Dockets: 97-1418(UI)
97-1420(UI)
97-1421(UI)
97-1422(UI)

BETWEEN:

VARDY VILLA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeals heard on common evidence with the appeals of *Roy Goobie* (96-2493(UI)), *Violet L. Diamond* (97-33(UI)), *Joseph Diamond* (97-34(UI)) and *David Keough* (97-263(UI)), on February 7, 2003, at Gander, Newfoundland,

Before: The Honourable Deputy Judge Murray F. Cain

Appearances:

Counsel for the Appellant: Greg K. Pittman

Counsel for the Respondent: Christa MacKinnon

JUDGMENT

The appeals in respect of the workers Violet L. Diamond (97-1421(UI)), Joseph Diamond (97-1420(UI)) and David Keough (97-1422(UI)) are dismissed and the decisions of the Minister are confirmed;

The appeal in respect of the worker Roy Goobie (97-1418(UI)) is allowed and the decision of the Minister is vacated in accordance with the attached Reasons for Judgment.

Signed this 23rd day of April 2003.

"Murray F. Cain"

D.J.T.C.C.

Citation: 2003TCC220
Date: 2003-04-23
Dockets: 97-1418(UI)
97-1420(UI)
97-1421(UI)
97-1422(UI)

BETWEEN:

VARDY VILLA LIMITED,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 96-2493(UI)

ROY GOOBIE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 97-33(UI)

VIOLET L. DIAMOND,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 97-34(UI)

JOSEPH DIAMOND,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

AND

Docket: 97-263(UI)

DAVID KEOUGH,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Cain, D.J.T.C.C.

[1] The above Corporate Appellant (the "Payor") and the personal Appellants (the "Workers") appealed the determinations of the Respondent that the engagements of the Workers by the Payor during specific periods ("the periods in question") were not insurable employments in accordance with the *Unemployment Insurance Act* (the "*Act*"). The Respondent in all cases notified the Appellants in writing that the reason for his decision was that there was no contract of service between the Payor and each respective Worker and therefore no employer-employee relationships.

[2] The appeals were heard at Gander, Newfoundland/Labrador on July 13, 2000 and the Parties agreed that the appeals should be heard at the same time, the evidence adduced to be applied to each respective appeal as the context required and that there was no necessity of creating more than one record.

[3] The periods in question determined by the Respondent for each of the Workers are as follows:

1. Roy Goobie - August 14, 1995 to November 17, 1995.

2. David Keough - April 3, 1995 to June 23, 1995 and September 4, 1995 to June 21, 1996.

3. Violet L. Diamond - April 3, 1995 to June 23, 1995 and September 4, 1995 to June 21,1996

4. Joseph Diamond - April 3, 1995 to June 23, 1995 and September 4, 1995 to June 21, 1996.

[4] The Court notes that in describing the period in question of Worker Roy Goobie, the Respondent did not include the period of November 20, 1995 to June 12, 1996. However the Respondent did include that period in his Reply. For the purpose of the record the Worker admitted the fact.

[5] The Respondent in his initial notice to the Appellants determined that the work performed by the Workers was not insurable because there was no contract of service between the Payor and the Workers during the respective periods in question. In his Replies to the Appellants' Notices of Appeal, the Respondent added, in the alternative, that the work was not insurable as it was excepted employment within the meaning of subparagraph 3(2)(*c*)(i**)** of the *Act* as in accordance with paragraph 251(1)(*b*) of the *Income Tax Act* the Payor and the Workers were factually not dealing with each other at arm's length.

[6] At the conclusion of the Appellants' case, the Court decided that the Appellants had established a *prima facie* case that there was in fact a contract of service between the Payor and the Workers. The Respondent led evidence contra and at the close of the case the Court heard oral submissions and reserved judgment.

[7] The Court subsequently called upon the parties to make and the parties did subsequently file submissions as to whether the Court had jurisdiction to decide the issue on the basis of the Respondent's alternate ground that there was no arm's length relationship between the Payor and the Workers.

[8] The Court delivered its judgment on February 5, 2001 and found that it had no jurisdiction to decide the issue on the basis that the Respondent could not raise an alternate ground in his Replies to the Appellants' Notices of Appeal without

originally having expressly determined that the employment was not insurable on that specific basis.

[9] The Court relied on *Candor Enterprises Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, 2000 264 N.R. 149, a decision of the Federal Court of Appeal. Although that case was decided on a factual situation arising under subparagraph 3(2)(c)(ii) of the *Unemployment Insurance Act*, this Court extended its ratio to apply to all determinations made by the Respondent irrespective of the section of the appropriate legislation relied upon.

