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Ethier v. Canada (Minister of National Revenue - M.N.R.)

Between
Romeo Ethier, Appellant, and
The Minister of National Revenue, Respondent

[1997] T.C.J. No. 426

[1997] A.C.I. no 426

Court File No. 95-2553(UI)

Tax Court of Canada
Edmonton, Alberta

Bowie T.C.J.

Heard: April 28, 1997
Oral Judgment: May 1, 1997
Reasons: May 23, 1997

(10 pp.)

Unemployment insurance -- Insurable employment -- What constitutes -- Employer-employee relationship -- Exceptions -- Non-arm's length relationship.

Appeal by the worker, Ethier, from the respondent Minister's decision that Ethier was not engaged in insurable employment. The payer was a delivery company involved in delivering parts and equipment to oil fields on an emergency basis, it was also involved in hauling gravel. Ethier was the father-in-law of the secretary-treasurer and manager of the business, and his daughter was the controlling shareholder. He drove a truck for the business. He was experienced in driving gravel trucks and took care of the truck that was used for that purpose. He was also involved in obtaining contracts. He was paid based on the gross receipts from the use of the truck and had signing authority on the payer's bank account. Ethier signed his own pay cheques on occasion.

HELD: Appeal allowed. Ethier was engaged in insurable employment. There was an employer-employee relationship in this case. He was an employee under a contract of service. The

company provided the truck as well as the tools required to service it. The risk of loss and the chance of profit both laid with the payer. The fact that he was occasionally paid late was not significant. Signing authority was common for truck drivers in the industry and Ethier's access to the account was strictly limited. The fact that he signed his own pay cheques was not damaging as it was done infrequently for only specific amounts. The Minister did not ascertain the prevailing rates of remuneration and other terms and conditions of employment in the industry at the appropriate time and place. She did not objectively compare them to the terms and conditions which governed the employment contract between Ethier and the company. As a result, the Minister's decision could not stand. Nothing in the evidence indicated that Ethier was given preferential terms, financial or otherwise, relative to those which would have been negotiated with a stranger having similar qualifications.

Statutes, Regulations and Rules Cited:

Income Tax Act.
Unemployment Insurance Act, ss. 3(1), 3(1)(a), 3(2)(c), 3(2) (c)(ii), 61(3)(a), 61(3)(b).

Brian Doherty and Brij Mohan, for the Appellant.
Susan Wong, for the Respondent.

JUDGMENT:-- It is ordered and adjudged that the appeal under section 70 of the Unemployment Insurance Act is allowed; and that the determination by the Minister of National Revenue on the application made to him under section 61 of that Act is reversed.

REASONS FOR JUDGMENT

1 BOWIE T.C.J. (Orally):-- The issue in this appeal is whether or not the Appellant was engaged in insurable employment during the two periods, June 17, 1991 to October 31, 1991 and June 8, 1992 to October 30, 1992 (the periods). The Appellant worked for a company called NC Double K Hotshot and Trucking Ltd. during each of these two periods. I shall refer to it as the Company.

2 The Minister's decision which is under appeal was embodied in a letter to the Company dated August 18, 1995 from W. Blahun, Chief of Appeals Division of Revenue Canada for the Minister of National Revenue. The relevant part of that letter reads as follows:

> It has been decided that Romeo Ethier was not employed in insurable employment. This is because Romeo Ethier was not employed under a contract of service, and therefore, he was not an employee.

> Notwithstanding the fact that Romeo Ethier was not engaged under a contract of service, the Minister is not satisfied that you and Romeo Ethier would have entered into a substantially similar contract of employment if you had been dealing with each other at arm's length.
>
> ...
>
> The decision in this letter is issued pursuant to paragraphs 61(3)(a) and 61(3)(b) of the Unemployment Insurance Act and is based on subsection 3(1) of the Unemployment Insurance Act.

