

Docket: 2002-4621(EI)

BETWEEN:

DONALD DOYLE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

TYSON HAMLIN O/A STRAITS AVIATION,

Intervener.

Appeal heard on April 2, 2003 at Montreal (Québec)

Before: The Honourable Deputy Judge J.F. Somers

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia

For the Intervener: No one appeared

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of June 2003.

" J.F. Somers "

D.J.T.C.C.

Citation: 2003TCC323

Date: 20030604--

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DONALD DOYLE,

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REASONS FOR JUDGMENT

Somers, D.J.T.C.C.

[1] This appeal was heard in Montreal, Québec, on April 2, 2003.

[2] The Appellant is appealing a decision made by the Minister of National Revenue (the "Minister") that the employment held with Tyson Hamlyn o/a Straits Aviation, the Payer, during the period at issue from May 28 to June 29, 2001 was insurable because there existed a contract of service between him and the Payer. Furthermore, the Minister informed the Appellant that the insurable hours for the period were established at 152 and the insurable earnings at \$1,520.00.

[3] Paragraph 5(1)(a) of the *Employment Insurance Act* reads as follows:

5(1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from

the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

...

[4] The burden of proof is on the Appellant. He must show on a balance of probabilities that the Minister erred in fact and in law in his decision. Each case stands on its own merits.

[5] In reaching his decision, the Minister relied on the following assumptions of fact, which were admitted or denied:

- a) the Payer was operating a air-taxi service in Newfoundland; (admitted)
- b) the Payer was operating under the trading name of "Staits Aviation"; (admitted)
- c) on May 8, 2001, the Appellant was hired as Pilot by the Payer; (admitted)
- d) the Appellant had to be certified by Transport Canada; (admitted)
- e) the Appellant was not certified prior to May 18, 2001; (denied)
- f) on May 28, 2001, the Appellant started to work; (denied)
- g) the Payer had only the Appellant as Pilot; (denied)
- h) Tyson Hamlyn did the administrative work; (denied)
- i) the Appellant was paid an hourly rate of \$10.00 by the Payer; (denied)
- j) following the Payer payroll sheet, the Appellant worked 40 hours by week the first two weeks and 24 hours during three other weeks; (denied)
- k) The Appellant worked 152 hours during the five-week period; (denied)

- l) during the five-week period, the Appellant flew only one charter flight; (admitted)
- m) on June 30, the employment was terminated; (denied)
- n) on July 31, 2001, the Payer issued to the Appellant a record of employment stating that he worked from May 28, 2001 to June 29, 2001 and the total insurable hours for the period were 152 hours and the total insurable earnings for the period were \$1,520.00; (denied)
- o) the Appellant made a complaint under the Canadian Labour Code concerning the employment period, the hours worked and the earnings calculated by the Payer; (denied)
- p) on August 8, 2001 an Inspector of the Department of Labour maintained the Payer's calculation of the Appellant's wages and number of hours worked; (denied)
- q) on January 11, 2002, a Referee, under the Wage recovery appeal under Part III of the Canada Labour Code, confirmed the decision of the Inspector as filed on August 8, 2001. (denied)

[6] The Payer was operating an air-taxi service in Newfoundland under the trade name of "Straits Aviation".

[7] On May 8, 2001 the Appellant was hired as a Pilot, certified as such by Transport Canada.

[8] The Appellant testified he was hired, by the Payer, as of May 8, 2001 (Exhibit A-1); his responsibilities were that of operations manager and chief pilot (Exhibit A-2).

[9] According to the Appellant his salary had been fixed at \$400.00 per week and not on the basis of \$10.00 an hour. During the period in question he worked as operations manager and pilot, but flew only one charter flight.

[10] On July 31, 2001, the Payer issued to the Appellant a record of employment stating that he had worked from May 28, 2001 to June 29, 2001 and that the total insurable hours for the period were 152 and the total insurable earnings were \$1,520.00.

[11] The Appellant made a complaint under the Canadian Labour Code concerning the employment period, the hours worked and the earnings calculated by the Payer. On August 8, 2001 an Inspector of the Department of Labour maintained the Payer's calculation of the Appellant's wages and the number of hours worked (Exhibit A-4).

[12] On January 11, 2002, a Referee, under the Wage recovery appeal under Part III of the Canada Labour Code, confirmed the decision of the Inspector as filed on August 8, 2001 (Exhibit A-5).

[13] The issue is to determine the number of hours to be credited to the Appellant as an employee of the Payer.

[14] The Appellant produced, for the Department of Transport, a time sheet which he had prepared himself. According to the Appellant, who happened to be the only pilot employed by the Payer, his time was consumed as operations manager and as chief pilot.

[15] The Payer operated an air-taxi service; flights were to be arranged on request only. In fact, the Appellant made only one flight during the period at issue; the rest of the time he said he was on stand-by. While on stand-by he had to assume the duties of operations manager, such as servicing the plane, checking the weather at the airport and at the place of destination. It is to be noted that the Appellant lived in a mobile home on the airport grounds.

[16] Canadian Air regulations 703.07(2) states:

"..For the purposes of subsection (1), an applicant **shall have...**

(b) managerial personnel who have been approved by the Minister in accordance with the *Commercial Air Service Standards*, are **employed on a full-time basis** and perform the functions related to the following positions, namely,

(i) operations manager,

(ii) chief pilot,...

[17] Jean-Guy Carrier, aviation inspector for Transport Canada testified that the Appellant had a certificate as operations manager and chief pilot on May 18, 2000.

[18] Commenting on Canadian Air, Regulation 703.07(2), this witness stated "employed on a full-time basis", did not mean that a person had to be on duty 40 hours per week. The Regulation implies only that the operations manager or chief pilot should be given sufficient time to perform the necessary functions relative to the position.

[19] The Appellant produced his time sheet (Exhibit A-3) based on 40-hour shifts. Since the Payer's operations consisted of air service on demand, the Appellant said he had to be constantly on duty.

[20] The Appellant admitted he received the sum of \$1,520.00 plus \$60.80 as vacation pay.

[21] The Appellant acknowledged he had to have a flight training record, which was completed on May 25, 2000.

[22] In his application for unemployment benefits, dated July 20, 2001, the Appellant indicated that the period of employment was from May 8, 2001 to July 8, 2001 (Exhibit R-1, Tab 2), while on the record of employment, signed by the Payer, the period of employment is from May 28 to June 29, 2001 for a total of 152 hours (Exhibit R-1 Tab 1). The Payer's time sheet indicated as well the period of employment as being from May 28 to June 29, 2001.

[23] In a letter dated August 1, 2001, the Payer stated that the period of employment was from May 28 to June 29, 2001 (Exhibit R-1, tab. 6), that the rate of pay was \$10.00 per hour and that training on company aircraft was at the expense of the potential employee. The Payer also stated that "The cost of your 3 hours training is \$150.00 dollars which is at \$50.00 per hour to cover the cost of fuel".

[24] In response to this letter from the Payer, the Appellant, in a letter dated October 15, 2001, stated: "... I am therefore claiming that you reimburse me the \$150 00 dollars deducted from my wages".

[25] There is contradiction between the evidence of the Appellant and that of the Payer as to the period of employment. The Appellant has the burden to show that his period of employment indicated on his application for unemployment benefits is more accurate than the one determined by the Payer.

[26] The Appellant could not be considered as an employee before he finalized his flight training term on May 25, 2001; therefore it is reasonable to conclude that he started working on May 28, 2001.

[27] During his period of employment the Appellant claimed from the Payer 40 hours a week. Transport Canada stated that it was not necessary for the operations manager to be on duty 8 hours a day. It was sufficient for him to be on duty for the amount of time necessary to perform his duties.

[28] The Appellant had only one commercial flight during his period of employment with the Payer. It is only reasonable to conclude that the Appellant did not work 40 hours per week. Furthermore the Appellant lived in a mobile house on the airport grounds and he did not have to be at the airport hangar 8 hours a day as claimed.

[29] The Appellant stated that the termination of employment was on July 8, 2001, contrary to the termination period of June 29, 2001 indicated on the record of employment. According to the information obtained by the appeals officer, who testified at the hearing, the weather was bad from June 29 to July 7, 2001 and no flight has been scheduled between those two dates. In the circumstances, the June 29, 2001 date is more acceptable for the termination of the employment.

[30] Considering the evidence, the Appellant has failed in his onus of establishing that the Minister erred in his decision.

[31] Consequently the appeal is dismissed and the Minister's decision is confirmed.

Signed at Ottawa, Canada, this 4th day of June 2003.

" J.F. Somers "
D.J.T.C.C.

CITATION: 2003TCC323

COURT FILE NO.: 2002-4621(EI)

STYLE OF CAUSE: Donald Doyle and M.N.R. and
Tyson Hamlyn o/a Straits Aviation

PLACE OF HEARING: Montreal, Québec

DATE OF HEARING: April 2, 2003

REASONS FOR JUDGMENT BY: Honourable Deputy Judge J.F. Somers

DATE OF JUDGMENT: June 4, 2003

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Vlad Zolia

For the Intervener: No one appeared

COUNSEL OF RECORD:

For the Appellant:

Name:
Firm:

For the Respondent: Morris Rosenberg
Deputy Attorney General of Canada
Ottawa, Canada

For the Intervener: