Docket: 2005-3109(EI)

BETWEEN:

BERNICE MARY KNEE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

M.E.R. SALES & SERVICES LTD.,

Intervener.

Appeal heard on September 26, 2008,
at Gander, Newfoundland and Labrador
Before: The Honourable Justice Wyman W. Webb

Appearances:

Counsel for the Appellant:	Archibald R. Bonnell
Counsel for the Respondent:	Toks C. Omisade
Counsel for the Intervener:	Archibald R. Bonnell

JUDGMENT

The Appellant's appeal under the *Employment Insurance Act* ("*Act*") from the decision of the Respondent that the employment of the Appellant by the Intervener during the period from December 21, 2003 to December 24, 2004 was not insurable employment within the meaning of section 5 of the *Act*, is dismissed, without costs.

Signed at Halifax, Nova Scotia, this 2nd day of October 2008.

"Wyman W. Webb"

Webb J.

Citation: 2008TCC560
Date: 20081002
Docket: 2005-3109(EI)

BETWEEN:

BERNICE MARY KNEE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

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M.E.R. SALES & SERVICES LTD.,

Intervener.

REASONS FOR JUDGMENT

Webb J.

[1] The issue in this appeal is whether the decision of the Respondent that the employment of the Appellant by the Intervener during the period from December 21, 2003 to December 24, 2004 was not insurable employment for purposes of the *Employment Insurance Act* ("*Act*") was reasonable.

[2] Subsection 5(2) of the *Act* provides in part that:

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

[3] Subsection 5(3) of the *Act* provides that:

> (3) For the purposes of paragraph (2)(i),
>
> (*a*) the question of whether persons are not dealing with each other at arm's length shall be determined in accordance with the *Income Tax Act*; and
>
> (*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.

[4] It is difficult to determine the identity of the shareholders of the Intervener. In the Reply it is stated as an assumption that William Knee (the Appellant's spouse) owned 50% of the shares of the Intervener and that the balance of the shares were owned by Audrey Knee, who was William Knee's spouse until she passed away several years ago. William Knee testified and he indicated that there were three shareholders as this was a requirement of the governing statute when the Intervener was incorporated. The three shareholders were William Knee, Audrey Knee and the lawyer who incorporated the company. Presumably the lawyer was holding his shares in trust for William Knee. Audrey Knee did not have a will when she passed away and her shares were never transferred to anyone else. William Knee did not know how many shares were held by each person but he stated that he had a controlling interest and the Respondent did not contest this point. I find therefore that William Knee held a controlling interest in the Intervener and therefore the Appellant and the Intervener were related for the purposes of the *Income Tax Act* as a result of the provisions of paragraph 251(2)(b) of that *Act* and are deemed to not be dealing with each other at arm's length under paragraph 251(1)(a) of the *Income Tax Act*. As a result the issue in this case is whether the decision of the Minister of National Revenue that the Appellant and the Intervener would not have entered into a substantially similar contract of employment for the period in question if they would have been dealing with each other at arm's length, is reasonable.

[5] In the case of *Porter v. M.N.R.*, 2005 TCC 364, Justice Campbell of this Court reviewed the decisions of this Court and the Federal Court of Appeal in

relation to the role of this Court in appeals of this nature. In paragraph 13 of this decision Justice Campbell stated as follows:

> In summary, the function of this Court is to verify the existence and accuracy of the facts relied upon by the Minister, consider all of the facts in evidence before the Court, including any new facts, and to then assess whether the Minister's decision still seems "reasonable" in light of findings of fact by this Court. This assessment should accord a certain measure of deference to the Minister.

[6] The Intervener carries on an electrical, mechanical and refrigeration contracting business. The main customers of the Intervener are Atlantic Wholesalers, fish plants, and berry plants. The Intervener would also do some wiring of houses and repair refrigeration trucks.

