Docket: 2011-1432(EI)

BETWEEN:

LAURA STEPHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SHARED HOMES INTERNATIONAL INC.,

Intervener.

Appeal heard on November 9, 2011, at Calgary, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Adam Gotfried
Agent for the Intervener:	Christopher Stephan

JUDGMENT

The appeal pursuant to the provisions of the *Employment Insurance Act* (the "*EI Act*") is allowed and the decision of the Minister of National Revenue made under the *EI Act* is varied on the basis that the Appellant was engaged in insurable employment for the purposes of the *EI Act* for the period from May 14, 2010 to May 27, 2010.

Signed at Ottawa, Canada, this 28th day of November 2011.

"Wyman W. Webb"

Webb J.

Docket: 2011-1433(CPP)

BETWEEN:

LAURA STEPHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SHARED HOMES INTERNATIONAL INC.,

Intervener.

Appeal heard on November 9, 2011, at Calgary, Alberta

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Adam Gotfried
Agent for the Intervener:	Christopher Stephan

JUDGMENT

The appeal pursuant to the *Canada Pension Plan* is quashed.

Signed at Ottawa, Canada, this 28th day of November 2011.

"Wyman W. Webb"

Webb J.

Citation: 2011TCC529
Date: 20111128
Dockets: 2011-1432(EI)
2011-1433(CPP)

BETWEEN:

LAURA STEPHAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

SHARED HOMES INTERNATIONAL INC.,

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 Shared Homes International Inc. (the "Company") during the period from May 14, 2010 to May 27, 2010 was not insurable employment for purposes of the *Employment Insurance Act* (the "*EI Act*") was reasonable. A file had also been opened for an appeal under the *Canada Pension Plan* (the "*CPP*"). A ruling had been made that the Appellant was employed in pensionable employment for the purposes of the *CPP*. The Appellant did not appeal this Ruling to the Minister and the Appellant indicated that she did not want to appeal this Ruling. Therefore there is no appeal of the ruling issued under the *CPP* and that appeal is quashed.

[2] Subsection 5(2) of the *EI 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 *EI 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] The shares of the Company throughout the period in question were held by the Appellant's spouse. The Appellant and the Company were therefore 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 Company 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 Company commenced to carry on business in February 2010 at the National Home Show in Toronto. The Company assisted Canadians who wanted to purchase real property in the United States and in particular those who wanted to purchase a fractional ownership interest. At the home show the Company received expressions of interest from approximately 70 to 75 people. Christopher Stephan indicated that around the end of April or early May 2010 he wanted to hire someone to be his assistant. He hired his wife as an "Accounting Bookkeeper" as described in the employment agreement that Christopher Stephan had prepared. Christopher Stephan is a lawyer who was admitted to the Alberta Bar in 2009 and the New York State Bar in 2010.

[7] In paragraph 9 of the Reply, the assumptions of fact relied upon by the Minister are set out. The assumptions include the following:

> (g) the Appellant was hired as an accountant bookkeeper/executive assistant and her duties included answering inquiries by phone, e-mail and internet, setting up appointments and setting up the books;

[8] Since the Appellant's duties included answering inquiries by phone, she would have to be on duty during the normal business hours to answer the phone. Therefore it seems to me that her hours of work (which corresponded to the office hours for the Appellant) were reasonable.

[9] Counsel for the Respondent in argument raised two main factors that were material in the Respondent making the determination that the two parties would not have entered into a substantially similar contract of employment if they would have been dealing with each other at arm's length. These were the rate of pay and the location of the work.