[10] The Minister in *Candor* determined that the employment of the Applicant was not insurable. The Federal Court of Appeal dealt with the question of whether the Tax Court could consider a ground of appeal that had not been considered by the Minister in his initial determination but had only been raised in the pleadings that followed the Applicant's Notice of Appeal filed subsequent to that determination.

[11] In its judgment, the Federal Court of Appeal questioned the validity of characterizing the Minister's determination under subparagraph 3(2)(*c*)(ii) as "discretionary" and whether the two-step procedure suggested in these cases is necessary or helpful. It held that the Tax Court Judge must verify whether the facts inferred or relied on by the Minister in making his determination were real and were correctly assessed having regard to the context in which they occurred. And after so doing, it must decide whether the conclusion with which the Minister was satisfied still seems reasonable. The Court stated that the Minister could not raise subparagraph 3(2)(*c*)(ii) for the first time in its pleadings because it was clear from the notice received by the Applicant of his uninsurability that the Minister had never considered the issues raised under subparagraph 3(2)(*c*)(ii) in making his determination. Therefore there will have been no determination by the Minister from which an appeal can be brought. This Court concluded that such a process must be used in every appeal irrespective of the section on which the Minister relied.

[12] Applying that ratio this Court concluded it had no jurisdiction to consider the alternate ground.

[13] The Respondent appealed the judgment of this Court to the Federal Court of Appeal and on July 17, 2002, that Honourable Court set aside the judgment. Linden J.A. who wrote the decision of the Court said at paragraph [3]:

> In my view, the Deputy Tax Court Judge erred in extending the reach of the Candor Enterprises decision which dealt only with a case

> under subparagraph 3(2)(c)(ii), and not with any case under subparagraph 3(2)(c)(i) of the Employment Act. [*sic*]

[14] The learned Judge then went on to review the various provisions of the *Act* dealing with the duties and responsibilities of a Tax Court Judge, relying on the discretionary aspect of the Tax Court Judge's jurisdiction and the two-step procedure peculiar to subparagraph 3(2)(*c*)(ii) and concluded as follows:

> [10] In this case, therefore, the Minister's determination was merely that the employment in question was not insurable. While the reason initially given by the Minister was that there was no contract of service (para. 3(1)(a)), there was added in the Reply to the Notice of Appeal the alternative ground of no arm's length. The authorities permit this, as is evidenced in **Schnurer** and **Doucet**, **supra**, and **Candor Enterprises** does not bar this procedure, as explained above. Subject to the **Candor Enterprises** exception, the Tax Court had the jurisdiction to decide any question of law necessary to determine whether the worker's employment was insurable. It had the jurisdiction to consider subparagraph 3(2)(c)(*i*), even though it was not raised until the Reply to the Notice of Appeal was filed in the Tax Court.

[15] The learned Judge ordered that the matter be remitted to the Chief Judge of the Tax Court of Canada, or his delegate, to determine whether subparagraph 3(2)(*c*)(i) excepts the employment in issue on the basis of the facts originally presented and any other evidence that may, with the permission of the Deputy Tax Court Judge, be adduced.

[16] On February 7, 2003 the case resumed before this Court at Gander, Newfoundland at which time counsel for the Appellants requested that they be permitted to lead evidence as it related to the relationship that existed between the Payor and the Workers.

[17] The Respondent objected on the grounds that extensive evidence had been led at trial on the relationship. The Court permitted the Appellants to lead further evidence on that issue alone.

[18] The Appellants called Dennis Vardy who was the controlling officer of the Payor and David Keough. Their evidence reinforced their previous evidence that they were not either social or close friends. Counsel for the Appellants filed with the Court jurisprudence in support of the principle that the relationship that existed between the employer and the Workers, or in this case the controlling officer of the

Payor, is an important factor in determining whether a relationship was one of arm's length or not. The Court reserved judgment.

DECISION ON ISSUES

[19] The Respondent based his determinations on the following assumptions in respect to the Workers:

JOSEPH AND VIOLET DIAMOND

(a) the Appellant was a corporation duly incorporated under the laws of the Province of Newfoundland on September 21, 1987;

(b) at all relevant times the Appellant's issued shares were owned by Dennis Vardy and his spouse, Amy Vardy;

(c) the Appellant engaged the Worker to drive students from the Newfoundland communities of Jamestown, Portland, Brooklyn and Lethbridge to and from the Musgravetown High School and Elementary Schools;

(d) during the period in question the Worker drove the same routes which took 1 hour in the morning and 1 hour in the afternoon for a total of 2 hours work, 5 days a week;

(e) the Worker was paid $50 per week from January 1, 1995 to March 31, 1995 and then $260 per week from April 30, 1995 to June 23, 1995;

(f) the Worker was paid $50 per week from September 4, 1995 to March 29, 1996 and then $250 per week from April 1, 1996 to June 21,1996;

