

Docket: 2008-562(EI)

BETWEEN:

JIN HUA HUANG,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

JUN HUA ZHU,

Intervenor.

Appeal heard on November 17, 2008, at Vancouver, British Columbia

Before: The Honourable D.W. Rowe, Deputy Judge

Appearances:

For the Appellant: The Appellant herself

Counsel for the Respondent: Shannon Walsh

For the Intervenor: The Intervenor himself

JUDGMENT

The appeal is allowed and the decision of the Minister of National Revenue dated December 5, 2007 is varied to find that:

- Jin Hua Huang was employed in insurable employment with Jun Hua Zhu from April 1, 2007 to August 31, 2007.

Signed at Sidney, British Columbia, this 26th day of January, 2009.

“D.W. Rowe”

Rowe D.J.

Citation: 2009TCC35
Date: 20090126
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JIN HUA HUANG,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

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JUN HUA ZHU,

Intervenor.

REASONS FOR JUDGMENT

Rowe, D.J.

[1] The Appellant appealed from a decision by the Minister of National Revenue (the “Minister”) dated December 5, 2007 wherein the Minister determined the employment of the Appellant, Jin Hua Huang (“Huang”) with her husband, Jun Hua Zhu, (“Zhu”) from April 1, 2007 to August 31, 2007, was not insurable employment pursuant to paragraph 5(2)(i) of the *Employment Insurance Act* (the “Act”). The Minister, after considering all of the terms and conditions of said employment, was not satisfied the contract of employment between Huang and Zhu would have been substantially similar if they had been dealing with each other at arm’s length.

[2] A Certified Court Interpreter – Jade Zhen – was present to assist Zhu by interpreting from Mandarin to English and English to Mandarin.

[3] Huang testified she is also known as Louise Huang and is employed as a Project Engineer with the Municipality of Delta, British Columbia. She holds a

Master's degree in that discipline from the University of British Columbia and has been in Canada for 8 years. Huang referred to a document – filed as Exhibit A-1 – in which she set out her comments pertaining to certain assumptions of fact as set forth in paragraph 6 of the Reply to the Notice of Appeal (“Reply”). Huang agreed the assumptions contained in said paragraphs were correct as follows:

A. STATEMENT OF FACTS

1. With respect to the facts alleged in the Notice of Appeal, he admits:
 - a) the Appellant provided services to Jun Hua Zhu (“Jun Zhu”) in his business;
 - b) the Appellant held the job title of office assistant and two of her duties were to provide business marketing services and office receptionist services;

...

6. In determining that the Appellant's employment was not insurable employment with Jun Zhu during the Period, the Minister relied on the following assumptions of fact:

- a) the facts admitted in paragraph one, above;
Jun Hua Zhu (“Jun Zhu”), the Employer
- b) the nature of Jun Zhu's business (the “Business”) was medical services, acupuncture, Chinese herbs, foot reflexology, Chinese massage and teaching;
- c) Jun Zhu had received training as an acupuncturist in China and immigrated to Canada in 1999;
- d) Jun Zhu operated the Business as a sole proprietorship;
- e) the Business has been in operation since 2003;
- f) Jun Zhu operated the Business under the name Wen Integral Traditional Chinese Medical Clinic;
- g) the Business is also known as Wen Acupuncture & TCM Clinic;
- h) Jun Zhu is the husband of the Appellant;
- i) Jun Zhu operated the Business year round;

j) during the Period, Jun Zhu operated the Business from a location at #30 – 1480 Foster Street, White Rock, B.C.;

...

l) the Business location is one kilometre from the Principal Residence:

m) Jun Zhu controlled the day-to-day operations of the Business;

n) Jun Zhu made the major business decisions of the Business;

o) the Business had the following gross monthly sales from April, 2007 to October, 2007:

Month	Gross Monthly Sales
April, 2007	\$288.32
May, 2007	\$1,137.93
June, 2007	\$487.44
July, 2007	\$354.06
August, 2007	\$1,787.16
Total Gross Sales during the Period	\$4,054.91
September, 2007	\$3,766.18
October, 2007	\$3,814.04

Jin Hua Huang, the Appellant

p) the Appellant is also known as Louise Hang;

...