[10] Christopher Stephan stated during his testimony that he had searched the internet around the time that the Appellant was hired and that based on this research the hourly rate of $21 / hour was reasonable. Unfortunately he did not keep a copy of the information that he had found at that time. The Appellant printed a copy of job postings that she found on the internet in February 2011. The following is a summary of these postings:

Title:	**Location:**	**Salary:**	**Experience Requested:**	**Education Requested:**
Bookkeeper	Calgary	$24.09 per hour	2 years to less than 3 years	Completion of University
Accounting bookkeeper	Fort McMurray / Yellowknife	$22.48 per hour	1 to less than 7 months	Completion of High School, Completion of college / CEGEP / vocational or technical training
Bookkeeper / Payroll Administrator	Brooks, AB	$20 to $23 per hour	2 years to less than 3 years	Completion of High School, some college / CEGEP / vocational or technical training
Office Assistant (Invoicing and Accounts Payable)	Calgary South East	$20 to $25 per hour	5 years or more	Some college / CEGEP / vocational or technical training
Accounting clerk	Calgary	$20 to $25 per hour		
Accountant / bookkeeper	Calgary	$25 per hour	Quick Book	

[11] The Appellant has a business certificate that was awarded to her in December 2005 from the Saskatchewan Institute of Applied Science and Technology. The Appellant worked for CSIT Consulting Inc. from January 12, 2005 to December 14, 2005 as an accounting clerk and office clerk. Her first child was born in April 2006 and from December 14, 2005 to May 14, 2010 she only worked a few hours each year for her father's company. While the period of employment with CSIT Consulting Inc. was from January 12, 2005 to December 14, 2005, the Appellant stated that she was away from May to August and the number of insurable hours (951.85) indicate that the Appellant was not working full time throughout this period of employment. If the number of hours worked each week was 35 to 40 hours, this would mean that she had worked approximately six months. Her work experience would therefore be approximately six to seven months, including the few hours that she worked for her father's company.

[12] The only witness called by the Respondent was an Appeals Officer with the Canada Revenue Agency ("CRA") whose only involvement with the file was that she had read the report prepared by the individual who had concluded that the Appellant's employment was excluded employment. The Appeals Officer could not add anything to what was written in the report as she did not prepare the report and was not otherwise involved.

[13] In the report of the Appeals Officer who was involved with the file, the paragraph related to "Remuneration" provides as follows:

> The rate of pay is not consistent with the tasks performed. It is not reasonable to believe that the payer would pay someone $21.00 per hour to learn all of their tasks. The rate paid to the worker is above what would be paid to an entry-level worker. The rate of remuneration is not relative to the skills or knowledge of the worker or the services the worker performed. In addition, the worker was not paid vacation pay. Her remuneration was issued late and was always transacted late. The worker was not acting in her own best interest regarding her remuneration.
>
> These indicate that remuneration was not substantially similar to an arm's length situation.

[14] In a previous section labelled "Analysis of Contradictions and Conflicting Information", the Appeals Officer wrote:

> The payer states in his letter of appeal that the worker holds a Business Certificate that included courses in Accounting and she has previous accounting and bookkeeping experience. As part of her work experience, she worked with "Simply Accounting" and did some invoicing. The worker stated she took a basic accounting course, her experience in invoicing consisted of working a few hours for her father and her past bookkeeping experience was minimal. The payer confirms the worker did not know how to operate Simply Accounting.
>
> The worker also was not trained in payroll or in working with foreign currency. She also had no recent employment history in property sales. The worker had not yet fully familiarize *[sic]* herself with the software.
>
> Based on these it is reasonable to believe the worker had to learn all job tasks. The worker was paid $21.00 per hour, the equivalent of $42,000 per annum. This amount of remuneration is not reasonable given qualifications and experience of the untrained worker.

[15] In the first paragraph referred to in the section labelled "Analysis of Contradictions and Conflicting Information", the author noted that the Appellant

had worked with “Simply Accounting” but in the last sentence he states that “the payer confirms the worker did not know how to operate “Simply Accounting”. If she worked with Simply Accounting then presumably she would know how to operate Simply Accounting. Also since the last sentence starts with “the payer ***confirms***[1]” it would be expected that what would follow would be a confirmation of what had preceded this sentence in the report, not a contradiction. This last sentence is inconsistent with the previous part of the same paragraph. The author of the report was not called as a witness nor was any explanation provided with respect to why the author of the report was not called as a witness. One explanation for the inconsistent statement in the last sentence is that there is a typographical error and either the word “confirms” or the word “not” is not correct. Since the author was not called to explain the report and address this issue, I draw an adverse inference and assume that the word “not” is incorrect and therefore the Appeals Officer was acknowledging that the Appellant did know how to operate Simply Accounting.