(g) the Worker was paid the same weekly amount even if the bus did not operate due to inclement weather;

(h) the Worker did not perform any additional or different duties in the periods where he was paid $260 or $250 per week than he did in the periods where he was paid $50 per week;

(i) the Worker was not supervised when carrying out his duties;

(j) the Worker was free to substitute his personal services with that of another driver without first obtaining permission from the Appellant;

(k) the Worker received his full pay even when he did not drive the school bus every day during the week;

(l) the Appellant was only interested in the completion of the service, not in how it was done or who performed the tasks;

(m) the Worker took the school bus home each day and was responsible for seeing that maintenance was done to the bus as needed;

(n) there was no contract of service between the Worker and the Appellant.

[20] In the alternative he based his determination on the following assumptions.

(a) while performing services for the Appellant, the Worker was in receipt of unemployment insurance benefits from January 1, 1995 to January 28, 1995 and from September 4, 1995 to March 29, 1996;

(b) while in receipt of unemployment insurance benefits the Worker's pay was reduced to $50 per week;

(c) the Worker's duties remained the same whether he was paid $50 per week or $250 per week;

(d) as per the ... Schedule “A”, the Appellant engaged other workers under schemes similar to the Worker's employment arrangement in 1995 and 1996;

(e) the Worker's rate of pay when employed full time was excessive;

(f) the Worker's employment with the Appellant was an artificial arrangement designed to take advantage of the unemployment insurance benefits system;

(g) the Worker benefited from the arrangement by receiving unemployment insurance benefits while working for the Appellant and receiving a weekly pay of $50 to top up his income;

(h) the Appellant benefited from this arrangement by having its wage costs subsidized by unemployment insurance benefits which enabled the Appellant to pay lower weekly wages to the Worker of $50 for

the same services that cost the Appellant $250 per week during the period in question;

(i) the Appellant was factually not dealing with the Worker at arm's length.

DAVID KEOUGH

(a) the Appellant was a corporation duly incorporated under the laws of the Province of Newfoundland on September 21, 1987;

(b) at all relevant times the Appellant's issued shares were owned by Dennis Vardy and his spouse, Amy Vardy;

(c) the Appellant engaged the Worker to drive students from the Newfoundland communities of Catalina and Little Catalina to and from the Catalina Elementary School;

(d) during the period in question the Worker drove the same routes which took 25 minutes in the morning, 25 minutes at lunch time and 25 minutes in the afternoon for a total of 1 hour and 15 minutes, 5 days a week;

(e) the Worker was paid $60 per week with no vacation pay from January 1, 1995 to March 31, 1995 and then $300 per week plus $12 vacation pay from April 2, 1995 to June 22, 1995;

(f) the Worker was paid $60 per week with no vacation pay from September 4, 1995 to March 29, 1996 and then $300 plus $12 vacation pay per week from April 1, 1996 to June 21, 1996;

(g) the Worker was paid the same weekly amount even if the bus did not operate due to inclement weather;

(h) the Worker did not perform any additional or different duties in the periods where he was paid $300 per week than he did in the periods where he was paid $60 per week;

(i) the Worker was not supervised when carrying out his duties;

(j) the Worker was free to substitute his personal services with that of another driver without first obtaining permission from the Appellant;

(k) the Worker received his full pay even when he personally did not drive the school bus every day during the week;

(l) the Appellant was only interested in the completion of the service, not in how it was done or who performed the tasks;

(m) the Worker took the school bus home each day and was responsible for seeing that maintenance was done to the bus as needed;

(n) there was no contract of service between the Worker and the Appellant.

[21] In the alternative he based his determination on the following assumptions.

(a) while performing services for the Appellant, the Worker was in receipt of unemployment insurance benefits from January 1, 1995 to January 28, 1995 and from September 4, 1995 to May 15, 1996;

(b) while in receipt of unemployment insurance benefits the Appellant's pay was reduced to $60 per week to perform the same services;

(c) as per the ... Schedule “A”, the Appellant engaged other workers under schemes similar to the Worker's employment arrangement in 1995 and 1996;

(d) the Worker's rate of pay when employed full time was excessive;

(e) the Worker's employment with the Appellant was an artificial arrangement designed to take advantage of the unemployment insurance benefits system;

(f) the Worker benefited from the arrangement by receiving unemployment insurance benefits while working for the Appellant and receiving a weekly pay of $60 to top up his income;

(g) the Appellant benefited from this arrangement by having its wage costs subsidized by unemployment insurance benefits which enabled the Appellant to pay lower weekly wages to the Worker of $60 for the same services that cost the Appellant $312 per week during the period in question;

(h) the Appellant was factually not dealing with the Worker at arm's length.