3 I am called upon to decide, first of all, whether the relationship between the Appellant and the Company during the periods was one of employer and employee or not. If it was not, then the appeal fails. If it was, then I must go on to consider the Minister's second, and presumably alternate, ground of decision under paragraph 3(2)(c). That involves a preliminary consideration of whether or not the Minister has, in arriving at her decision based on that paragraph, fallen into what may be called an error of law in the decision-making process. If she has not, then I have no power to look behind her decision and substitute my opinion for hers. If she has, then the proceeding before me is in the nature of a trial de novo and I must decide on the evidence before me whether or not, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and nature and importance of the work performed, it is reasonable to conclude that the Appellant and the Company would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length[1].

4 The driving force behind this Company is Michael Honan. He is the secretary-treasurer and manager. He makes the operational decisions. The shares are owned two-thirds by his wife, Kim Honan, and one-third by his mother, Jean Honan. The Appellant is his father-in-law, Kim's father. It is not disputed that the Appellant and the Company are related, and therefore are not at arm's length. Initially, the Company's business was to operate a hotshot, which is essentially a rapid delivery truck transporting parts and equipment to the oil fields on an emergency basis.

5 In 1990 it appeared to Mr. Honan that conditions in the haulage business in and around Edmonton were such that money could be made operating a gravel truck. He knew something of this business, having himself operated gravel trucks many years previous. The necessary ingredients for such an addition to the Company's business were a suitable truck, an experienced and reliable driver to operate it, and a source of haulage contracts. The Company leased the truck, including a pup trailer to increase its capacity, on suitable terms. Before doing so, however, Mr. Honan approached his father-in-law to see if he would be willing to operate it for the Company. He said that he would.

6 Mr. Ethier was particularly suited to the task. He had many years of experience as a truck

driver, most of it in the gravel haulage business. He also was, of course, well known to Mr. Honan over a long period of time, during which Mr. Honan had learned that he was a reliable, capable and experienced operator. He also had contacts with prospective customers from his previous experience, which would be useful in obtaining work for the truck. Finally, he was between jobs at the time.

7 The terms of the engagement were described by the Appellant and by Michael Honan in their evidence. The Appellant's duties as driver of the truck for the Company consisted of warming-up the truck in the morning, inspecting it, and then proceeding to the location designated by the dispatcher of the Company for which the truck was to work that day. Generally during the construction season the work consisted of hauling aggregate to a construction site, and repeat trips would be made from early morning until evening. The Appellant put in five to seven days per week, of 12 to 15 hours each in this way. He was also responsible for washing the truck and performing minor maintenance on it, as well as taking it to a service centre when it required major repairs or maintenance. His duties also included soliciting work from construction companies and the like. Michael Honan also made efforts to find work for the truck, and he made the decisions as to which contracts would be accepted and which would not.

8 Remuneration is paid by companies using the services of haulage operators on the basis of a rate per ton/mile hauled. The Appellant in turn was paid by the Company 30 per cent of the gross receipts from the use of this truck, regardless of whether the truck produced a profit or not. This aspect of the Company's operations required, in addition to the truck and the Appellant to operate it, a certain amount of paper work in the form of billing, bookkeeping and the like. This, it appears, was done at various times and in varying degrees by Michael Honan, Kim Honan and her sister, Sherry Bourgeois. Michael Honan and Kim Honan both were engaged in other employment on a more or less full-time basis, but were able to devote the necessary amount of their time to the demands of running the Company nevertheless.

9 The Appellant had signing authority with respect to the Company's bank account. Much seems to have been made of this in the Minister's mind in making the determination that she did. However, I accept the evidence of the Appellant and of Michael Honan, which established to my satisfaction that it is common in the industry to give truck operators access to the bank account, or alternatively to credit facilities of the truck owner, so that they may pay for repairs, licences, fuel and other expenditures as required. I also accept their evidence that Mr. Ethier's authority to access the bank account was strictly limited. He had to obtain permission by telephone before making expenditures. On a number of occasions he also signed his own pay cheques, but only when specifically authorized by Michael Honan to do so, and only for the amount that he was told was his pay for the relevant period. This was done as a matter of convenience, because Michael Honan was frequently away from the city and not able to sign cheques when required.

