Docket: 2003-4087(EI)

BETWEEN:

MARTHA V. GWYNN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

ROBERT GWYNN o/a GWYNN'S TRUCKING & BACKHOE,

Intervenor.

---

Appeal heard on common evidence with the appeal of *Martha V. Gwynn* (2003-4088(CPP)) on July 28, 2004 at Sydney, Nova Scotia

Before: The Honourable Justice G. Sheridan

Appearances:

| | |
|---|---|
| For the Appellant: | The Appellant herself |
| Counsel for the Respondent: | Ronald MacPhee |
| For the Intervenor: | The Intervenor himself |

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JUDGMENT

This appeal pursuant to subsection 103(1) of the *Employment Insurance Act*, is allowed and the decision of the Minister of National Revenue on the appeal made to him under section 91 of that *Act* is vacated on the basis that the Appellant was engaged in insurable employment pursuant to paragraph 5(1)(*a*) of the *Act* for the period December 30, 2002 to May 9, 2003, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 25th day of November, 2004.

"G. Sheridan"

Sheridan, J.

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| For the Appellant: | The Appellant herself |
| Counsel for the Respondent: | Ronald MacPhee |
| For the Intervenor: | The Intervenor himself |

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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 25th day of November, 2004.

"G. Sheridan"

Sheridan, J.

Citation:2004TCC579
Date: 2004-11-25
Dockets: 2003-4087(EI)
2003-4088(CPP)

BETWEEN:

MARTHA V. GWYNN,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent,

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ROBERT GWYNN o/a GWYNN'S TRUCKING & BACKHOE,

Intervenor.

## REASONS FOR JUDGMENT

**Sheridan, J.**

[1] The Appellant, Martha Gwynn, is appealing from the decisions of the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan*. The appeals were heard on common evidence. There is no dispute that Mrs. Gwynn's work was pensionable under paragraph 6(1)(*a*) of the *Canada Pension Plan*; accordingly, the Appellant's appeal under the *Plan* is dismissed.

[2] As for the *Employment Insurance Act* appeal, although the Minister admits that Mrs. Gwynn was employed under a contract of service by the Intervenor, her husband Robert Gwynn operating as Gwynn's Trucking & Backhoe, from December 30, 2002 to May 9, 2003, he takes the position that her work was uninsurable : as the wife of her employer Mrs. Gwynn is deemed by the *Act* to have been in "excluded" employment unless the Minister is satisfied that an arm's length employee would not have worked under a "substantially similar"[1] contract of employment. The Minister was not so satisfied and it is from that determination that Mrs. Gwynn appeals.

[1] See Appendix to these Reasons for Judgment for relevant legislative provisions.

[3] Robert Gwynn established himself in business operating as Gwynn's Trucking & Backhoe in 1991. At that time, Mrs. Gwynn was working 60 hours per week at $8.00 an hour as a "flagger" for the provincial department of highways. Needing someone to assist him in his new venture, Mr. Gwynn offered her a salary of $1,045.00 to be paid bi-weekly, this amount being based on a calculation of a 55-hour week at a rate of $9.00 an hour. Mrs. Gwynn accepted his offer and left her job as a flagger. In her new position, she was responsible for both secretarial work (handling client calls, payroll and bookkeeping, banking) and service truck driving (picking up repairs and, if necessary, ploughing snow). She worked out of an office in the Gwynn residence in Dingwall, Nova Scotia. The home office is fully equipped with a telephone, fax, printer, computer and office supplies.

[4] Although the business operates year-round, it is seasonal in nature with most of its revenues generated during the winter months from snow removal contracts with local businesses and organizations, as well as for individuals on an "as required" basis. In summer, Gwynn's Trucking & Backhoe has essentially only one client, the provincial government's highways department, for which Mr. Gwynn hauls materials used in road construction. Mrs. Gwynn's duties are significantly reduced during this period. The practice adopted by Gwynn's Trucking & Backhoe is for Mr. Gwynn to accumulate what little paperwork is generated over the summer months for Mrs. Gwynn's attention on a "catch up" basis when the busy winter season resumes.

[5] Dingwall, where the business is located, is a small Nova Scotia town unable to meet all of the business needs of Gwynn's Trucking & Backhoe: to attend to the banking Mrs. Gwynn had to drive to the next community some 40 kilometres away, to purchase repairs, to Sydney, a distance of nearly 300 kilometres. For these excursions, she used the service truck, a vehicle which has a plough attachment for use in the snow removal aspect of the business.