ROY GOOBIE

(a) the Appellant was a corporation duly incorporated under the laws of the Province of Newfoundland on September 21, 1987;

(b) at all relevant times the Appellant's issued shares were owned by Dennis Vardy and his spouse, Amy Vardy;

(c) the Appellant engaged the Worker to drive students from the Newfoundland communities of Jamestown, Portland, Brooklyn and Lethbridge to and from the Musgravetown High School and Elementary Schools;

(d) during the period in question the Worker drove the same routes which took 40 minutes in the morning and 35 minutes in the afternoon for a total of 1 hour and 15 minutes work, 5 days a week;

(e) the Worker was paid $400 per week plus 4% vacation pay from August 14, 1995 to November 17, 1995 and then $65 per week without vacation pay from November 20, 1995 to June 28, 1996;

(f) the Worker was paid $400 per week plus 4% vacation pay from September 2, 1996 to October 11, 1996;

(g) the Worker was paid the same weekly amount even if the bus did not operate due to inclement weather;

(h) the Worker did not perform any additional or different duties in the periods where he was paid $400 per week plus vacation pay than he did in the periods where he was paid $65 per week;

(i) the Worker was not supervised when carrying out his duties;

(j) the Worker was free to substitute his personal services with that of another driver without first obtaining permission from the Appellant;

(k) the Worker received his full pay even when he did not drive the school bus every day during the week;

(l) the Appellant was only interested in the completion of the service, not in how it was done or who performed the tasks;

(m) the Worker took the school bus home each day and was responsible for seeing that maintenance was done to the bus as needed;

(n) there was no contract of service between the Appellant and the Worker.

[22] In the alternative he based his determination on the following assumptions.

(a) the Worker was in receipt of unemployment insurance benefits from December 25, 1994 to August 5, 1995 and when his claim expired he was put on the Appellant's payroll full time as of August 14, 1995 at full pay;

(b) while performing services for the Appellant, the Worker was in receipt of unemployment insurance benefits from November 20, 1995 to June 12, 1996;

(c) while in receipt of unemployment insurance benefits the Appellant's pay was reduced to $65 per week to perform the same duties;

(d) as per the ... Schedule "A", the Appellant engaged other workers under schemes similar to the Worker's employment arrangement in 1995 and 1996;

(e) the Worker's rate of pay when employed full time was excessive;

(f) the Worker's employment with the Appellant was an artificial arrangement designed to take advantage of the unemployment insurance benefit system;

(g) the Worker benefited from the arrangement by receiving unemployment insurance benefits while working for the Appellant and receiving a weekly pay of $65 to top up his income;

(h) the Appellant benefited from this arrangement by having its wage costs subsidized by unemployment insurance benefits which enabled the Appellant to pay lower weekly wages to the Worker of $65 for the same services that cost the Appellant $400 per week during the period in question;

(i) the Worker was factually not dealing with the Appellant at arm's length.

[23] Schedules "A" mentioned in the alternative assumptions is the same for appeals of the Payor and each of the Workers and is as follows:

Schedule "A"

Employee No. 1

On the Payor's payroll for:

14 weeks at $50.00/week from January 1, 1995 to March 31, 1995;

12 weeks at $260.00/week from April 3, 1995 to June 23, 1995;

30 weeks at $50.00/week from September 4, 1995 to March 29, 1996;

12 weeks at $250.00/week from April 1, 1996 to June 28, 1996;

6 weeks at $100/week from September 2, 1996 to October 11, 1996.

Employee No. 2

On the Payor's payroll for:

13 weeks at $50.00/week from January 1, 1995 to March 31, 1995;

12 weeks at $250.00/week from April 3, 1995 to June 23, 1995;

30 weeks at $50.00/week from September 4, 1995 to March 29, 1996;

12 weeks at $250.00/week from April 1, 1996 to June 28, 1996;

6 weeks at $100/week from September 2, 1996 to October 11, 1996.

Employee No. 4

On the Payor's payroll for:

14 weeks at $400.00/week from August 14, 1995 to November 17, 1995;

30 weeks at $65.00/week from November 20, 1995 to June 28, 1996;

12 weeks at $400/week from September 2, 1996 to October 11, 1996.

Employee No. 5

On the Payor's payroll for:

13 weeks at $60.00/week from January 1, 1995 to March 31, 1995;

12 weeks at $300.00/week from April 3, 1995 to June 23, 1995;

30 weeks at $60.00/week from September 4, 1995 to March 29, 1996;

12 weeks at $300/week from April 1, 1996 to June 28, 1996;

4 weeks at $100/week from September 2, 1996 to September 27, 1996;

2 weeks at $300/week from September 30, 1996 to October 11, 1996.