[4] Huang testified she had not worked for Zhu prior to December, 2006 and was not involved in obtaining a business location nor had she played a role in obtaining the lease on the business premises in the Municipality of White Rock, as assumed by the Minister in subparagraph 6(1) of the Reply. Huang stated she had visited those premises only once prior to starting work on April 1, 2007 when the acupuncture

Clinic opened for business. She disagreed with the assumptions of the Minister set out in subparagraph 6(r) that she had coordinated the leasehold improvements in the new location and done so because she was more fluent in English than Zhu. Huang stated the contractor hired to perform the necessary renovations and improvements spoke Mandarin and Zhu probably communicated with him in that language so there was no need for her to play any role in that undertaking. Further, she did not have a good understanding of construction matters. Huang stated she was hired by Zhu to act as a marketing manager to promote the new business within the community and to perform the duties of Office Assistant. Zhu had no other employees and Huang worked in the office from 9:30 a.m. to 5:30 p.m., Monday through Friday. Her salary was \$2,300.00 per month and her duties required her to design various marketing materials including a logo, a business card - Exhibit A-2 - which identified her as Louise Huang, Marketing Manager - and advertising in the Yellow Pages. She also provided information to the Chamber of Commerce in Delta and in White Rock. There were 9 or 10 other businesses in those municipalities that offered similar services to those available in Zhu's Wen Acupuncture & TCM Clinic ("Clinic"). Huang stated she contacted people personally to advise them of the availability of products and services at the Clinic. She designed a website and prepared brochures and advertisements for publications. She attended community events sponsored by the Business Improvement Association where she handed out promotional material regarding the Clinic. She also conducted some door-to-door residential visits to promote the Clinic. Huang acknowledged that sales at the Clinic during the first 4 months of her employment were only \$4,054.91 while her wages for that period were \$9,200.00. In her view, that was to be expected as the business was new and there is not much need for treatment during the summer months when the weather is warm and people are active. Huang stated that Zhu had registered his business at some point in 2003 but worked as an instructor at a college on a part-time basis and also performed acupuncture services at certain clinics since he had been registered as an acupuncturist in British Columbia since 2001. She reiterated she had not performed any services for Zhu between December 1, 2006 and April 1, 2007 so there was no reason for her to have received any payment from him. Huang stated that while working in the White Rock office, she answered the phone, made appointments and greeted patients but Zhu collected the fees for treatments and payments for products. With respect to receipt of pay cheques, Huang referred to the table in paragraph 6(kk) and stated that the date - May 4, 2007 - written on the pay cheque she negotiated on June 6, 2007 - was in error and Zhu should have used the correct date of June 4 instead of May 4. She pointed out she had received a pay cheque dated May 3, 2007 which she negotiated that day and it would not have made any sense for Zhu to have issued another pay cheque dated the next day since she had started work only on April 1. She acknowledged that Zhu had not paid her wages for July until August 13

and suggested he must have forgotten. The Clinic had a bank account but she did not have any signing authority nor any investment in that business. Huang worked until August 31 and her baby was born on September 24. She stated the only work performed for Zhu after August 31 was to upload the website to the server, a process that probably occupied about 20 minutes. While employed by Zhu, she had completed all the design needed to construct it and had started that process in July. However, because digital photographs of Clinic products had to be taken and inserted in the website together with descriptions and benefits to the patient and because she had to perform other duties, was able to work on the site from time to time. The editing process was time-consuming and various revisions were undertaken before it was ready to be published by uploading it to the server. During her previous employment, Huang had designed a website and carried out promotional activities and was familiar with preparation of brochures and similar material and had utilized software for those purposes. After leaving that employment, she searched for work as an Office Assistant while striving to find work in her engineering profession. When deciding to work for Zhu, she agreed on a monthly salary of \$2,300.00 which was based on an hourly wage of about \$15.00. In her opinion, that wage was fair because she did not require any training or learning on-the-job in view of her marketing experience which included attending various trade shows. Huang had prepared a document titled Work List – Exhibit A-3 – which she had intended to submit to the Minister but decided it was not required once the Minister accepted that work had been performed by her at the Clinic. Huang stated she had been aware on April 1, 2007 that the work which needed to be done would be completed in less than 6 months and she intended to obtain employment as an engineer which she obtained with the City of Chilliwack and later with the Municipality of Delta. After she left Zhu's employ, she was not replaced at the Clinic. She considered this to be normal since the start-up work had been performed and there was no need for a Receptionist/Office Assistant until business volume increased at some point in the future. Huang stated she regarded the work performed by her for Zhu to be substantially the same as she would have performed for an unrelated employer.

