Docket: 2009-3833(EI)

BETWEEN:

JUDIS HOLDINGS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on November 18, 2010 at Calgary, Alberta

By: The Honourable Justice Judith Woods

Appearances:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Scott England

JUDGMENT

The appeal with respect to a decision of the Minister of National Revenue made under the *Employment Insurance Act* that Dion Hildebrandt was engaged in insurable employment for the period from January 1, 2005 to December 31, 2007 is allowed, and the decision is vacated. Each party shall bear their own costs.

Signed at Toronto, Ontario this 20th day of January 2011.

"J. M. Woods"

Woods J.

Citation: 2011 TCC 31
Date: 20110120
Docket: 2009-3833(EI)

BETWEEN:

JUDIS HOLDINGS LTD.,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Woods J.

[1] Judis Holdings Ltd. appeals in respect of a decision of the Minister of National Revenue that Dion Hildebrandt (the "Worker") was engaged in insurable employment for purposes of the *Employment Insurance Act*. The period at issue is from January 1, 2005 to December 31, 2007.

[2] The shareholders of the appellant are the Worker's parents. In these circumstances, the employment of the Worker is deemed not to be insurable unless the Minister is satisfied that the terms of employment are substantially similar to arm's length arrangements. The relevant provisions of the *Act* read:

> **5(2)** Insurable employment does not include
>
> […]
>
> (i) employment if the employer and employee are not dealing with each other at arm's length.
>
> **5(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.

[3] In this case, the Worker's employment was determined by the Minister to be insurable based on his determination that the terms of employment were substantially similar to arm's length terms.

[4] The wording of paragraph 5(3)(*b*) has led to some difficulty in interpretation. In *Birkland v. MNR*, 2005 TCC 291, Bowie J. commented that the provision is unusual in that some deference must be given to the Minister's decision. He described the principles to be applied as follows:

> [4] At this point it is sufficient simply to state my understanding of the present state of the law, which I derive principally from paragraph 4 of *Légaré* (reproduced above) and from the following passage from the judgment of Richard C.J., concurred in by Létourneau and Noël JJ.A., in *Denis v. Canada*.
>
> > 5 The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, March 10, 2000).
>
> This Court's role, as I understand it now, following these decisions, is to conduct a trial at which both parties may adduce evidence as to the terms upon which the Appellant was employed, evidence as to the terms upon which persons at arm's length doing similar work were employed by the same employer, and evidence relevant to the conditions of employment prevailing in the industry for the same kind of work at the same time and place. Of course, there may also be evidence as to the relationship between the Appellant and the employer. In the light of all that evidence, and the judge's view of the credibility of the witnesses, this Court must then assess whether the Minister, if he had had the benefit of all that evidence, could reasonably have failed to conclude that the employer and a person acting at arm's length would have entered into a substantially similar contract of employment. That, as I understand it, is the degree of judicial deference that Parliament's use of the

> expression "… if the Minister of National Revenue is satisfied …" in paragraph 5(3)(*b*) accords to the Minister's opinion.

[5] Further, I have expressed concern in the past about the application of paragraph 5(3)(*b*) by the Minister in circumstances where the employer and employee do not intend to have an insurable relationship: *C&B Woodcraft Ltd. v. MNR*, 2004 TCC 477. To give such a wide scope to the Minister's discretionary authority seems to be a "heads you lose, tails you lose" proposition for the parties. I have a difficult time believing that this was Parliament's intent. Counsel did not raise this as an issue and it is not necessary for me to consider it given the conclusion that I have reached.

[6] Turning to the facts at hand, the Worker is a licensed autobody mechanic who was presented with an opportunity to purchase an existing business. Not having sufficient funds for the purchase, the Worker convinced his parents to go into business with him. The corporate appellant acquired the business and the Worker's parents, Mr. and Mrs. Hildebrandt, became the sole shareholders as they had put up all the money for the purchase.

[7] The Worker was the only member of the family with autobody experience and he managed the "shop" side of the business as foreman. His father ran the front office and his mother did the bookkeeping.

[8] Although nothing was set in stone, it was understood that in a few years the Worker would acquire the business from his parents when they wished to retire.

[9] The Minister saw this relationship as being a typical employment relationship in which the Worker reported to the shareholders, was paid an hourly wage, and the shareholders determined the work hours.

[10] The evidence revealed quite a different arrangement. Notwithstanding that the Worker did not own any shares, the business was run more as a partnership. The Worker had much more freedom with his work hours than an arm's length shop foreman would have had, the Worker was paid for time that he took off work, and he provided considerable assistance relating to the overall operation of the business.

[11] It was apparent from the evidence that the working relationship was different in very material ways from what the Minister had assumed.

[12] In my view, it would not be reasonable to conclude that the terms of

employment were substantially similar to arm's length terms.

[13] Counsel for the respondent expressed some frustration during argument that the evidence was different from what the Minister had understood the facts to be. That is an unfortunate aspect of appeals heard under the informal procedure, but the procedure is salutory in that it allows appeals to be decided in a timely and cost-effective way.

[14] The appeal is allowed, and the decision that Dion Hildebrandt was engaged in insurable employment with the appellant during the period from January 1, 2005 to December 31, 2007 is vacated. Each party shall bear their own costs.

Signed at Toronto, Ontario this 20th day of January 2011.

"J. M. Woods"

Woods J.

CITATION:	2011 TCC 31
COURT FILE NO.:	2009-3833(EI)
STYLE OF CAUSE:	JUDIS HOLDINGS LTD. and THE MINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	November 18, 2010
REASONS FOR JUDGMENT BY:	The Honourable Justice J. M. Woods
DATE OF JUDGMENT:	January 20, 2011

APPEARANCES:

Counsel for the Appellant:	Deryk W. Coward
Counsel for the Respondent:	Scott England

COUNSEL OF RECORD:

For the Appellant:

Name:	Deryk W. Coward
Firm:	D'Arcy & Deacon LLP Winnipeg, Manitoba

For the Respondent:	Myles J. Kirvan Deputy Attorney General of Canada Ottawa, Canada