Employee No. 6

On the Payor's payroll for:

8 weeks at $60.00/week from January 1, 1995 to February 23, 1995;

17 weeks at $250.00/week from February 27, 1995 to June 23, 1995;

2 weeks at $40.00/week from September 4, 1995 to September 15, 1995;

27 weeks at $50.00/week from September 18, 1995 to March 29, 1996;

12 weeks at $250.00/week from April 1, 1996 to June 28, 1996;

6 weeks at $100/week from September 2, 1996 to October 11, 1996.

Employee No. 7

On the Payor's payroll for:

12 weeks at $400.00/week from September 4 to November 24, 1995;

25 weeks at $50.00/week from November 27, 1995 to May 26, 1996.

[24] The Workers Joseph and Violet Diamond admitted assumptions (a), (b), (d) to (g) inclusive, (k), and (m) first above set out under their names and assumptions (a) and (b) of the alternative claim, but denied all other assumptions hereinabove set out.

[25] The Worker Keough admitted assumptions (a), (b), (d) to (g) inclusive, (k), and (m) first above set out under his name and assumptions (a) and (b) of the alternative claim, but denied all other assumptions hereinabove set out.

[26] The Worker Goobie admitted assumptions (a), b), (d) to (g) inclusive, (k) and (m) first above set out under his name and assumptions (a) and (b) of the alternative claim, but denied all other assumptions hereinabove set out.

FACTS

[27] The Payor contracted with the Government of Newfoundland/Labrador to convey children to schools by bus.

[28] He hired bus drivers at various times and at various rates of pay, specified the routes they were to follow and provided them with buses. All of the Workers were employed during the periods in question on the same basis in that at some time during those periods, they worked for twelve consecutive weeks as full-time employees at a full-time wage rate. At all other times during those periods they were in receipt of unemployment insurance benefits and continued to work but at a

rate of pay within that permitted by the *Act* for people working and drawing benefits at the same time.

[29] The rates of pay of the Workers differed. However all with the exception of Worker Goobie were placed on full-time employment during the months of April, May and June of the periods in question, laid off for the summer and then worked from September through the following April as part-time employees while in receipt of unemployment insurance benefits. Worker Goobie was hired full time during the period August to November because of special skills which he possessed, was then hired part time until June while in receipt of unemployment benefits and then presumably would have been re-hired the following August.

SUBMISSIONS

[30] The Respondent's submissions may be summarized as follows. The Payor and the Workers concocted a scheme by which they would be employed by the Payor as bus drivers principally during the school year and the Payor's costs of such employment would be subsidized by benefits received by the Workers from the unemployment insurance fund during that term.

[31] The Payor would hire the Workers at a salary for 12 to 14 months during the above term. The Workers would then make application for and become entitled to unemployment insurance benefits and then be re-employed by the Payor to perform the same duties on an alleged part-time basis at an hourly rate, within the permissible limits authorized by the *Act*, while receiving those benefits. He submitted such a scheme was excepted employment under the *Act* as it created a factual non-arm's length relationship.

[32] The Payor and the Workers submitted and I quote:

> ... the Appellants were dealing factually at arm's length. All employees testified they were given duties to perform by their employer, Dennis Vardy, of Vardy Villa Limited and none of the employees were in any way associated with the directing mind of the corporation. The Appellants submit the test whether an employer/employee are factually dealing with each other at arm's length would have to be very similar to the test for the employer/employer have a contract of service, which we submit is conceded by the Respondent.

[33] It is clear the words **"employer/employer"** in the second last line of the above quote should read **"employer/employee"** and that the word **"to"** should be inserted between the word **"employer/employer"** and **"have"** in the same line.

[34] In addition the Appellants submitted that it was incumbent on the Respondent to call evidence what the respondent was thinking at the time his determination was made and should have called evidence of the investigation made by his Department prior to formulating his determination.

DECISION

[35] All of the Workers testified and described their duties. Based on that evidence it was clear to me that during both their full-time and part-time work they were employed under contracts of service. They were bus drivers and were given routes to run and buses to drive by the Payor and were under the control of the Payor as much as they could possibly be.

[36] They all denied that there was any agreement between them and the Payor as submitted by the Respondent.

[37] In making this finding, I concluded as follows:

1. In respect to the appeal of Vardy Villa Limited, Joseph and Violet Diamond, their evidence demolished assumptions (i), (l) and (n), that assumption (c) was only denied because the routes were inaccurately described.
2. In respect to the appeal of Vardy Villa Limited and Roy Goobie, their evidence demolished assumptions (i), (l), (m), and (n), that assumption (c) was only denied because the routes were inaccurately described.
3. In respect to the appeal of Vardy Villa Limited and David Keough, their evidence demolished assumptions (i), (l), and (n), that assumption (c) was only denied because the routes were inaccurately described.

