Date: 20070122

Docket: A-117-06

Citation: 2007 FCA 56

CORAM: **LÉTOURNEAU J.A.**
EVANS J.A.
MALONE J.A.

BETWEEN:

DARSHAN NURSERIES INC., NIRMALJIT KAUR RANDHAWA, AND PARMINDER KAUR RANDHAWA

Appellants

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Vancouver, British Columbia, on January 18, 2007.

Judgment delivered at Ottawa, Ontario, on January 22, 2007.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
MALONE J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

[1] This is an appeal by two employees, Nirmaljit Kaur Randhawa ("Nirmaljit") and Parminder Kaur Randhawa ("Parminder"), and their employer, Darshan Nurseries Inc. ("Nurseries") from a decision of Justice Little of the Tax Court of Canada. In that decision, the Judge rejected their appeals from a ruling by the Minister of National Revenue that Nirmaljit and Parminder were not in "insurable employment" with Nurseries for the purpose of the *Employment Insurance Act*, S.C. 1996, c. 23.

[2] The relevant provisions of the Act are as follows:

2) Insurable employment does not include	(2) N'est pas un emploi assurable :
(*i*) employment if the employer and employee are not dealing with each other at arm's length.	*i*) l'emploi dans le cadre duquel l'employeur et l'employé ont entre eux un lien de dépendance.
3) For the purposes of paragraph (2)(*i*),	(3) Pour l'application de l'alinéa (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	*a*) la question de savoir si des personnes ont entre elles un lien de dépendance est déterminée conformément à la *Loi de l'impôt sur le revenu*;
(*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.	*b*) l'employeur et l'employé, lorsqu'ils sont des personnes liées au sens de cette loi, sont réputés ne pas avoir de lien de dépendance si le ministre du Revenu national est convaincu qu'il est raisonnable de conclure, compte tenu de toutes les circonstances, notamment la rétribution versée, les modalités d'emploi ainsi que la durée, la nature et l'importance du travail accompli, qu'ils auraient conclu entre eux un contrat de travail à peu près semblable s'ils n'avaient pas eu de lien de dépendance.

[3] The periods of employment under review in this appeal are, for Nirmaljit, March 8 to July 3, 1999, February 7 to July 27, 2000, and April 5 to September 1, 2001. For Parminder, the periods are March 20 to October 7, 2000, and May 7 to October 20, 2001.

[4] During these periods, Nurseries was solely owned by Darshan Randhawa ("Darshan"). Nirmjalit is his wife. Parminder is married to Darshan's brother, Inderpal. Justice Little concluded

that, at the times relevant to this appeal, Nirmaljit, Inderpal, and Parminder were employed by Nurseries under contracts of service. This finding is not now challenged by the Minister.

[5] Having held that these employees were related to their employer for the purpose of the Act, the Judge concluded that there was sufficient evidence for the Minister not to be satisfied that, "having regard to all the circumstances", it was "reasonable to conclude" that Nirmaljit and Parminder "would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length." Since Nirmaljit and Parminder were not dealing with Nurseries at arm's length, they were not in insurable employment. However, the Judge allowed Inderpal's appeal, on the ground that his work had been remunerated by promissory notes and Darshan's subsequent transfer to him of 50% of the shares in Nurseries.

[6] The nub of the dispute concerns the extent to which unrelated employees of Nurseries were paid in priority to the appellants. The Minister's argument was that, because unrelated employees were paid more regularly and with less delay than the appellants, it was not reasonable to conclude that unrelated employees would have accepted the same conditions of employment as the appellants. The Judge noted the irregularity and delays in the payment of wages to Nirmaljit and Parminder, and concluded the unrelated employees were paid in priority to the appellants.

[7] The appellants appeal to this Court on the ground that, on the evidence before him, the Judge's conclusion was erroneous. In particular, they say, Nurseries had a serious cash-flow problem because it could not sell its trees and shrubs until they had sufficiently matured, which

occurred some considerable time after the employees had performed their work. The situation was exacerbated by Darshan's inefficient management of the business, especially during a period of poor health. The evidence shows, they allege, that unrelated employees, who appear not to have been reliant on their wages from Nurseries, remained loyal to Darshan, confident that they would eventually be paid for their work, as indeed they were, when the business's finances permitted.