[5] Huang was cross-examined by counsel for the Respondent. She confirmed the Clinic is operated by her husband – Zhu - as a sole proprietorship. She recalled the telephone interview with the Rulings Officer – Lisa Amundsen (“Amundsen”) in September, 2007 and had informed her that Zhu had worked part-time for acupuncture clinics prior to April 1 of that year. Huang identified a bundle of documents she transmitted by facsimile to Heidi Thomson - Appeals Officer - on November 23, 2007 which included examples of advertising and promotional material and extracts from a newsletter she had prepared for the Clinic. Huang stated she had earned \$40,000.00 per year at her previous job which she left in late 2005 to

start her own water and waste treatment business by importing specialized equipment from the United States and selling it in Canada, an enterprise similar to that carried on by her previous employer where she had worked for 4 years. Huang stated that when she knew she was pregnant she started looking for employment close to their family home but decided to work for her husband when he opened the Clinic. Huang transmitted copies of her pay cheques – Exhibit R-2 – to Thomson. She repeated her observation that the cheque dated May 4, 2007, should have been dated June 4 but she had not detected the error prior to depositing it on June 6. Huang agreed the work at the Clinic had to be performed personally and that she did not have to record hours. The internet connection was at their residence and she did some work for the Clinic from there. Huang stated she did not participate in the process of obtaining the Clinic business space and that her husband had written and received e-mails with respect to the lease. She denied having informed the Rulings Officer that she was performing services for her husband in December in connection with any business activity. In her assessment, Zhu's written English is better than her own so there was no need for her to become involved in any matters pertaining to the landlord and the desired space. When speaking with the Rulings Officer, she stated she went with Zhu on one occasion to inspect the space and any other inference drawn of other involvement must have been the result of a misunderstanding. Huang confirmed her earlier statement that she did not receive any payment from Zhu until after she started working on April 1, 2007 and did not receive any payment after August 31, 2007. She had attempted to find employment as an engineer and wanted to work enough hours – 600 – to qualify for unemployment benefits based on maternity leave. In 2007, she and Zhu had a 9 year old son and friends cared for him after school until they returned home. Huang acknowledged there was no specific day for her salary to be paid by Zhu. The amount she earned per month was within \$500.00 – after source deductions – of the amount she had earned at her former employment and she was confident she could have worked at an office job for another employer to earn approximately \$2,000.00 per month. In her opinion, the work she performed at the Clinic was important at the initial stage of the business if it were to succeed.

[6] The intervenor – Zhu – did not cross-examine.

[7] The Appellant closed her case.

[8] Zhu testified in English. The interpreter had been booked only for the morning but Zhu informed the Court he wanted to proceed rather than re-schedule a continuation when an interpreter could attend. Zhu was informed that if necessary, his wife – Huang – could interpret from English to Mandarin and Mandarin to English. Zhu stated he came to Canada from China in 1999. He was a qualified

specialist in internal medicine in China but was not permitted to practice in British Columbia. He studied acupuncture and registered in 2001 with the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia (“College”) a successor to the College of Acupuncturists, first established in 1996. Once qualified as an acupuncturist, he worked part-time in various acupuncture clinics. In 2005, he suffered a serious medical problem that was almost fatal and afterwards recuperated for nearly one year. Once he regained his health, he wanted to find a location to open a clinic in White Rock and began searching in various news publications until he found one that appeared to be suitable. He entered into negotiations with Dr. Finch, a dentist, for some adjoining extra space already leased by her from the landlord. In his opinion, it was very important to create the proper image for a new business and he needed someone who could design a website, create promotional materials, handle advertising and act as an Office Assistant. At that time, Huang was looking for employment and Zhu suggested she should work for him and offered a salary of \$2,300.00 per month which she accepted. Zhu stated he did not know how long the job would last. Later, it turned out he could handle all office duties personally without hiring another person. With respect to the lease, Zhu stated he handled all negotiations personally and referred to a bundle of sheets – Exhibit A-4 – comprised of e-mails between himself and Dr. Finch, who was willing to sub-lease part of her office space to him for purposes of the Clinic together with communications with Vicky, a representative of Ocean Park Enterprises Ltd., (“Ocean Park”), the entity managing White Rock Square in which Dr. Finch had her office space. In the course of communicating with Dr. Finch and Vicky, Zhu used “Davy” as his first name rather than Jun. Zhu began corresponding with Dr. Finch by e-mail on January 4, 2007 and stated Huang did not participate in the ongoing process to obtain the sub-lease. His ability to read and write English was better than his capacity to speak it, particularly as at 2007. Zhu stated that prior to April 1, 2007 he did not practice acupuncture from their family home but used that home address to register with the College in 2004 when he paid his annual membership fees and insurance. He graduated from medical school in China in 1984 – at age 20 – and went on to specialize in internal medicine and is continuing his efforts to become registered as a physician in British Columbia. In the interim, he intended to earn a living by practising as an acupuncturist and by offering other related health services and products from the 300-square foot office in White Rock. In his experience, the volume of patients depends on many factors including the type of office presented, the extent of advertising and promotion and other influences such as weather conditions. He did some research into the matter and ascertained that marketing companies charged fees that were beyond his budget and he was aware he needed an Office Assistant during the early stages of his new practice. He opened a bank account for the Clinic and had sole signing authority. Huang did some website work