[38] In all of the above findings, the Payor and the Workers established a *prima facie* case.

[39] During the investigation by the Department of Human Resources and Development, a departmental investigator, Ms. Angela Wells, interviewed the President of the Payor, Dennis Vardy, on two occasions.

[40] The result of interviews with Dennis Vardy were reproduced in two forms, one a verbatim question and answer statement and the other a summary of an interview conducted by Ms. Wells. Both were admitted in evidence without objection as Exhibit R-2. Both statements were typed and subsequently shown to Dennis Vardy. He was given an opportunity to read them over and he initialed each page at the bottom. The statements were damaging to the appeals of the Workers in that the contents ascribed to them knowledge of the scheme on which the Respondent based his determinations.

[41] In Exhibit R-2 questions and answers 6, 9, and 11 in the verbatim statement read as follows:

> **6. How is the pay decided?**
>
> **For Bus Drivers**
>
> The rate is based on what I can get them for. It varies. I also will hire them on with full time pay for 12 weeks somewhere in the year. They would not agree to work for me, if I didn't in some cases. The part time salary is decided on also by what they will do it for [*sic*]. It sort of works out to $50 week, but varies. I try to get the drivers for about $150 a week if they don't come on for full salary sometime throughout the year.
>
> **9. Why are drivers being laid off after 12 weeks in some cases when school is still ongoing?**
>
> This is because I agreed to take them on for full pay for 12-14 weeks somewhere in the year. I didn't do it in the summer because it would cost me too much money as school is out. After the 12 weeks were up they agreed to get part-time wages again. The hours of work didn't change.
>
> **11. Were there any negotiations with the employees on how long you would keep them on full salary or when they would go on full salary? Did they tell you when they needed their weeks in order to qualify for UIC?**
>
> No, I just told them I would take them on sometime during the year for 12-14 weeks full-time salary. I put them on full salary at different times because I couldn't afford to have them on all at the same time. I wouldn't do it in summer time, and I wouldn't do it for everyone. Some would drive the bus without this arrangement.

> I didn't realize there could be a problem with this agreement. I have been doing it for several years.

[42] Part of Exhibit R-2 is a summary of the duties and responsibilities of the Workers that Mr. Vardy gave to Ms. Wells. The summary was not verbatim but was compiled by the notes Ms. Wells took during the interview. The summary was typed, shown to Mr. Vardy and he initialed each page at the bottom and signed the last page. The following are excerpts from that summary:

> Joseph Diamond **105-879-787**
>
> Joe drove the bus a couple of hours per day. He kept the bus at his place in Lethbridge. He said that Joe would look after buses when full time but there was no difference in work when he was a part-time driver. Mr. Vardy said he did not know why there were no earnings reported for the week when Mr. Diamond was supposed to be working (June 6-10, 1994 885). He should have been working that week and report earnings. He said that Mr. Diamond agreed to work for $260.00 per week as full time and was then paid $50.00 per week after as a part-time employee. There was no differences in duties for the above period. Spring/summertime the bus was kept in Jamestown and at his house during the winter time. Mr. Vardy said that the hours did not change either.
>
> Mr. Vardy stated that he could not get Mr.Diamond as a part-time employee without taking him on as full time for 12 weeks sometime during the year at $260.00/week.
>
> Violet Diamond **105-987-432**
>
> Mr. Vardy stated that Violet Diamond had the same duties when she was paid $50.00 as a part-time employee and when she was a full-time employee and paid $260.00 week. She drove the bus the same number of hours for these periods. The bus remained at her home in winter time, parked in Jamestown in spring/summertime. Mr. Vardy could not account for Mrs. Diamond not reporting earnings from June 6-10,1994 and states that she should have been driving the bus during that time. Her duties were bus driver only. He would not be able to get her to drive without giving her $260.00/week full time pay for 12 weeks sometime during the year.
>
> Roy Goobie **103-724-142**

> Hired on August 7, 1995 to do bus maintenance and work in the garage. He received 40 hours per week and $416 salary a week. He does not know why Roy was not on payroll from November 20-24, 1995 because bus runs had to be made. Mr. Vardy feels that there was an error on the payroll and he did complete the run that week. He would have received $65 that week and received $65 for each week following for doing the bus run only effective November 20, 1995.
>
> David Keough **119-026-847**
>
> Mr. Keough was hired on January 2, 1994 to drive buses in Catalina area. He had a 20-minute morning run and a 25-minute afternoon run. Claimant agreed to the pay of $60.00 a week to drive bus as long as the employer agreed to pay him $312 a week and have Mr. Keough employed as a full-time employee for 12 weeks sometime throughout the school year.
>
> Mr. Vardy states that there was no change in the hours and work duties for Mr. Keough when he works for $60.00 a week to when he received $312.00 a week. Mr. Vardy states that Mr. Keough did do grease jobs on local buses when employed full-time but this was only a couple of hours work. This work did not make forty hours a week.