[8] Because the appellants impugn the Judge's findings on questions of fact, and questions of mixed fact and law, they must demonstrate that his conclusion was vitiated by palpable and overriding error. It is important to note in this regard that the hearing in the Tax Court lasted six days and involved an array of witnesses and a mass of documents, many of which concerned Nurseries' pay practices.

[9] In these circumstances, it is particularly salutary for an appellate court to recognize the advantages which the Tax Court Judge had in seeing and hearing the witnesses, and immersing himself in the evidence. A rational basis in the facts and the evidence for the Judge's conclusions will suffice to uphold his decision. We are not persuaded that they lacked that rational basis.

[10] The appellants' witness, Hardeep Wadhawan, a payroll clerk employed by Nurseries' accountants, GP Wadhawan Inc., prepared a payroll summary showing the annual income of employees of Nurseries, and the dates and amounts of the cheques made out to them in payment of their wages. In my opinion, these, together with more detailed documentary evidence respecting the number of hours and dates that employees worked, and the wages that they earned, provide a

reasonable basis for the Judge's conclusion that the appellants were paid later and less regularly than unrelated employees.

[11] For example, the payroll summary (Appeal Book, vol, 2.3, pp. 736-41) shows (at p. 736) that an unrelated employee, Manjit Mann, received 6 cheques in 1999, 8 in 2000, and 5 in 2001, generally at approximately monthly intervals. Baljit Sidhu (at p. 737) received 8 cheques in 1998, and Sarabjit Rai (at p. 739) received 8 cheques in 1998, 5 in 1999, and 7 cheques in 2000.

[12] In contrast, the Judge found that Nirmaljit had accrued wages of more than $22,000 in taxation years 2000 and 2001, but was not paid by Nurseries what she was owed until May 2002. According to the Judge, Parminder had accrued wages of more than $28,000 in 2000 and the first half of 2001, but was not paid any wages until July 2001, and was not fully paid until May 2002. Counsel for the appellants does not challenge these findings. Indeed, he concedes that, unlike the appellants, no unrelated employee had to wait a year, and more, to be paid.

[13] Counsel for the appellants says that Darshan testified that he did not always have sufficient cash to pay all his employees for work done, and prioritized the payment of wages on the basis of need, not intending thereby to favour the unrelated employees over the appellants. In my view, the intentions of the employer are not relevant. The question is whether it is reasonable to conclude, on the basis of all the circumstances of the employment, including delays in and the regularity of the payment of wages to the appellants, whether unrelated employees would have accepted similar

conditions of employment. The fact that Darshan eventually paid all his employees does not undermine the Judge's conclusion.

[14] Counsel for the appellants also submits that the Judge erred when he stated at paragraphs 16 and 19 of the reasons that Paul Wadhawan, Nurseries' accountant, testified that Nurseries paid the unrelated employees ahead of the appellants. Counsel for the respondent admits that the Judge made a mistake in attributing this statement to Paul Wadawhan. He should have said that the payroll summaries put into evidence by Hardeep Wadawhan showed that unrelated employees were paid more regularly and with less delay than the appellants.

[15] It is unfortunate that the Judge erroneously attributed to the testimony of Paul Wadawhan his conclusion respecting the relative treatment of unrelated and related employees with regard to the payment of wages. It would certainly have been helpful if the Judge had made some analysis of the payroll summaries, which, surprisingly, were not the subject of discussion at trial.

[16] Nonetheless, I am not persuaded that these shortcomings in the reasons warrant the intervention of the Court and a new trial. The Judge's conclusion respecting differences in the wage treatment of the appellants and unrelated employees is supported by the evidence before him, and justifies his ultimate determination that there was sufficient evidence for the Minister not to be satisfied that it was reasonable to conclude that unrelated employees would have agreed to be employed on substantially similar conditions as the appellants.

[17] For these reasons, I would dismiss the appeal, but, in view of the error in the Judge's reasons, without costs.

"John M. Evans"
J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
B. Malone J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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