from their home but worked on the website design using the computer at the office as there was no requirement for an internet connection until the site was ready to be posted to the server. The internet service at their home was registered to the Clinic. Zhu stated he employed Huang because of her skills in advertising and promotion and her knowledge of office procedure and her ability to market the health products offered for sale to patients. With respect to the issue of the construction required to the Clinic space, Zhu referred to the Construction Agreement – Exhibit A-5 – dated March 6, 2007 - which was written in both Mandarin and English since the contractor was Chinese and they communicated in Mandarin. Zhu translated the Chinese characters into English. As a result of his facility in both languages, it was not necessary for Huang to play any role whatsoever in this aspect of the start-up process and only provided her services when the Clinic was open for business on April 1, 2007. Zhu stated his ability to speak English had improved considerably since that date and he is able to deal with patients and to conduct all aspects of his practice in that language.

[9] Zhu was cross-examined by counsel for the Respondent. Zhu stated he had worked part-time since 2003 as an instructor at a Chinese Medicine college. He agreed that he had spoken with Amundsen – Rulings Officer – but denied the suggestion that he told her he had hired Huang in December, 2006 to assist him in his new enterprise. Zhu stated there must have been a misunderstanding as there was nothing for Huang to do at that point since he handled all lease negotiations and dealt directly with the contractor. Once the Clinic opened, he controlled it and made all business decisions. Zhu identified the Questionnaire – Exhibit R-3 – that he completed, signed on October 28, 2007 and returned to the Appeals Officer in which he provided gross sales figures – page 8 – and attached payroll records for Huang. The Clinic website was published in September by Huang from their family residence. Zhu conceded he was inexperienced in terms of establishing a business and formed the opinion later that he should have started to advertise his services earlier than April 1 when the Clinic was opened.

[10] Huang did not cross-examine.

[11] Zhu – intervenor – closed his case.

[12] Amundsen testified she has been employed by Canada Revenue Agency (“CRA”) since 1995 and has served as a Rulings Officer for the past 5 years. In the course of issuing a ruling on the insurability of Huang’s employment with Zhu, on August 31, 2007, she conducted an extensive telephone interview with Huang over the course of about 30 minutes. In Amundsen’s assessment, Huang spoke English

fluently and stated she started working for Zhu in December, 2006 and had met with the contractor, although she and her husband did not receive keys to the business premises until April 1. Amundsen recalled that Huang also disclosed it was necessary for her to deal with the contractor because Zhu's English was not very good. Amundsen stated Huang told her the Clinic website was not published yet but she would complete that task and would not be paid by Zhu for that service. Amundsen stated she formed the clear impression from her discussion with Huang that Zhu was seeing patients in an in-home office at their residence and was also working as an instructor. Amundsen checked the CRA database and ascertained Zhu had reported business revenue from that home address and a business loss had been claimed in a particular taxation year prior to 2007. Amundsen stated a major factor in her ruling was the understanding that Huang had played a role in locating the leased premises and negotiating the lease but had not been remunerated for her services until after April 1, 2007. Amundsen recalled Huang explained the work she had performed with respect to the brochures, newsletter and contacts with the Chamber of Commerce. Amundsen stated that during the telephone conversations with Huang and Zhu, she made notes on her computer.

[13] Amundsen was cross-examined by Huang and reiterated she had not misunderstood the nature of their conversation.

