

2004-3910(EI)

July 12, 2007

Marilyn Pickett v. MNR

JUSTICE:

Q. The issue before the Court today is whether or not the Appellant and the Employer were dealing with each other at arm's length under Section 5(2)(1) of the *Employment Insurance Act*. The Minister's assumptions in 7(a) through to 7(o), 7(r), 7(s) and 7(u) of the Reply were basically all admitted and undisputed. The only fact that's really in dispute of the assumptions put forth by the Minister are facts in 7(p), 7(q) and 7(t) of the Reply; 7(v) is a question for the Court to determine.

In this case, I don't think it's necessary for the Court to draw an adverse inference in relation to the Appellant's failure to attend.

The burden in this case is clearly, unequivocally upon the Appellant. The Appellant has chosen, for whatever reason, not to give evidence. It's their choice. If they can't meet the burden and they don't give evidence, well they've made that decision. But in any event, I don't think it's appropriate to draw an adverse inference in this particular case against the Appellant. I've reviewed, with interest, Porter versus The Minister, the authority

cited by the Minister with respect to the analysis in dealing with a case of this nature. And I adopt the comments of Madame Justice Campbell that she adopted the comments of Mr. Justice Bowie and Mr. Justice Archambault with respect to the state of the law in this particular area. In paragraph 13 of the case, Madame Justice Campbell states in part, 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 the facts and the evidence before the Court, including any new facts, then to assess whether the Minister’s decision is still seen as reasonable in light of findings of fact by this Court. This assessment should accord a certain amount of deference, measure of deference, to the Minister

If the decision of the Minister (and I assume the decision of the Minister) was based solely on the terms of the assumptions, then certainly the decision would be reasonable. But it would not be reasonable if some of the assumptions were found to be in error, in particular some of the more significant assumptions and that depends on the findings of fact which the Court have made. I’ve considered all the evidence presented, most particularly the evidence of Mr. Pickett who I found to be an honest, forthright and frank individual. He was familiar with his business operations and he’s overall responsible for

the business. And although he didn't have an in depth knowledge with respect to the step-by-step processes as followed by the Appellant who happens to be his spouse, he was familiar somewhat with what he would call the paper work which was to be conducted in operating his business which has grown in the past few years. Based upon the evidence that's been presented before me, in particular in dealing with paragraph 5(7)(p), sorry 7(p) in the Assumptions of Fact, I find that the Appellant was not required to be in the office eight hours per day as suggested or reported. I believe that the duties of the Appellant would have changed somewhat or could change somewhat depending upon the type of work which the company had at the time, the nature of the work, the duration of the work, and other factors. I reviewed in detail with the Appellant's witness, the variety of duties carried by the Appellant during the course of her employment. And I find as a fact, based upon the evidence presented that between June 30 and October 31, 2003, the Appellant would have worked 27 hours a week and would have received remuneration at the rate of \$10.00 per hour; and for the period of November 1 to December 1, 2003, 14 hours per week and received remuneration at the rate of \$10.00 per hour; and from December 1 onward to December 27, 2003, eight hours per week at the rate of \$10.00 per hour. I draw those findings of fact based upon the evidence as presented by the Appellant's witness, Mr.

Pickett, and the nature of the employment that the Appellant was doing including the variety of the tasks which were described that she conducted and I take this description by the Appellant's witness as not being a description of task which were all inclusive; in other words, there were likely some other tasks which she did not perform. And these tasks would not necessarily be tied directly related to the contracts which were operational at the time, but could fluctuate throughout a year, given the nature and the duties of the payroll person, office person in respect to certain filings and whatnot. I find that she was doing the payroll, source deductions, remittance of all source deductions, journal ledger extensions, doing the payroll and payroll extensions, separation certificates on employees, payment of all bills of the business and discussions and confirmation with the creditors with respect to bills, variety of bank transactions including bank deposits, reconciliations, discussions with bank officials, issuance of invoices for work which was done and contracted to be done, participating in writing up of bids, doing bid deposits and making sure that they were bondable, on a regular basis, preparation of records for the accountant for the financial statements on an annual basis, answering the telephone, dealing with bank officials, reviewing financial statements with the accountant, doing a variety of returns which were required to be filed with the government including all

source deductions, HST returns, preparing financial statements on a quarterly basis, dealing with the bid bonds, use of the computer, e-mail, safety programs (a particular important thing to the Appellant's employer) use of the fax machine and also checking for contracts, availability of contracts on a daily basis.

So, I think that the Appellant's tasks were more significant at some times of the year than others, but nevertheless she did have tasks to perform during the relevant periods of time, some of the tasks I just described. As indicated, I make these findings of fact—and these findings of fact are based upon the information before the Court. The calculations, are mainly based upon the number of employees and the expected time, it would take to do some of these tasks, rough as the information may be. And it's the best effort of the court to do it in the circumstances.

So, giving those findings of fact, as they specifically relate to paragraphs 7(p), (r) and (t) of the Reply, I would find that the decision of the Minister, given those facts, was not reasonable; the decision of the Minister should be that there was insurable employment with an arm's length relationship for the time periods in question at the hours

worked and the hourly rates as referred to. I refer the matter back to the Minister for reconsideration and finalization.

CITATION: 2007TCC518

COURT FILE NO.: 2004-3910(EI)

STYLE OF CAUSE: Marilyn Pickett and
The Minister of National
Revenue

PLACE OF HEARING: Gander, Newfoundland

DATE OF HEARING: July 12, 2007

REASONS FOR JUDGMENT BY: The Honourable Justice
E.P. Rossiter

DATE OF ORAL JUDGMENT: July 12, 2007

APPEARANCES:

Agent for the Appellant: Wayne Budgell

Counsel for the Respondent: Lindsay Holland

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General
of Canada
Ottawa, Canada.