeeper. As previously noted, the Appellant has been a bookkeeper in the workforce for decades;

g. The assumptions found at paragraphs (r), (t), (v), (x), (aa), (ff), and (ii) compare the Appellant's work conditions and pay with the work conditions and requirements of two deckhands on the Payer's boat. These comparisons are of little, if any value. The role the Appellant played as a bookkeeper and overall helper on land is not comparable to the work, and compensation the deck hands performed on the boat. It is my conclusion that using the deckhands as a comparable leads to incorrect conclusions in this matter.

[13] The assumptions relied upon by the Minister attempt to describe the work the Appellant performed and the hours she worked.

[14] The attempt to do so vastly understates the actual work the Appellant performed.

[15] Based on the evidence, it appears the Appellant most likely worked for more than her agreed upon 40 hours a week. This is relevant because I should take into consideration whether an arm's length party would perform more than the agreed 40 hours a week in my analysis.

III. <u>Issues to be decided</u>

[16] The issue is whether it was reasonable for the Minister to conclude, having regard to all the circumstances of the Appellant's employment, that the Appellant would not have entered into a substantially similar contract of employment if she been dealing with the Payer at arm's length.

LAW

[17] Under subsection 5(2)(i) and subsection 5(3) of the *EIA*, non-arm's length employees are not considered to have been engaged in insurable employment

unless they would have entered into a substantially similar contract of employment with their employer if they had been dealing with each other at arm's length.

[18] Paragraph 5(2)(i) and subsection 5(3) are as follows:

> 5(2) Excluded employment Insurable employment does not include…
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.
>
> 5(3) Arm's length dealing 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.

[19] Paragraph 5(2)(i) provides that, when an employee and employer are not dealing with each other at arm's length, the employer and the employee will not have to pay EI and the employee will not be entitled to secure employment insurance benefits.

[20] Paragraph 5(3)(a) provides that the question of whether or not an employee and an employer are not dealing with each other at arm's length shall be determined pursuant to section 251 of the *Income Tax Act* (the "*ITA*"). Under paragraph 251(1)(a) of the *ITA*, related persons are deemed not to deal with each other at arm's length. Non-related persons could also be considered not dealing at arm's length based on the facts.

(1) <u>The Exception in Paragraph 5(3)(b) of the *EIA*</u>

[21] Paragraph 5(3)(b) of the *EIA* provides that a related employer and employee are deemed to deal at arm's length if the Minister is satisfied that, having regard to all the circumstances of the employment, 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. The factors to be considered are:

1) the remuneration paid;

2) the terms and conditions;

3) the duration; and

4) the nature and importance of the work performed.[1]

[22] In *Légaré*, the Federal Court of Appeal explained the role of the Minister with respect to the issue of insurability of a worker in a non-arm's length relationship with their employer:

> The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review.[2]

[23] The Federal Court of Appeal also explained the purpose and the origin of the exception.[3]

> Under the *Unemployment Insurance Act*, excepted employment between related persons is clearly based on the idea that it is difficult to rely on the statements of interested parties and that the possibility that jobs may be invented or established with unreal conditions of employment is too great between people who can so easily act together. And the purpose of the 1990 exception was simply to reduce the impact of the presumption of fact by permitting an exception from the penalty (which is only just) in cases in which the fear of abuse is no longer justified. [...]

(2) Appeal from the Minister's Decision

---

[1] For a practical application, see for example: *Gray v MNR*, 2002 FCA 40 (FCA); *Canada v Miller*, 2002 FCA 412 (FCA); *CB Woodcraft Ltd v MNR*, 2004 TCC 477 (TCC); *Actech Electrical Limited v MNR*, 2004 TCC 572 (TCC); *Lenover v MNR*, 2007 TCC 594 (TCC).

[2] *Légaré v MNR*, [1999] FCJ No 878 at para 4.

[3] *Ibid* at para 12.

[24] Appeals to the Tax Court of Canada of a decision of the Minister under subsection 5(3) of the *EIA* are unique. Where most appeals, including appeals of a decision of the Minister under paragraph 5(3)(a), are trials, appeals under paragraph 5(3)(b) resemble a form of judicial review.

[25] In *Lalande*, Justice Sommerfeldt summarized the process as follows[4]:

> a. When reviewing a conclusion of the Minister in the context of paragraph 5(3)(b) of the *EIA*, this Court is to verify the facts inferred or relied on by the Minister, in order to confirm that those facts are real and were correctly assessed by the Minister.
>
> b. After investigating all the facts, this Court must decide whether the Minister's conclusion seems reasonable.
>
> c. The *EIA* requires this Court to show some deference to the Minister's initial assessment.
>
> d. When there are no new acts and there is nothing to indicate that the known acts were misunderstood by the Minister, this Court is not to substitute its opinion for that of the Minister.

(3) Do the Minister's Conclusions seem Reasonable?

[26] The facts at trial do not support the Minister's conclusions. As described above, there are assumptions made by the Minister that I have determined to be incorrect. I find these assumptions to be crucial in determining the Appellant's case.

[27] Furthermore, in reviewing the assumptions made by the Minister, it has become evident to me that the Minister understated the tasks performed by the Appellant. The Appellant worked far more hours and performed many more tasks than the Minister considered. I find this to be relevant in considering the reasonableness of the Minister's decision.

[28] The Minister also seemed to be relying upon, to the detriment of the Appellant, comparing the work and compensation of the Appellant to that of the deckhands. These are misleading comparisons. I find this to be relevant in considering the reasonableness of the Minister's decision.

---

[4] *Lalande v MNR*, 2016 TCC 33 at para 31.

[29] It does appear that the Appellant most likely worked more than 40 hours a week during the lobster season. I accept that this occurred as part of the Payer’s learning curve in year one of the business. It was also the Appellant’s first year in the job. It is not surprising that she worked more hours than she initially expected. I do not find this to be a basis to support the Minister’s ruling.

[30] When considering the Minister’s decision, I find that the corrected facts and a more fulsome description of the work the Appellant performed supports the conclusion that the Appellant played a crucial role in the Appellant’s business. She was paid a fair amount by the Payer, and the duration of her job was logical as it coincided with lobster fishing season.

IV. Conclusion

[31] In light of all of the above, it is my finding that if the Minister had the benefit of all of the evidence before the Court, the Minister would have made a different Decision. The Minister would not reasonably have failed to conclude that the Payer and an arm's-length employee would have entered into a substantially similar contract of employment to that between the Payer and the Appellant.

[32] As the Minister's Decision was not reasonable in light of the fullness of the evidence, I will be ordering that the Minister's Decision be varied to reflect that

the Appellant was in insurable employment for the period from April 21, 2022, to July 2, 2022.

These Amended Reasons for Judgment are issued in substitution of the Reasons for Judgment dated August 10th 2023.

Signed at Sydney, Nova Scotia, this 15th day of August 2023.

"R. MacPhee"

MacPhee J.

CITATION:	2023 TCC 110
COURT FILE NO.:	2023-268(EI)
STYLE OF CAUSE:	ARLENE W. BINGLEY AND THE MINISTER OF NATIONAL REVENUE AND I'SE THE BYE FISHERIES LTD.(Intervener)
PLACE OF HEARING:	Sydney, Nova Scotia
DATE OF HEARING:	July 11, 2023
AMENDED REASONS FOR JUDGMENT BY:	The Honourable Justice Ronald MacPhee
DATE OF AMENDED REASONS FOR JUDGMENT:	August 15, 2023

APPEARANCES:

For the Appellant:	The Appellant herself
Counsel for the Respondent:	Jennifer Goodhart
Agent for the Intervener:	Wallace Bingley

COUNSEL OF RECORD:

For the Appellant:	
Name:	N/A
Firm:	
For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada