

Docket: 2015-4499(EI)

BETWEEN:

KATHLEEN BISSET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on June 1, 2016, at Toronto, Ontario

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Stephen Oakey

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**JUDGMENT**

The appeal with respect to Minister of National Revenue's decision dated August 10, 2015 made under the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of June 2016.

“V.A. Miller”

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V.A. Miller J.

Citation: 2016TCC145

Date: 20160606

Docket: 2015-4499(EI)

BETWEEN:

KATHLEEN BISSET,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

V.A. Miller J.

[1] The issue in this appeal is whether the Appellant was engaged in insurable employment during the period August 18, 2014 to April 3, 2015 (the “Period”) when she performed administrative services for Tristan Legare (the “Payer”).

[2] The Appellant and the Payer are spouses of each other and the Minister of National Revenue (the “Minister”) determined that the Appellant’s employment was not insurable because the parties were not dealing with each other at arm’s length in accordance with paragraphs 5(2)(i) and 5(3)(b) of the *Employment Insurance Act* (the “Act”).

[3] The Appellant was the only witness at the hearing. In her testimony, she agreed with most of assumptions relied on by the Minister and I will summarize those assumptions and her testimony in the following paragraphs.

#### Facts

[4] The Payer operated a small carpentry and construction business as a sole-proprietorship under the name Birch Point Contracting (the “Business”). He started this Business in May 2014 and it operated year-round. The Business specialized in renovating kitchens and bathrooms and constructing patios and decks.

[5] The Payer hired two workers to assist him with the construction Business – his father-in-law and an unrelated worker. He engaged the Appellant, his spouse, to perform office administration duties for the Business. Those duties included (i) running errands; (ii) maintaining the books and records; (iii) tracking income and paying expenses; (iv) processing the payroll; and (v) making the bank deposits for the Business. The Appellant had no prior experience as a bookkeeper but her brother is an accountant and she was able to consult him concerning her duties.

[6] The Appellant performed her duties from her home. She had no set schedule and she worked around her children's schedules and her other responsibilities. The Appellant agreed that she usually completed most of her duties on Tuesdays when her 2 year old child was at day-care.

[7] The Appellant worked for the Payer from May 2014 to July 2014 without pay. She performed these same duties for the Payer from August 18, 2014 to April 3, 2015 and she was paid \$12/per hour for a 20 hour work week.

[8] The Appellant stated that she did not always work 20 hours each week but she did work 40 hours every two weeks.

[9] The Minister assumed that neither the Appellant nor the Payer kept track of the hours that the Appellant worked. However, the Appellant testified that she kept track of her hours on a calendar and she transferred the number of hours to a timesheet each month. To corroborate her testimony, she tendered two timesheets for the month of January. She stated that she had destroyed the calendar.

[10] All of the workers were paid on a bi-weekly basis by direct deposit. The construction workers had their pay deposited into their personal bank accounts. Whereas, the Appellant's pay was included with the Payer's earnings and deposited into the Payer's personal bank account.

[11] The Appellant ceased working for the Payer on April 3, 2015 to go on maternity leave. Her baby was born on April 7, 2015.

[12] After April 3, 2015, the Payer started to complete the Appellant's duties. However, he found that he could not complete both the administrative and the construction work and the Appellant began to perform her duties again in May 2015. She again worked 20 hours a week from May 2015 to April 3, 2016. It was her evidence that she was not paid for this period because she was on maternity leave. She started to get paid again after April 3, 2016.

[13] The Appellant stated that she was contacted by an appeals officer from the Canada Revenue Agency who asked her questions about her claim for employment insurance benefits. The appeals officer told her that she could work for the Payer while she was on maternity leave.

### Law

[14] The relevant statutory provisions of the *Act* read:

5(2) Insurable employment does not include

(i) employment if the employer and employee are not dealing with each other at arm's length.

5(3) For the purposes of paragraph (2)(i),

(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.

[15] In *Birkland v Minister of National Revenue*, 2005 TCC 291, Bowie J. reviewed the various decisions from the Federal Court of Appeal that discussed this court's role in an appeal pursuant to the above provisions. He stated his understanding of the present state of the law as follows:

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.

Analysis

[16] There was no dispute that the Payer and the Appellant were not dealing with each other at arm's length. They are related to each other because they are spouses of each other.

[17] The question is whether, having regard to all the circumstances of the employment, they would have entered into a substantially similar contract of employment if they were not related to each other. It is my opinion that the answer to this question is no. My opinion is based on the following.

[18] Prior to the period in question, the Appellant worked for the Payer for at least three months without being paid. She said that she performed the same duties in May to July 2014 as she performed from August 2014 to April 2015. She again worked for the Payer from May 2015 to April 2016 without receiving any pay.

[19] The Payer employed two construction workers who were paid for all the hours they worked. Their pay was deposited directly into each of their accounts.

[20] The Appellant had her own personal bank account but her pay was not deposited into her account. It was included with the Payer's earnings and deposited into the Payer's bank account. The Appellant stated that this procedure was followed for convenience as all family bills were paid from the Payer's bank account. However, there was no evidence concerning the amount of the Payer's earnings or the amount deposited into his account every two weeks and I am left to wonder whether the Appellant was actually paid.

[21] The Appellant was paid for working for the Payer for 600 hours. This is the exact number of hours she required to qualify for employment insurance benefits.

[22] The Payer did not take steps to hire another bookkeeper to perform the Appellant's duties after she went on maternity leave.

[23] When I consider the facts presented at the hearing, the testimony and the exhibit presented at the hearing with respect to the remuneration paid, the terms and conditions, the duration and the nature of the work performed, I conclude that the Minister's decision was reasonable. The appeal is dismissed.

Signed at Ottawa, Canada, this 6<sup>th</sup> day of June 2016.

“V.A. Miller”

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V.A. Miller J.

CITATION: 2016TCC145  
COURT FILE NO.: 2015-4499(EI)  
STYLE OF CAUSE: KATHLEEN BISSET AND M.N.R.  
PLACE OF HEARING: Toronto, Ontario  
DATE OF HEARING: June 1, 2016  
REASONS FOR JUDGMENT BY: The Honourable Justice Valerie Miller  
DATE OF JUDGMENT: June 6, 2016

APPEARANCES:

For the Appellant: The Appellant herself  
Counsel for the Respondent: Stephen Oakey

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: William F. Pentney  
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