[14] Amundsen was cross-examined by Zhu. She stated she had reviewed her typed notes of the telephone interview with Zhu on three occasions before testifying and formed the opinion he understood the subject matter and the import of the questions posed by her and had answered them accordingly.

[15] Zhu testified in rebuttal that he had filed income tax returns showing revenue received in the course of teaching at a college - as an independent contractor - and by providing other instruction and training. For that purpose, he used their home address as his business address but none of that income had been derived from treating patients.

[16] The position of the Appellant was that she had done the necessary important work to enable the business to get started and that the duration was reasonable having regard to the circumstances. In her submission, the salary of about \$15.00 per hour was reasonable bearing in mind her previous experience with marketing, advertising, trade fairs and website design and her familiarity with office procedure. Although she wanted to work enough to qualify for unemployment benefits based on maternity leave, she submitted she could have done so by working for another employer while waiting to obtain permanent employment as an engineer. She submitted it was not

unusual for an employee to use a private computer for the benefit of an employer and that the website had taken more time to complete because she was not able to work at it on a steady basis because of the need to carry out other tasks pertaining mainly to marketing the Clinic business.

[17] Zhu – as intervenor – submitted it was clear on the evidence Huang had not been providing any business services to him until April 1, 2007 and that she had done the work in return for a reasonable wage. He also submitted that an individual has the right to choose employment based on considerations other than money. He submitted the evidence established he did not have any prior business experience and merely made a mistake when writing the cheque dated May 4, 2007 instead of inserting the correct date of June 7.

[18] Counsel for the Respondent submitted the evidence of Amundsen was clear that Huang had discussed the nature of the services provided to Zhu – on a voluntary basis – prior to April 1, 2007, beginning in December, 2006 concerning the lease. Counsel submitted it was not reasonable for Huang to have accepted lower-paying employment with Zhu except that she was pregnant and time was running out for her to work enough hours to satisfy the threshold for maternity leave entitlements pursuant to the *Act*. Counsel pointed to the evidence indicating Huang had not been paid on a consistent basis and had published the website at some point in September even though her last day of employment was August 31. In counsel's assessment of the overall evidence, Huang had not performed enough work to justify the salary paid during that 5-month period, particularly in light of the minimal revenue earned by Zhu in operating the Clinic. Based on the evidence, counsel submitted the decision of the Minister was correct after having considered the indicia set forth in the relevant provision of the *Act*.

[19] The relevant provisions of the *Act* are paragraphs 5(1)(a) and 5(2)(i) and subsection 5(3) which read as follows:

5. (1) Subject to subsection (2), insurable employment is
 - (a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;
 - ...
- (2) Insurable employment does not include
 - ...

(i) employment if the employer and employee are not dealing with each other at arm's length.

(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.

[20] In *Quigley Electric Ltd. v. Canada (Minister of National Revenue – M.N.R.)*, [2003] F.C.J. No. 1789; 2003 FCA 461, the Federal Court of Appeal heard an application for judicial review of a decision issued by a judge of the Tax Court of Canada confirming the decision of the Minister that the Appellant's employment with a related employer was not insurable. Malone J.A., writing for the Court - at paragraph 7 and following – stated:

7 A legal error of law is also said to have been committed when the Judge failed to apply the legal test outlined by this Court in *Légaré v. Canada (Minister of National Revenue)* (1999) 246 N.R. 176 (F.C.A.) and *Perusse v. Canada* (2000) 261 N.R. 150 (F.C.A.). That test is whether, considering all of the evidence, the Minister's decision was reasonable.

8 Specifically, it is argued that the Judge circumscribed the scope of his review function when, after finding that the Minister clearly did not have all the facts before him he stated:

... That is not to say that on reviewing new information, I am then precluded from finding that the Minister did not have, after all, sufficient information to exercise his mandate as he did without my interference. This would simply mean that I have found that the new factors not considered were not relevant.

9 According to the applicant, the proper question was not whether the Minister had sufficient information to make a decision, notwithstanding the evidence of Mrs. Quigley; rather the question was whether, considering all the evidence, the Minister's decision still seemed reasonable. Instead, the applicant asserts that the

Judge carried out an irrelevant examination of whether Mrs. Quigley was a "principal" or a "subordinate" of Quigley Electric Ltd.

