

Docket: 2004-1419(EI)
2004-1420(CPP)

BETWEEN:

JANICE HACKETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on November 25, 2004, at St. John's, Newfoundland,
By: The Honourable Justice E.A. Bowie

Appearances:

Counsel for the Appellant: Jeffrey Slade
Counsel for the Respondent: Steven Leckie

JUDGMENT

The appeals pursuant to subsection 103(1) of the *Employment Insurance Act* and section 28 of the *Canada Pension Plan* are dismissed and the decision of the Minister of National Revenue on the appeal made to him under section 91 of the *Act* and the determination of the Minister on the application made to him under section 27.1 of the *Plan* are varied on the basis that the Appellant was not employed in insurable employment by Melvyn Hickey for the period May 28, 2002 to June 21, 2002 within the meaning of paragraphs 5(1)(a) of the *Act* and 6(1)(a) of the *Plan*.

Signed at Ottawa, Canada, this 30th day of March, 2005.

“E.A. Bowie”

Bowie J.

Citation: 2005TCC208
Date: 20050330
Docket: 2004-1419(EI)
2004-1420(CPP)

BETWEEN:

JANICE HACKETT,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Bowie J.

[1] The Appellant fished with Mr. Melvin Hickey during the period from May 28, 2002 to June 21, 2002. The question that arises in these appeals is whether, in doing so, she was self-employed or employed by Mr. Hickey under a contract of service. The significance of this distinction is that if she was self-employed then she falls within the definition of a fisher found in section 1 of the *Employment Insurance (Fishing) Regulations*,¹ and so she is entitled to the more generous benefits that they provide. Another result of finding her to be self-employed is that she would then not have been engaged in pensionable employment under the *Canada Pension Plan*² (the *Plan*). The rulings made under the *Employment Insurance Act*³ (the *Act*) and the *Plan* were to the effect that Ms. Hackett was employed by Mr. Hickey under a contract of service, and these rulings were confirmed on appeal to the Minister under section 91 of the *Act* and section 27 of the *Plan*.

¹ S.C. 2003, c.15.

² S.C. 1999, c.17.

³ S.C. 2004, c.22.

[2] The definitions of "fisher" in the *Regulations* and of "employment" in the *Plan* read as follows:

1(1) The definitions in this subsection apply in these *Regulations*.

“fisher” means a self-employed person engaged in fishing and includes a person engaged, other than under a contract of service or for their own or another person’s sport,

- (a) in making a catch;
- (b) in any work incidental to making or handling a catch, whether the work consists of loading, unloading, transporting or curing the catch made by the crew of which the person is a member, or of preparing, repairing, dismantling or laying-up the fishing vessel or fishing gear used by that crew in making or handling the catch, where the person engaged in any such incidental work is also engaged in making the catch; or
- (c) in the construction of a fishing vessel for their own use or for the use of a crew of which the person is a member in making a catch.

2(1) In this *Act*,

“employment” means the performance of services under an expressed or implied contract of service or apprenticeship, and includes the tenure of an office.

These definitions require the application of the common law test most recently approved by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Inc.*⁴ to the facts of the case.

[3] Melvin Hickey owns his own fishing vessel. He, the Appellant and two other individuals fished for crab during the period in question. They took several trips, sometimes spending the night at sea, and sometimes docking at Fortune Harbour and sleeping aboard the vessel. They each took turns performing various tasks such as baiting the crab pots, cleaning the decks, cooking, and so on. Although it was not entirely clear in the evidence, it seems likely that the actual sailing of the vessel was done by Mr. Hickey himself, and as the owner and master of the vessel, I have no doubt that he was in a position to direct the other persons aboard as to their duties. The members of the crew were paid a percentage of the catch. The

⁴ [2001] 2 S.C.R. 983.

Appellant's share on this occasion was 17½%. The Appellant testified that when she went aboard the vessel she took with her some gasoline for the generator and some food, both of which she acquired ashore and paid for. She described the groceries that she took aboard as being a few things that were on sale. Several receipts for purchases that she made were entered into evidence, from which it appeared that she made two purchases of gasoline at a total cost of \$50.00, two purchases of food and snacks at a total cost of \$47.00, and she purchased personal gear consisting of rubber suit, gloves and boots at a cost of \$259.97.

[4] Mr. Hickey, as I have said, owned the boat. He also owned the gear and the fishing quota that permitted him and his crew to fish, and he paid all the expenses other than small amounts of food and gasoline. There was no suggestion in the evidence that the Appellant contributed in any way to the major expenses that the ownership and operation of a fishing boat entail. I refer to such expenses as the annual outlays for insurance, maintenance and repairs, and the running expenses such as diesel fuel and bait and salt required for each trip, to name but a few. Even the small amounts of food that the Appellant bought were negligible in comparison to the amount that one person would consume during the period with which the appeals are concerned.

[5] I turn now to the *Sagaz* test. I do not think that control should be considered a major factor in cases like this. Of necessity the captain of a vessel has control over the crew in the sense that he must have the right to direct the other members of the crew not only in what they do but also in how they do it. The safety of the vessel and the crew require that. The fact that the captain commands the vessel does not negative the possibility that the other members of the crew share with him as entrepreneurs in the venture. Of more significance is the degree to which the Appellant had the opportunity to gain a profit or suffer loss in the venture. The fact that she was paid a share of the catch militates in favour of finding her to be a self-employed person. However, she had no real risk of suffering an operating loss. She had her time and about \$100 worth of supplies to lose if they landed no catch at all. The major expenses were all borne by Mr. Hickey. Similarly, the capital investment in equipment was Mr. Hickey's. The Appellant spent some \$260 to equip herself for the trip, but it was entirely for protective clothing for herself.

[6] It is not entirely irrelevant to consider the degree to which the Appellant's efforts were integrated into the business of Mr. Hickey as a fisher, but this must be considered from the worker's point of view if it is not to be misleading. The Appellant's efforts were entirely integrated with those of Mr. Hickey, in my opinion. I heard no evidence to suggest that on other occasions she did similar

work for others, or that she held herself out as available to do so. There is nothing in the evidence that points towards a conclusion that Ms. Hackett's efforts were in any way entrepreneurial; no one aware of the facts of this case would consider her to be a business person rather than a labourer, albeit one whose pay depended on the success of the voyage.

[7] I conclude that Mr. Hickey employed Ms. Hackett under a contract of service during the period in question. The appeals are therefore dismissed.

Signed at Ottawa, Canada, this 30th day of March, 2005.

“E.A. Bowie”

Bowie J.

CITATION: 2005TCC208

COURT FILE NO.: 2004-1419(EI) and 2004-1420(CPP)

STYLE OF CAUSE: JANICE HACKETT &
HER MAJESTY THE QUEEN

PLACE OF HEARING: St. John's, Newfoundland

DATE OF HEARING: November 25, 2004

REASONS FOR JUDGEMENT BY: The Honourable Justice E.A. Bowie

DATE OF JUDGMENT: March 30, 2005

APPEARANCES:

Counsel for the Appellant: Jeffrey Slade
Counsel for the Respondent: Steven Leckie

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