[16] In any event, the Appellant testified that she did have previous experience with Simply Accounting and I accept her testimony and I find that she did know how to operate Simply Accounting. Therefore the conclusions in the report that “the worker had to learn all job tasks” and that she was an “untrained worker” are not reasonable.

[17] The author of the report also noted that the amount of pay, in his opinion, was not reasonable. However, there is no analysis of the job market in Red Deer in 2010 in the report nor was there any evidence presented by the Respondent that any analysis of the job market in Red Deer in 2010 had been completed by the Appeals Officer for the CRA. His conclusion that the amount of pay was not reasonable seems to be based only on his personal opinion.

[18] I accept Christopher Stephan’s testimony that he did investigate the job market in the area before settling upon the hourly rate of $21 per hour and that this amount was within a reasonable range of pay for a person who would have been performing the services of the Appellant in 2010 in Red Deer. The amount is also reasonable when compared to the amounts that the Appellant had found in 2011. The Appellant did have some work experience, a business certificate and knew how to operate “Simply Accounting”. It seems to me that the hourly rate that should be used as a comparison is the lowest of the hourly rates from the job

[1] Emphasis added.

postings for February 2011, which was $20 per hour. The Appellant's hourly rate of $21 per hour was therefore 5% more than the comparative rate of $20 per hour.

[19] In interpreting the phrase "all or substantially all" for the purposes of the *Income Tax Act*, the CRA has consistently maintained the position that this phrase means 90% or more. This is reflected in several Technical Interpretations of the CRA and in paragraphs 18 and 24 of Interpretation Bulletin IT-151R5 and paragraph 1 of Interpretation Bulletin IT-507R. When the Minister is evaluating whether the terms and conditions of an employment arrangement are "substantially similar" to those that would have been entered into if the parties had been dealing at arm's length, it seems to me that the Minister should not adopt a more restrictive meaning of "substantially" than the CRA has adopted in interpreting "all or substantially all". Since the substantially part of the phrase would accommodate a shortfall of up to 10%, it seems reasonable to me that in situations where an amount could be greater or less than another amount (and be substantially similar) that the range of 90% to 110% should be used as a guide to assist in determining if one amount is substantially similar to another amount.

[20] Therefore it seems to me that the Respondent in considering whether the amount of pay was "substantially similar" to what would have been paid if they would have been dealing with each other at arm's length, the Respondent should have completed an analysis of the job market in Red Deer in 2010 and based his determination on whether the amount paid was ***substantially*** similar to what arm's length persons would be paid in that job market for the same work. In light of the absence of any analysis of the job market in Red Deer that was completed by the Appeals Officer or anyone else with the CRA and the testimony of Christopher Stephan and the Appellant and their analysis in 2010 and 2011 (which indicate that the Appellant was only paid 5% more than the lowest rate of pay for a bookkeeper in February 2011), it seems to me that the decision of the Minister that the amount paid to the Appellant was not substantially similar to the amount that would have been paid if they would have been dealing with each other at arm's length, is not reasonable.

[21] With respect to the timing of the cashing of the cheques by the Appellant, the Appellant testified that this was simply how she operated and that she would wait until she had a few cheques before going to the bank. I accept her testimony and I find that the timing of the cashing of her cheques was not related to any term or condition of her employment and would not support a finding that she would not have entered into a substantially similar contract of employment with the Company if she would have been dealing at arm's length with the Company.

[22] Counsel for the Respondent also raised the issue of the location of the work. The Appellant and Christopher Stephan and their children were living with Christopher Stephan's parents in 2010. A room was set up in this house as an office. The position of the Respondent is that Christopher Stephan would not have hired an arm's length person to work in the office located at his parent's house. It seems to me that it is important to remember that the provisions of paragraph 5(3)(*b*) of the *Employment Insurance Act* do not require that the terms and conditions must be exactly the same as they would have been if they would have been dealing with each other at arm's length but whether:

> 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.