10 The law which governs the application of paragraph 3(1)(a) of the Act is well established. It requires a consideration of a number of factors, all of which must be weighed by the trial judge in

the light of the evidence and the context of the relationship at issue. See Wiebe Door Services Ltd. v. M.N.R., 87 D.T.C. 5025, per McGuigan J.A. at page 5030.

11 The evidence satisfies me that the relationship in this case was one of employer and employee. The Company supplied not only the truck, but the tools used by the Appellant to service it and to perform minor repairs. The risk of loss and the chance of profit both lie with the Company. Whatever the profit picture turned out to be, Mr. Ethier was paid 30 per cent of the gross receipts for the truck. Certainly, he had an incentive to see that there were enough contracts to keep the vehicle busy, but if he worked he was paid. I do not consider it significant that he was occasionally paid late because the Company had cash flow problems. This is not an unusual situation with small, fledgling enterprises.

12 Once again, it seems, the Minister has equated a lack of direct, on-the-spot supervision of the worker with abandonment of control. I refer to the Minister's assumptions pleaded at subparagraphs 6(w) and (y) of the Reply to the Notice of Appeal. They read as follows:

> In determining as he did the Minister relied on the following assumptions of fact:
>
> ...
>
> (w) the Worker was not supervised in the performance of his duties.
> ...
> (y) the Worker was able to use his own methods in the performance of his duties.

I am left wondering how many ways the Minister thinks there are to drive a gravel truck, or for that matter to wash it and grease it.

13 Michael Honan's evidence satisfied me that he maintained effective control of the gravel truck side of the business in his capacity as manager of the Company. He inspected the truck from time to time, he discussed prospective work with the Appellant, and made the business decisions as to what work to accept. The Appellant's access to the bank account required his specific approval, which was given over the telephone only after he knew the reasons for it. Like a great many employees, Mr. Ethier was not under the direct view of his employer while he did his work, but if he did not do it, or if he did it badly, that would soon have become known to the Company and he would have been disciplined or fired. The evidence in this case admits of no other conclusion than that Mr. Ethier was an employee under a contract of service during the relevant time periods.

14 I turn now to the issue raised by the Minister's resort to paragraph 3(2)(c) of the Act. The first question I must answer is whether or not the Minister erred in law in reaching his conclusion under subparagraph 3(2)(c)(ii) that she was not satisfied that it was reasonable to conclude that the

Appellant and the Company would, if dealing with each other at arm's length, have entered into a substantially similar contract of employment.

15 Paragraph 6 of the Minister's Reply to the Notice of Appeal is devoted to the assumptions of fact upon which, at least according to the pleader, she relied in making the determination which is under appeal. The pleading of these assumptions has become customary, no doubt on the theory that they assume the status of established facts if they are not successfully rebutted by the Appellant, as in cases arising under the Income Tax Act.[2] The difficulty which arises from such a pleading in this case, as in many others, is that the Minister's agent who has drawn and signed the pleading, and who I should point out is not of counsel, has not restricted himself to pleading the primary facts assumed by the Minister. Instead the pleading is replete with recitations of the various statements made by the Appellant and by representatives of the employer, without any indication as to whether or not they were accepted as true by those who made the decision on the Minister's behalf.[3] If it were necessary to decide the matter, I would be inclined to take the view that the Minister's officials, not having said otherwise in the pleading, should be taken to have accepted these statements as being accurate and truthful. In that case it is difficult to see how the Minister's decision could possibly be supported in light of the assumption pleaded in subparagraph 6 (ab) infra.

16 What these assumptions do in the present case is give some insight, indeed the only insight available, into the Minister's reasoning by which she decided as she did. The subparagraphs containing the assumptions in paragraph 6 are no less than 39 in number. Many of them recite facts that are not in dispute; for example the names of the shareholders and the directors of the Company, and the personal relationships among the Appellant, his daughter and her husband. I refer to subparagraphs 6(b), (c), (d) and (e). Others are shown by the evidence to be incorrect. For example, subparagraph 6(s) states that the rates charged by the Payor, that is the Company, for hauling are set by the trucker's association. The evidence was clear that this was not so. It is difficult, however, to see what relevance that fact could possibly have had in connection with the question that the Minister had to decide.