10 In my analysis, the Judge correctly followed the approach advanced by this Court in *Canada (A.G.) v. Jencan Ltd.* [1998] 1 F.C. 187 (C.A.), namely, that the Minister's exercise of discretion under paragraph 5(3)(b) can only be interfered with if she acted in bad faith, failed to take into account all relevant circumstances or took into account an irrelevant factor.

11 Bad faith on the part of the Minister is not an issue in this case.

12 While the reasons for decision are lengthy, it is clear that the Judge was analysing the oral evidence of Jean Quigley in conjunction with paragraph 5(3)(b); namely, whether having regard to all of 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. After reviewing other authorities in the Tax Court, the Judge rejected any suggestion that Mrs. Quigley could be termed a principal of Quigley Electric Ltd. and in turn dismissed her examples of special treatment within the company as arising from her personal relationship with the controlling shareholder and not to her employment contract.

13 He concluded by indicating that the factors considered by the Minister, as set out earlier in his reasons, were the relevant factors for his consideration. That, in the context of this case, can only mean that the Minister's decision was reasonable considering all of the evidence. I can discern no legal error in this analysis or conclusion.

14 I would dismiss the application for judicial review with costs.

[21] In the case of *Porter v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 266; 2005 TCC 364, Campbell, J. reviewed the comments of Justice Archambault in *Bélanger v. Canada (Minister of National Revenue - M.N.R.)*, 2005 CarswellNat 3971; 2005 TCC 36 and those of Justice Bowie in *Birkland v. Canada (Minister of National Revenue - M.N.R.)*, [2005] T.C.J. No. 195; 2005 TCC 291 wherein both discussed the function of this Court in the context of the decision of the Federal Court of Appeal in *Légaré, supra*, and subsequent decisions of that Court. At paragraphs 12 and 13 of her Judgment, Justice Campbell stated:

12 The Tax Court's mandate, in Employment Insurance cases as set out in the cases of *Légaré* and *Pérusse*, was recently reaffirmed by Letourneau J. in *Livreur Plus Inc. v. Canada*, [2004] F.C.J. No. 267 at paragraphs 12, 13 and 14:

12. As already mentioned, the Minister assumed in support of his decision the existence of a number of facts obtained by inquiry from workers and the business he considered to be the employer. Those facts are taken as proven. It is for the person objecting to the Minister's decision to refute them.

13. The function of a Tax Court of Canada judge hearing an appeal from the Minister's decision is to verify the existence and accuracy of those facts and the assessment of them by the Minister or his officials, and after doing so, to decide in light of that whether the Minister's decision still seems to be reasonable: *Légaré v. Canada (Minister of National Revenue -- M.N.R.)*, [1999] F.C.J. No. 878; *Pérusse v. Canada (Minister of National Revenue -- M.N.R.)*, [2000] F.C.J. No. 310; *Massignani v. Canada (Minister of National Revenue)*, 2003 FCA 172; *Bélanger v. Canada (Minister of National Revenue)*, 2003 FCA 455. In fact, certain material facts relied on by the Minister may be refuted, or the view taken of them may not stand up to judicial review, so that because of their importance the apparent reasonableness of the Minister's decision will be completely destroyed or seriously undermined.

14. In exercising this function the judge must accord the Minister a certain measure of deference, as to the initial assessment, and cannot simply substitute his own opinion for that of the Minister unless there are new facts or evidence that the known facts were misunderstood or wrongly assessed: *Pérusse v. Canada (Minister of National Revenue - M.N.R.) supra*, paragraph 15.

13 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.

[22] I turn now to the facts in the within appeal. It is apparent from the assumptions set forth in the Reply and from the testimony of Amundsen – Rulings Officer – that the Minister's decision relied heavily on the following material:

1. that prior to April 1, 2007 Zhu operated his business of medical services, acupuncture, Chinese herbs, foot reflexology, Chinese massage and teaching, from the principal residence occupied by himself and Huang. (See subparagraph 6(k) of the Reply.)

2. that the Appellant was hired in December, 2006 to obtain a new business location and to obtain a lease for that location. (See subparagraph 6(q) of the Reply.)
3. that the Appellant dealt with the contractor after the lease was signed in order to coordinate the leasehold improvements for the new business location because her English was better than Zhu's. (See subparagraph 6 (r) of the Reply.)
4. that the Appellant received no remuneration from Zhu between December, 2006 and April 1, 2007 even though she was providing services to his business. (See subparagraph 6(gg) of the Reply.)
5. that Zhu did not fully pay the Appellant for the services she performed as an Office Assistant. (See subparagraph 6(ii) of the Reply.)
6. that the Appellant received remuneration for the month of May, 2007, one month early and did not cash the cheque until June 6, 2007. (See subparagraph 6(ll) of the Reply.)