[23] In making this determination it is necessary to have regard to all of the circumstances of the employment. It is clear that the office was not used as a place to meet clients. It is also clear that Christopher Stephan could arrange to have the telephone calls transferred to any phone. With respect to e-mail messages, one would simply need a computer and access to the internet. There was also a reference to regular mail but no indication of how often regular mail would be received. In any event if a person were to work from their own home they could arrange to pick up mail from another location. The accounting work could also be done at another location. There does not appear to be any reason why it would be necessary for an arm's length person to work at the office located in Christopher Stephan's parent's house.

[24] As a result it seems to me that the comparison that should be made is whether the terms and conditions would be substantially similar if an arm's length employee were to work at his or her own home. To simply make a determination (as counsel for the Respondent was suggesting) that the terms and conditions would not be substantially similar because Christopher Stephan (as the officer and director of the Company) would not hire an arm's length person to work in his parent's house is not reasonable having regard to all of the circumstances. It seems to me that the terms and conditions related to the employment of the Appellant would be substantially similar to those that would have been entered into between the Company and an arm's length employee working from his or her own home.

[25] The report of the Appeals Officer in relation to the duration of employment refers to the "payer" having opened another business. The other business would be the law practice that was started by Christopher Stephan not the payer. Christopher

Stephan stated that the business of the Company continued at the same level throughout the fall of 2010, even though he was running for election as a municipal councillor. Both Christopher Stephan and the Appellant testified that this was a very busy time for Christopher Stephan and I accept their testimony and find that the business of the Company continued at the same level throughout the fall of 2010.

[26] The report of the Appeals Officer also stated that the phone for the Company had been transferred to a new location in November 2010. The parties submitted phone records to establish that the phone for the Company was not rerouted to Christopher Stephan's law office until after the Appellant ceased working. There is nothing to suggest that any of the Appellant's tasks were transferred to Christopher Stephan's law office staff until after the Appellant ceased working.

[27] The report also indicates that "[t]he job appears to have been created for the worker". However, there is no analysis of the income of the Company. If the Company did not have any income or had very little income, this could suggest that it may not have been reasonable to hire an arm's length person to work 40 hours per week at $21 per hour. However, without any analysis of the income of the Company (which is information that the Minister of National Revenue could presumably have obtained), it seems to me that the best person to determine whether a worker is required is the person who is operating the business. I accept the testimony of Christopher Stephan that the Company needed to hire someone. Although the period under appeal is only the two week period from May 14, 2010 to May 27, 2010, Counsel for the Respondent indicated that the decision for this period would be applied to the remaining period. Several of the facts referred to were related to events that occurred after the period in question. Two such events were the start of the law practice by Christopher Stephan and his running for election as a municipal councillor. It seems clear that someone else would certainly have been required to answer the phone and e-mails for the Company during that time.

[28] As a result I am unable to conclude that the Minister's decision still seems reasonable in light of the evidence that was presented and therefore the appeal under the *EI Act* is allowed and the decision of the Minister of National Revenue made under the *EI Act* is varied on the basis that the Appellant was engaged in insurable employment for the purposes of the *EI Act* for the period from May 14, 2010 to May 27, 2010.

Signed at Ottawa, Canada this 28th day of November 2011.

"Wyman W. Webb"

Webb J.

CITATION:	2011TCC529
COURT FILE NOS.:	2011-1432(EI) 2011-1433(CPP)
STYLE OF CAUSE:	LAURA STEPHAN AND M.N.R.
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	November 9, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	November 28, 2011

APPEARANCES:

For the Appellant:	The Appellant Herself
Counsel for the Respondent:	Adam Gotfried
Agent for the Intervener:	Christopher Stephan

COUNSEL OF RECORD:

For the Appellant:

Name:	
Firm:	

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