[7] The Appellant’s work history was mainly in a retail store. Prior to marrying William Knee the Appellant worked for 25 years or more at a grocery and dry goods store. As part of her duties she was responsible for the payroll deductions for the employees. As well, she completed a bookkeeping course while she was living in Labrador City.

[8] When the Appellant married William Knee in 1998 the bookkeeping work for the Intervener was being done by an outside bookkeeper. The Appellant took over this task and did the day-to-day bookkeeping for the business. When she first started doing the bookkeeping work for the Intervener, she was not paid. This continued for approximately a year and a half and then she became an employee of the Intervener in January 2000. During the period of employment that is the subject of this appeal, she was paid $600 bi-weekly until the week ending April 23, 2004, and then she was paid $700 bi-weekly thereafter. These amounts included vacation pay. These amounts were determined on the basis that she worked six hours per day for five days of each week. She was therefore paid $10 per hour until April 23, 2004 and $11.67 per hour thereafter.

[9] She described her duties as general bookkeeping duties which would include preparing invoices for customers, preparing the cheques for payments to employees and suppliers, and preparing the HST returns. She changed the reporting period of the Intervener from an annual reporting period to a quarterly reporting period. She would also do banking for the Intervener. Both William Knee and the Appellant confirmed that she would also run errands for the Intervener from time to time, which could include picking up parts and on one occasion delivering Freon to William Knee when he was working at a remote location. However there was no indication whether this

delivery of Freon occurred during the employment period in question. The Appellant would also work with William Knee when he was preparing a bid for a contract.

[10] The Appellant stated that she believed that she did work six hours per day five days per week throughout the period in question. However, she did agree with the assumption that was made by the Respondent that her duties consisted of issuing an average of 30 cheques per month, including bi-weekly payroll cheques for herself and weekly payroll cheques for the other employees and payments to no more than 20 suppliers, and issuing invoices to an average of 12 clients per month. She indicated that she would make a trip to the bank about once or twice per week to make a deposit, which would result in approximately six trips to the bank per month. The Appellant was unable to provide any details with respect to the amount of time that she would spend on any of these particular tasks. Even though the Appellant may have worked six hours each day for five days each week, the issue is still whether the Appellant and the Intervener would have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length.

[11] The Appellant indicated that her day would start in the morning before William Knee left for the jobsite. During the day she would answer phone calls for the Intervener but she would simply pass on any messages to William Knee. It should also be noted that a cellular phone number was stated on the invoices issued by the Intervener and therefore customers could call William Knee directly on his cell phone. She would also meet with William Knee when he returned home from work. However, the only evidence of the time that he would return home was in response to a question by counsel for the Appellant. The question related to the time that he completed work the day before the hearing. He indicated that he did not get home until late at night. If the Appellant did not get home until late at night during the period in question, this would raise the issue of whether there be enough hours in the day after the time that the Appellant returned home from a jobsite for the Appellant to complete her six hours per day.

[12] A copy of the listing of the employees and the amounts paid to the employees in 2003 and 2004 was introduced. The schedule shows that there are two employees in December 2003, the Appellant and John Shearing, but the Appellant was the only employee for the last week of December. For the first four months of 2004 there was only one employee -- the Appellant. For the months of May, June and July of 2004 there were two employees -- the Appellant and Garry Goodyear. For one week in August there were three employees - the Appellant, Garry Goodyear and John Nichol and for the balance of August there were only two employees – the Appellant and Garry Goodyear. For the month of September, for two weeks in October and for

three weeks in November there was only one employee – the Appellant. For the balance of the year there were, at any one time, only two employees - the Appellant and either Stirling Knee or Melissa Baker. The Appellant was the only person who was employed throughout the period from December 21, 2003 to December 24, 2004.