17 The same can be said of a great many of the subparagraphs in question. Most offensive, perhaps, is subparagraph 6(ak), which purports to show the earnings and unemployment insurance benefits received by the Appellant, not only during 1991 and 1992, but back to 1988. The assumptions end with subparagraph 6(am), which pleads in ritualistic fashion as follows:

> 6(am) having regard to all the circumstances of the employment referred to in paragraphs 6(a) to 6(al), supra including the remuneration paid, the terms and conditions, the duration and nature and importance of the work performed, the Minister's decision that the Worker and the Payor would not have entered into a substantially similar contract of employment if they had been dealing at arm's length, was reasonable and arrived at in a fair and proper manner.

That, of course, is not an assumption of fact at all, but a conclusion of law, and a most self-serving one at that. Not only is it self-serving, but in my view it is wrong. Deplorable as this pleading is, I do not intend to review its shortcomings at any greater length. I have no doubt that it contains sufficient irrelevant assertions and inaccuracies that they alone would vitiate the Minister's decision. I prefer, however, to base my decision on a narrower footing.

18 The Minister's decision cannot survive her apparent failure to ascertain the prevailing rates of remuneration and other terms and conditions of employment in the industry at the appropriate time and place, and to make an objective comparison of them to the terms and conditions, including those pertaining to remuneration, which governed the employment contract between the Appellant and the Company.

19 Much is alleged in paragraph 6 about the terms and conditions of the Appellant's contract; see, for example, subparagraphs 6(k), (l), (m), (n), (o), (p), (q), (r) and (z). The pleading contains only the following two statements which could be said to speak, albeit indirectly, to pay rates in the industry.

> 6(m) The Payor's representative Sherry Bourgeois, Kim L. Honan's sister, stated in a signed questionnaire dated June 23, 1995:...v) the Worker was paid the industry rate. ...
>
> 6(ab) the Payor stated that they [sic] would have hired an unrelated person under the same working arrangement and pay if the Worker was not available.

These two subparagraphs, of course, militate in the Appellant's favour rather than the Respondent's. Nowhere does paragraph 6 speak to other aspects of the terms and conditions of employment among persons at arm's length in the industry in the Edmonton area in the early 1990s.

20 It is clear that the Minister did not, as Parliament directed her to do, have regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and nature and importance of the work performed, in comparison to the terms and conditions prevailing among arm's length employers and employees. Her decision therefore cannot stand, and I must determine that question de novo on the basis of the evidence before me.

21 Both the Appellant and Mike Honan gave evidence to the effect that the terms and conditions of the employment contract in issue were in accordance with the industry standard. I accept their evidence. Counsel for the Minister at the opening of the trial, by consenting to the entering of Exhibits A-2 and A-3 into evidence, effectively admitted, and quite properly so, that the accepted standard remuneration for a gravel truck driver at the relevant time and place was 25 to 30 per cent of the gross revenue of the truck. Mr. Ethier has many years of experience as a truck driver and was well known by Mr. Honan to be extremely reliable. He had contacts that could be useful to the Company. These factors warranted paying him at the top of the prevailing range.

22 Mr. Honan stated unequivocally that if his father-in-law had not been available then he would have paid the same percentage of the gross to some other driver as experienced, or less to someone less qualified. Nothing in the evidence suggests that the Appellant was given preferential terms, financial or otherwise, relative to those which would have been negotiated with a stranger having similar qualifications.

23 I therefore find that the terms and conditions of Mr. Ethier's employment by the Company are essentially those which would have been entered into by an employer and an employee negotiating at arm's length with each other at the relevant time and place.

24 The appeal is allowed.

qp/d/scl/mjb/mjb/DRS/DRS

1 Tignish Auto Parts Inc. v. M.N.R., [1994] F.C.J. No. 1130.

2 There is at least the suggestion that this is so in the reasons for judgment of Isaac C.J. for the Court in Schnurer v. Canada, (Federal Court of Appeal, unreported, February 3, 1997 - Court File No. A-315-96).

3 I refer to subparagraphs 6 (g), (l), (m), (n), (o), (u), (z), (aa), (ab), and (ai).