[43] During extensive cross-examination Dennis Vardy equivocated whether he made the verbatim and summary statements, whether he understood the statements or whether the contents thereof were consistent with what he said during the interview. (See Transcript of cross-examination of Dennis Vardy, page 40, lines 17 to 25 inclusive and page 41 lines 1 to 16 inclusive; pages 48 and 49; page 50 lines 4 to 25 inclusive and page 51 lines 1 to 5 inclusive.)

[44] Mr. Vardy was cross-examined in respect to the difference between his testimony on the appeals and the answers he gave and comments he made to Ms. Wells during the questioning and interview. In particular the Respondent zeroed in on his answer to **Question 6** and the description of the duties of the Workers that appear in the summary. Beginning at line 7 on page 42 and continuing on page 43 of the transcript of Dennis Vardy's cross-examination, he testified as follows:

> Q. Okay. Now, she does talk about people that aren't involved in this, but I'll get you to look at question number 6. "How was the pay decided"? And it says, "for bus drivers, the rate is based on what I can get them for, it varies. I also will hire

them on full-time pay for 12 weeks somewhere in the year. They would not"

A. That's not always true.

Q. That's not always true?

A. No.

Q. Okay. Now, tell me about that then. Would you have said that?

A. No, I wouldn't have said that, no.

Q. You wouldn't have said that?

A. No.

Q. Okay, What's the -- you did sign the bottom of that page though, right?

A. That' right.

Q. Did you read that question?

A. What did I read five or six years ago, I don't know.

Q. You don't remember if you read that question?

A. No, I can't remember, no.

Q. Okay. It says, "they would not agree to work for me if I didn't, in some cases". Is that true, that they wouldn't agree to work for you if they wouldn't get 12 full weeks of employment at –

A. Well, I guess there are people out there that if they know they're not going to get at least 12 weeks work, they're not going to go to work.

[45] And continuing the cross-examination in respect to Question 6 from line 21 of page 45 and continuing on page 46:

Q. All right. Now, is there a reason why your answer would have been different here?

A. I don't know, I mean, I don't -- the way it is with Angela Wells, I don't want to tell her nothing.

HIS HONOUR:

Q. I'm sorry, what did you say, sir?

A. The way it is with the person that interviewed me, me and she don't get along and so, I don't really know, you know, what -

[46] And on Page 56, lines 6 to 23 Mr. Vardy testified as follows:

Q. All right. And the same thing a little further on, "there was no differences in duties for the above period". Now, they're talking about the full-time period and the part-time period.

A. It's completely different.

Q. You're saying now that they're completely –

A. Sure it is, yeah.

Q. Would you have told Ms. Wells if there was a difference?

A. I would have told her if it would have avoided being here today.

HIS HONOUR:

Q. I'm sorry, what did you say, sir? You would what?

A. I should, you know, I don't know what the -- I don't know, she's -- I don't know. Me and she don't get along very well.

[47] Clearly Mr. Vardy had difficulty explaining statements he made minutes before. The answers he gave to the Court indicate that he did not wish to repeat the same answers again.

[48] Ms. Wells testified that the verbatim statement and the summary statement were prepared as a result of two meetings with Mr. Vardy and that he reviewed the statement in her presence and confirmed that it was accurate. At no time did Mr. Vardy request that he be allowed to take the statement home to read. She further testified that had he made such a request she would have permitted it. (See

transcript of evidence of direct examination of Ms. Angela Wells pages 1 to 7 inclusive).

[49] Mr. Vardy protested that he should not be expected to remember things that he did 4 or 5 years ago. That was a valid complaint. However the statements were taken in March of 1996 during the periods in question. One would imagine that his memory and understanding would be clearer then than on the day of hearing of the appeals. I am satisfied that the answers and the summary statement are consistent with what he told Ms. Wells and I accept those statements as evidence of the situation that existed at that time between the Payor and the Workers and reject the denials of Mr. Vardy.

[50] I find that those answers and the summary statement clearly establish the scheme that the Respondent submitted existed during the periods in question. There is no question in my mind that the suggested scheme existed and was in fact initiated by the Payor.

[51] The next question to be determined is whether the Workers were party to that scheme.

[52] The Workers testified that when they were engaged in full employment as bus drivers, that employment included maintaining the vehicles they were driving and in the case of David Keough, maintaining several other buses. Other than testifying that they maintained the buses, with the exception of Worker Roy Goobie, no evidence was led that satisfied me that any extensive maintenance was carried out by any of the Workers that would justify the full-time pay. The statements of Mr. Vardy described such maintenance in very casual terms and downplayed the Workers' responsibility for such tasks.