[6] The issue under appeal is whether Mrs. Gwynn was in insurable employment from December 30, 2002 to May 9, 2003. The Minister concedes that Mrs. Gwynn was an employee under a contract of service with Gwynn's Trucking & Backhoe but argues that her work was excepted from the definition of insurable employment because she and Mr. Gwynn were not dealing with each other at arm's length, and that Mr. Gwynn would not have entered a "substantially similar" contract with an arm's length person. In reaching this conclusion, the Minister relied on certain assumptions of which only paragraphs (d), (g), (i), (j), (k) and (l) are disputed by the Appellant. Based on these assumptions, the Respondent submitted in its Reply to the Notice of Appeal that:

1. Mrs. Gwynn's duties were not onerous enough to cause her to work 55 hours per week;

2. some of the time, she performed her duties, especially banking, without pay; and,

3. she did not receive vacation pay

all of which, was sufficient to satisfy the Minister that her contract of employment was not one which would have been agreed to between Mr. Gwynn and an arm's length person.

[7] Mrs. Gwynn has the onus of rebutting the Minister's position. Both she and Mr. Gwynn testified at the hearing. Their evidence was credible and showed many of the disputed assumptions to be either incorrect or incomplete. Before addressing the impact of this finding, however, regard must be had to the approach this Court must take in determining whether the Minister has properly exercised his discretion under paragraph 5(3)(*b*) of the *Act.* Counsel for the Respondent referred the Court to *Tignish Auto Parts Inc. v. M.N.R*[2] and *Canada (A.G.). v. Jencan Ltd*.[3], in which the Federal Court of Appeal held that an appeal under paragraph 5(3)(*b*) involves a two-stage inquiry: first, to determine whether the Minister's discretion was properly exercised; and only if the Court concludes that the Minister's discretion was improperly exercised, then to determine whether, taking into account all the circumstances set out in the *Act*, it was reasonable to conclude that the employment arrangement between the related employer and employee is substantially similar to one in which those dealing at arm's length would have entered. In a more recent decision[4], however, Sharlow, J.A. signalled that a new approach must be taken in determining whether there has been an appropriate exercise of ministerial discretion:

> [6] Having carefully considered the submissions of counsel and the reasons for the decision of the Tax Court Judge, we are all of the view that the Tax Court Judge erred in law in reaching his conclusion. In particular, he failed to consider the directions of this Court in Légaré v. Ministre du Revenue National (1999), 246 N.R.

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[2] [1994] F.C.J. No. 1130 (F.C.A.)

[3] [1998] 1 F.C. 187 (F.C.A.)

[4] *Valente v. M.N.R.* [2003] F.C.J. No. 418 (F.C.A.)

> 176, [1999] F.C.J. No. 878 (QL) (F.C.A.) and Pérusse v. Canada (Minister of National Revenue) (2000), 261 N.R. 150, [2000] F.C.J. No. 310 (QL) (F.C.A.). These cases mark a departure from earlier decisions in defining the role of the Tax Court in considering appeals from Ministerial determinations under paragraph 5(3)(b) of the Employment Insurance Act, S.C. 1996, c. 23.

[8] In *Pérusse v. M.N.R.*[5], the Federal Court of Appeal referred to the procedure set out in the Légaré decision:

> [14] In fact, the judge was acting in the manner apparently prescribed by several previous decisions. However, in [Légaré], this Court undertook to reject that approach, and I take the liberty of citing what I then wrote in this connection in the reasons submitted for the Court:
>
> > The Act requires the Minister to make a determination based on his own conviction drawn from a review of the file. The wording used introduces a form of subjective element, and while this has been called a discretionary power of the Minister, this characterization should not obscure the fact that the exercise of this power must clearly be completely and exclusively based on an objective appreciation of known or inferred facts. And the Minister's determination is subject to review. In fact, the Act confers the power of review on the Tax Court of Canada on the basis of what is discovered in an inquiry carried out in the presence of all interested parties. The Court is not mandated to make the same kind of determination as the Minister and thus cannot purely and simply substitute its assessment for that of the Minister: that falls under the Minister's so-called discretionary power. However, the Court must verify whether the facts inferred or relied on by the Minister are real and were correctly assessed having regard to the context in which they occurred, and after doing so, it must decide whether the conclusion with which the Minister was "satisfied" still seems reasonable.
>
> [15] The function of an appellate judge is thus not simply to consider whether the Minister was right in concluding as he did based on the factual information which Commission inspectors were able to obtain and the interpretation he or his officers may have given to it. **The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first**

[5] [2000] F.C.J. No. 310 (F.C.A.)