[13] As a result, for periods totaling approximately six months during the twelve month period from December 21, 2003 to December 24, 2004 there was only one employee of the Intervener. That one employee was the Appellant who was a bookkeeper. Why would a business that is carrying on an electrical, mechanical, and refrigeration contracting business have as its only employee, a bookkeeper? This seems to raise doubts about whether the Intervener and the Appellant would have entered into a substantially similar contract of employment if they would have been dealing with each other at arms length. It does not seem reasonable that a company involved in electrical, mechanical and refrigeration contracting work would have had only one employee for periods totaling approximately six months in a year and that one employee would be a bookkeeper who could not do any electrical, mechanical or refrigeration work.

[14] As well the fact that the Appellant was paid for six hours per day for five days each week throughout the entire period raises an issue of whether the Intervener would have paid a person with whom the Intervener was dealing at arm's length for six hours of work each day for five days each week throughout this period for the work that the Appellant was doing. As noted above the average number of cheques that would be written each month would be 30 cheques. These would include the payroll cheques and cheques to the suppliers. There were no more than twenty suppliers. Invoices would be issued to an average of twelve clients per month. The Appellant would also make bank deposits once or twice each week.

[15] Assuming that the Appellant would spend an average of one hour preparing each cheque, which would include locating the information required to complete the cheque, and two hours to complete each invoice, the amount of hours spent each month on these two items would then be 54 hours per month. Assuming that the Appellant made bank deposits six times per month and each time she would spend one hour to complete this task, this would only add an additional six hours for a total of 60 hours per month. She was paid for working 120 hours each month which would leave 60 hours per month for the errands and, every three months, the HST return. For the periods totaling approximately six months when the Appellant was the only employee presumably less time would be required to complete the cheques for those periods.

[16] The Appellant also continued to work for the Intervener following the termination of her employment for no pay. This would also raise doubts about whether the Appellant and the Intervener would have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length.

[17] As a result it does not seem to me that the facts as presented in this case, would lead to a conclusion that the decision of the Minister was unreasonable in concluding that the Appellant and the Intervener would not have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length.

[18] One other item that was not noted by either party was the date of termination of employment. Since the period of employment in question ended on December 24, 2004 and since the Appellant stated that she was laid off in December of 2004, the Appellant's employment was presumably terminated effective December 24, 2004 – Christmas Eve. The duration of the employment is a factor that is to be taken into account under paragraph 5(3)(b) of the *Act*. This could include the termination date. Would the Intervener have terminated the employment of the Appellant on Christmas Eve if they would have been dealing with each other at arm's length? This is not a likely termination date for an employee who is dealing at arm's length with his or her employer and the termination of the employment is not as a result of any action of the employee.

[19] William Knee stated that the reason that the Appellant was laid off was because the Intervener had lost $22,000 on one contract. While this would support a decision to reduce staff, the timing of the termination occurring on Christmas Eve, suggests that the duration of the contract would have been different if the Intervener would have been dealing at arm's length with the Appellant. The date of termination of employment raises the question of whether the date was irrelevant to William Knee and the Appellant because they were expecting that employment insurance benefits would be paid to the same household as the Appellant's salary and if the employment insurance benefits would have been paid to a different household (which would be the case if the employee were a person who was dealing at arm's length with the Intervener) whether the date of termination of employment (and hence the duration of the employment) would have been different.

[20] As a result the Appellant's appeal under the *Act* from the decision of the Respondent that the employment of the Appellant by the Intervener during the period

from December 21, 2003 to December 24, 2004 was not insurable employment within the meaning of section 5 of the *Act*, is dismissed, without costs.

Signed at Halifax, Nova Scotia this 2nd day of October 2008.

"Wyman W. Webb"

Webb J.

CITATION:	2008TCC560
COURT FILE NO.:	2005-3109(EI)
STYLE OF CAUSE:	BERNICE MARY KNEE AND M.N.R. AND M.E.R. SALES & SERVICES LTD.
PLACE OF HEARING:	Gander, Newfoundland and Labrador
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REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	October 2, 2008

APPEARANCES:

Counsel for the Appellant:	Archibald Bonnell
Counsel for the Respondent:	Toks Omisade
Counsel for the Intervener:	Archibald Bonnell

COUNSEL OF RECORD:

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