[53] The Respondent entered invoices in respect to buses that were allegedly under the care of David Keough while he was employed and those invoices showed that the maintenance was carried out by an independent contractor.

[54] Worker Violet Diamond testified that her bus had a maintenance log but she was not sure where it was or whether it was filled out. Production of logs for the buses involved would have been useful. Her only task appears to have been sweeping out the bus at periodic intervals.

[55] Worker Roy Goobie was employed approximately one half month in advance of the time that the other Workers were engaged. His evidence and the

evidence of Mr. Vardy establish that during the month of August he would work full time in the head office shop of the Payor. From the first week in September to November 17, 1995 he would spend 50% of his time bussing and 50% at mechanical and carpentry work at the head office. His salary is reasonable considering the work performed while working full time and part time. After November 14, 1995 he was part time and only made the school runs in the morning and afternoon. Between the morning and afternoon runs he would be at home. This evidence establishes a *prima facie* case and has not been demolished by any evidence led by the Respondent. I find that the employment of Worker Roy Goobie was insurable.

[56] The jurisprudence in respect to the principles applicable to non arm's length transactions under the *Income Tax Act* were canvassed extensively in a judgment of this Court in *Parrill v. Canada (Minister of National Revenue - M.N.R.)*, [1996] T.C.J. No. 1680, Court file numbers 95-2644(UI) to 95-2649(UI), by Cuddihy T.C.J**.** which judgment was affirmed by the Federal Court of Appeal in **(**[1998] F.C.J. No. 836).

[57] The learned Judge concluded from an examination of the relevant authorities that

> ... 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.

[58] He further stated that

> 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. (See Attorney General of Canada v. Rousselle et al. 124 N.R. 339.)

[59] The learned Judge concluded that

> ... 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.

[60] And he said that:

> The Court is also bound to insure in analyzing all the circumstances and the accepted evidence, that the parties are not defeating the purpose of the legislation.

[61] The issue in these appeals is essentially one of fact. The onus rests on the Payor and the Workers to establish on the balance of probabilities that they did deal with each other at arm's length.

[62] The Payor testified that he could not afford to hire the Workers on a full-time basis and that presumably means that he would have operated at a loss or at an unacceptable margin of profit. However no financial information or documentation was entered in evidence to support or justify this contention.

[63] The evidence of the Payor and Workers Joseph Diamond, Violet Diamond and David Keough fails to demolish any of the assumptions in respect to the alternate ground. While their duties may have varied slightly during full time, the Court finds their respective salaries for full time was clearly excessive when one compares the duties performed in each category of employment.

[64] The engagement and the structuring of the salaries in the way described is not in keeping with what might be expected of a true arm's length relationship that should demonstrate the real ordinary operation of the economic forces of the market place unhindered by arrangements or transactions that are not consistent with the object or intent of the law.

[65] With the co-operation and knowledge of these Workers, the Payor created a scheme to use the *Act* to subsidize its bus operation. As was stated by Pratte J. in *Tanguay v. Canada (Unemployment Insurance Commission)*, 68 N.R. 154 at 157 quoting Donaldson L.J. in *Crewe et al. v. Social Security Commissioner*, [1982] 2 All E.R. 745:

> In my judgment it is crucial to reaching a decision on this appeal to remember that this is an insurance scheme, however it may be funded, and that it is an insurance against unemployment. It is of

> the essence of insurance that the assured shall not deliberately create or increase the risk...

[66] I find that the employment of Workers Joseph Diamond, Violet Diamond and David Keough was not insurable as the relationship created by the contracts of service was one of non-arm's length.

[67] In summary the appeal of Worker Roy Goobie and the appeal of the Payor in respect of this Worker are allowed and the determinations of the Respondent are vacated. The remaining appeals of the Payor and the appeals of the other Workers are dismissed and the determinations of the Respondent are confirmed.

Signed this 23rd day of April 2003.

"Murray F. Cain"

D.J.T.C.C.

CITATION:	2003TCC220
COURT FILE NO.:	97-1418(UI), 97-1420(UI), 97-1421(UI), 97-1422(UI), 97-2493(UI), 97-33(UI), 97-34(UI) and 97-263(UI),
STYLE OF CAUSE:	Vardy Villa Limited, Roy Goobie, Violet L. Diamond, Joseph Diamond and David Keough
PLACE OF HEARING:	Gander, Newfoundland
DATE OF HEARING:	February 7, 2003
REASONS FOR JUDGMENT BY:	The Honourable Deputy Judge Murray F. Cain
DATE OF JUDGMENT:	April 23, 2003

APPEARANCES:

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