> **time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament)**. The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs [her] not simply to substitute [her] own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading. [Emphasis added.]

[9] Having exercised my judicial function as mandated above, the present facts, I am satisfied that "new facts" and "facts that had been misunderstood" by the Minister came to light at the hearing. The investigating official was a "D.Williams" whose report was apparently based on, among other unidentified sources, telephone conversations with the Gwynns and the answers supplied in the department's standard form questionnaire. "D. Williams" was not called as a witness at the hearing. I accept the Gwynns' uncontradicted evidence that they were confused by what was required of them and frustrated in their efforts to explain their situation by the rigid and impersonal nature of both the questionnaire and the telephone interviews. As a result, the information provided to the Minister did not tell the whole story.

[10] What was clear to me at the hearing was that both Mr. and Mrs. Gwynn work hard to make a living in a region of the country where that can be difficult. Even the Minister does not dispute that Mrs. Gwynn did the work for which she was paid. But based on the limited and quite unreliable information he had before him, he came to the conclusion that she did not really put in the hours she claimed; in other words, that she was occupying a nominal position at Gwynn's Trucking & Backhoe as receptionist, bookkeeper and service truck driver that permitted Mr. Gwynn, through Gwynn's Trucking & Backhoe, to engage in a kind of income-splitting scheme.

[11] On the evidence before me I do not find the Minister’s determination to be justified. I accept Mrs. Gwynn's evidence that her bi-weekly pay of $1,045.00 was based on the notion of a 55-hour week at the rate of $9.50 an hour, regardless of how many hours she actually worked. This amount was, in effect, a "salary", not an hourly rate calculated each month according to the hours logged. Mr. Gwynn testified that he had arrived at this salary relative to Mrs. Gwynn's prior earnings as a flagger (60 hours a week at $8.00 an hour). By expressing her proposed income in comparable terms, Mr. Gwynn gave her the chance to compare apples to apples to better decide whether to leave her flagger position to take the job at Gwynn's Trucking & Backhoe. Until Mrs. Gwynn's EI claim was disputed, Mr. Gwynn admitted he had not turned his mind to the nice legal distinctions between "salary" and "wages". The Minister did not have the benefit of this information before him.

[12] Nor did the Minister have a complete picture of the nature of Mrs. Gwynn's duties. As receptionist, Mrs. Gwynn was required to be on call for requests for ploughing after each winter storm; normally this meant early morning work as most clients wanted snow removal done in time to allow them to get to work or to school that day. Given the unpredictability of the weather and people's individual needs, however, the timing and number of such demands varied. The one constant was that the calls had to be taken when, and as often as, they came in, regardless of how many hours Mrs. Gwynn had worked that day. When the weather improved, the pace of the business slowed and Mrs. Gwynn was able to enjoy a less hectic schedule.

[13] Another unpredictable and equally demanding factor was the requirement to keep the snow ploughing equipment in operation. Mr. Gwynn explained, for example, that his contract with the school board required him to have the snow cleared by a certain time, failing which he was responsible for the school board’s cost of replacing his services. In the event of a breakdown, it was Mrs. Gwynn's task to secure replacement parts on a timely basis. What this often meant for her was a pre-dawn drive in the service truck to Sydney, some three hours away and the closest source of repairs.

[14] Her duties in the service truck (equipped with a plough) did not end there. In addition to picking up repairs, Mrs. Gwynn used it to help with the snow ploughing, depending on the demand. As it happened, she devoted more time than usual to this task during the period in question as Mr. Gwynn was hospitalized with complications from diabetes for much of that time. The information before the Minister did not contain the full details of this aspect of Mrs. Gwynn's duties.

