Docket: 2016-1392(EI)

BETWEEN:

RANDY STUCKLESS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on August 19, 2016, at Gander, Newfoundland

Before: The Honourable Justice Valerie Miller

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	David Besler

JUDGMENT

The appeal with respect to the Minister of National Revenue's decision dated February 19, 2016, made under the *Employment Insurance Act*, is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 2nd day of September 2016.

"V.A. Miller"

V.A. Miller J.

Citation: 2016TCC191
Date: 20160902
Docket: 2016-1392(EI)

BETWEEN:

RANDY STUCKLESS,

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 May 25, 2015 to October 17, 2015 (the "Period") when he performed services for Randy and Ryder Construction Ltd. (the "Payer").

[2] The Minister of National Revenue (the "Minister") determined that the Appellant's employment was not insurable because the Appellant and the Payer 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 only witness at the hearing was the Appellant. He stated that he did not receive the Reply to Notice of Appeal (the "Reply") which had been filed with the Court on June 8, 2016. Counsel for the Respondent informed the Court that the Reply had been sent to the Appellant by registered mail on June 8, 2016 and it was not returned to the Canada Revenue Agency. The Appellant was given an opportunity to read the Reply and he was asked if he would like to have an adjournment of his hearing so that he could bring all documents which he thought were relevant for his appeal. The Appellant did not want an adjournment.

[4] In his testimony, the Appellant agreed with most of the assumptions relied on by the Minister and I will summarize the assumptions and the Appellant's testimony in the following paragraphs.

[5] The Appellant has been a bricklayer for approximately 16 years. He testified that he had the Payer incorporated because he could not find work. He believed that once he started the Payer, if there was a shortage of work, he would be able to draw employment insurance ("EI") benefits.

[6] The Payer was incorporated on May 4, 2015 and its business was masonry bricklaying and landscaping. The shareholders of the Payer were:

a) the Appellant who held 20% of the common shares;

b) the Appellant's spouse who held 40% of the common shares; and,

c) the Appellant's father who held 40% of the common shares.

[7] According to the Appellant, his father was a "silent shareholder". The Appellant stated that he was aware that his employment would not be insurable if he owned more than 40% of the shares in the Payer. As a result, his father and his spouse were each given 40% of the shares. It was the Appellant's belief that if he owned only 20% of the shares and work slowed, he would have a "better chance" to receive EI benefits.

[8] The Appellant was also a Director and the President of the Payer. His duties included:

i. answering phone calls;

ii. providing design ideas and quotes to prospective clients;

iii. ordering materials;

iv. building walkways, planters, retaining walls and various other brick work;

v. landscaping and operating equipment.

[9] The Minister assumed that the Appellant's duties also included hiring and supervising casual workers and invoicing the Payer's clients. However, the Appellant stated that his spouse hired the labourers and did all invoicing for the Payer. It was his evidence that both he and his spouse were involved in the Payer's business. According to the Appellant, his spouse went to the job sites; issued

quotes on the jobs; managed the job sites and ordered supplies and tools for the Payer.

[10] The Appellant's spouse was present at the hearing of this appeal but she did not testify. If she had been called as a witness, counsel for the Respondent would have been able to cross-examine her with respect to the precise services she rendered for the Payer. Failing this, I have inferred that the evidence from the Appellant's spouse would not have assisted the Appellant.

[11] The Payer reported that the Appellant was the only employee during the Period. It issued weekly payroll cheques to the Appellant for a total of 19 cheques.

[12] The Minister also assumed the following:

> (t) during the Period, the Appellant used the Payer's debit card in excess of $11,600 for cash ABM transactions;
>
> (u) during the Period, the Appellant used the Payer's debit card in excess of $6,500 for other personal transactions;

[13] The Appellant agreed with these assumptions but stated that he has repaid the Payer.

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:

> At this point it is sufficient simply to state my understanding of the present state of the law, which I derive principally from paragraph 4 of Légaré (reproduced above) and from the following passage from the judgment of Richard C.J., concurred in by Létourneau and Noël JJ.A., in *Denis c. Ministre du Revenu national*
>
> 5 The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the *Act* is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, March 10, 2000).
>
> 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] The Payer was controlled by the Appellant's father and the Appellant's spouse. In accordance with subsection 251(2) of the *Income Tax Act*, the Appellant and the Payer are related. They are deemed not to deal with each other at arm's length by paragraph 251(1)(a) of the *Income Tax Act*.

[17] The question is whether, in light of the evidence adduced at court, would the Minister, if he had the benefit of all this evidence, reasonably have concluded that the Payer and a person acting at arm's length would have entered into a substantially similar contract of employment. It is my opinion that the answer to this question is no.

[18] I do not believe that the Appellant's spouse performed all of the tasks alleged by the Appellant. I believe that her only duty with the Payer was to maintain its books and records. The Appellant's spouse had no training in the Payer's business; she reported no income from the Payer; and, during the period, she worked for another payer.

[19] The Appellant's testimony was self-serving. He has not brought any evidence to show that the Minister's assumptions were incorrect.

[20] It is my view that the Appellant made all of the decisions for the Payer. He decided when he would work; his own rate of pay; the quotes issued by the Payer; the contracts which the Payer would accept; the days and hours he would work; and the casual laborers who would be hired and laid off by the Payer. The Appellant decided the direction of the Payer's business. It is my opinion that the Appellant incorporated the Payer to give the appearance that he was employed by an independent third party.

[21] There is no basis for me to conclude that the Minister's decision would have been different if he had the benefit of the evidence given before me. The appeal is dismissed.

Signed at Ottawa, Canada, this 2nd day of September 2016.

"V.A. Miller"

V.A. Miller J.

CITATION:	2016TCC191
COURT FILE NO.:	2016-1392(EI)
STYLE OF CAUSE:	RANDY STUCKLESS AND M.N.R.
PLACE OF HEARING:	Gander, Newfoundland
DATE OF HEARING:	August 19, 2016
REASONS FOR JUDGMENT BY:	The Honourable Justice Valerie Miller
DATE OF JUDGMENT:	September 2, 2016

APPEARANCES:

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COUNSEL OF RECORD:

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Name:

Firm:

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