[15] Also in dispute is the amount of time Mrs. Gwynn spent on banking duties. Her evidence was, and I accept it, that she had to drive to do the banking, usually every two weeks, to a community some 40 kilometres away. I reject the Respondent’s position that her having made some Gwynn's Trucking & Backhoe deposits during the following summer, without being paid, diminished the validity of the performance of this task during the period in question. The Gwynns' evidence was that the banking requirements were significantly reduced during the slow summer period. Further, Mrs. Gwynn testified that she had her own personal affairs to see to at the same bank (some 40 kilimetres away) where the business had its account. As for Mr. Gwynn, he could not do the banking in the summer because he was busy all day working on the highway. In these circumstances and in the context of a family-run business, it would be absurd to expect Mrs. Gwynn to refuse to deposit the odd cheque for her husband, in his capacity as Gwynn's Trucking &

Backhoe. It seems to me that in their efforts to apply the statutory criteria in cases such as these, officials sometimes lose sight of the reality of the small, family-run business. Such enterprises form the backbone of Canada's economy. While remaining ever-vigilant in its duty to ensure that violence is not done to the requirements of the legislation, this Court ought not to interpret its provisions in a manner that is detrimental to either the efficient operation of the business or the harmony of the family unit.

[16] The last aspect of Mrs. Gwynn's duties has to do with bookkeeping and payroll. To these tasks she turned her mind when she was finished driving for parts or ploughing snow or not answering the phone. I draw no adverse conclusions from her admission on cross-examination that she sometimes "threw in a load of wash" while she was working on the books in the home office. She did the payroll twice a month and the invoices monthly. Mr. Gwynn testified that he needed someone to help him with the paperwork because he himself lacked the expertise. And even if he had been able to do it, he did not have the time as he was occupied full-time providing snow removal services. His view was that she was doing "an exceptional job for a woman who trained herself" in accounting and computer skills. With that statement, I agree.

[17] I am satisfied on a balance of probabilities that during the period December 30, 2002 to May 9, 2003, Mrs. Gwynn was properly fulfilling her duties as a receptionist, bookkeeper and service truck driver in the same manner and to the same extent that an arm's length employee would have done. Not having had all of the facts before him when he reached his decision, the Minister exercised his discretion improperly. On the evidence presented at the hearing, Mrs. Gwynn has succeeded in showing that it was unreasonable for the Minister to have concluded that Mr. Gwynn and an arm's length person would not have entered a "substantially similar" contract.

[18] Before closing, I would add that at the hearing, counsel for the Respondent seemed to suggest that Mrs. Gwynn's claim for EI ought to be denied because her duties under her contract of employment with Gwynn's Trucking & Backhoe were *too onerous* to constitute an "arm's length" contract within the meaning of the *Act*. This is not the basis upon which the Minister exercised his discretion as set out in the Reply to the Notice of Appeal; in fact, it is the complete opposite of the Minister's submission set out therein that her duties were *not onerous enough*. I am not at all convinced that it was open to the Respondent to make such an argument but even if it was, there is no evidence upon which this (apparently) alternative position could reasonably be based. In the context of a small, family-run enterprise in a rural region of the country where employment of any kind is often hard to come by, I am satisfied that Mrs. Gwynn's duties were well within the scope of

what an arm's length employee might reasonably be expected, and would accept to undertake.

[19] For the above reasons, the Court finds that Mrs. Gwynn was engaged in insurable employment for the period December 30, 2002 to May 9, 2003. The appeal under the *Employment Insurance Act* is allowed and the Minister's decision vacated.

Signed at Ottawa, Canada, this 25th day of November, 2004.

"G. Sheridan"

Sheridan, J.

## APPENDIX

Subsection 5(1) of the *Employment Insurance Act* reads:

**Types of insurable employment**
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;

…

**Excluded employment**

(2) Insurable employment does not include

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

...

**Arm's length dealing**

(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.

The relevant portions of section 251 of the *Income Tax Act* read:

(1) **Arm's length. -** For the purposes of this Act,

> (a) related persons shall be deemed not to deal with each other at arm's length;

...

(2) **Definition of "related persons".** For the purpose of this Act, "related persons", or persons related to each other, are

> (a) individuals connected by blood relationship, marriage or common-law partnership

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| STYLE OF CAUSE: | Martha V. Gwynn v. M.N.R. |
| PLACE OF HEARING: | Sydney, Nova Scotia |
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| REASONS FOR JUDGMENT BY: | The Honourable Justice G. Sheridan |
| DATE OF JUDGMENT: | November 25, 2004 |

APPEARANCES:

| | |
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| For the Intervenor: | The Intervenor himself |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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