[23] I will review the relevant portions of the evidence relating to the matters set out above.

[24] The evidence of Amundsen – Rulings Officer – was that she understood clearly from speaking to Huang and subsequently to Zhu – by telephone – that Huang was the one who found the business location and negotiated the lease and dealt with the contractor. She also understood that Zhu had been operating his business from their principal residence in Surrey and examined his income tax returns wherein she ascertained he reported business income from that address and certain expenses which had resulted in a loss.

[25] Huang testified she did not participate in any dealings with Dr. Finch regarding the sub-lease of space to Zhu and she did not communicate with the agent of the landlord – Ocean Park – with respect to that matter. She also stated she was not involved with the contractor, an individual who spoke Mandarin and that Zhu negotiated with him and – probably - conducted all necessary business in that language. Zhu testified he had been searching for space in White Rock and when he located an appropriate premises began communicating – mainly by e-mail – with Dr. Finch and the representative – Vicky – of Ocean Park, as of January 4, 2007, in order to obtain the lease and permission to undertake leasehold improvements. The contract – Exhibit A-5 – with Royal Globe Construction Ltd. – for the renovations was dated

March 6, 2007, and it is reasonable to assume the sub-lease of the premises from Dr. Finch must have been signed and the approval of Ocean Park for the construction must have been obtained prior to that date. A perusal of the e-mails indicates that Zhu was capable of expressing his thoughts satisfactorily although the grammar and structure is indicative of someone for whom English is a second language. The written material prepared by Huang which was presented in the form of exhibits – including Exhibit A-1 - indicates her ability to write English was not markedly superior to that of Zhu although her spoken English was much better than his at that time.

[26] I accept the version of events as related by both Huang and Zhu concerning this aspect of the proceeding. It did not make any sense for Huang to be fixed with the responsibility of finding the space and negotiating the lease and hiring a contractor to make the necessary improvements when Zhu was more capable than her of carrying out those tasks particularly since there were no language impediments that would defeat his goal. As an acupuncturist, he was aware of the type of space needed to pursue his goal of opening a practice. I also accept the explanation by Zhu that he was earning revenue as an instructor at a college and/or earning money by working part-time at acupuncture clinics prior to 2007 and had reported that revenue as business income while using their principal residence as a business address because it was the one he had used to register with the College. I accept his evidence that he did not carry on an acupuncture practice from the residential location and that he decided to open a practice in White Rock and undertook steps to achieve that end, beginning in December, 2006. I am satisfied Huang did not perform any work for Zhu's business until the Clinic opened on April 1, 2007.

[27] When Zhu elected to testify in English rather than having the appeal rescheduled to obtain the services of a Mandarin-speaking interpreter, it was extremely difficult to understand him even though he was speaking to me directly from the witness box. Both of us were aware of the context and I was able to observe him intently. The documents were readily accessible in order to understand the points he was making in the course of his testimony. In addition, counsel for the Respondent was helpful in referring Zhu to certain exhibits or to particular parts within a document dealing with dates, locations, et cetera. In my assessment of the evidence, it would have been nearly impossible for Amundsen to have obtained an unambiguous, clear understanding from Zhu of the relevant circumstances of the employment situation between himself and Huang by speaking with him via telephone on August 31, 2007. Zhu spoke very quickly and had to start over again on several occasions in order to get his thoughts arranged in an orderly sequence so he could express them orally. He had a tendency to speak very quickly and it was

difficult – sometimes – to understand the import of his testimony without taking the time to have him repeat it in segments in order to be certain of the meaning. His ability to speak English is much better in November, 2008 than when he spoke with Amundsen because he has been dealing with patients in English as well as in Mandarin since he opened the Clinic. Because much of his medical studies throughout his career in China and thereafter were in English, he did not have difficulty reading that language and could write sufficiently well to express his thoughts in matters respecting business, banking or normal daily transactions and interactions with English-speaking people.

[28] I appreciate that it is cost-effective for Ruling Officers and Appeals Officers to conduct interviews by telephone. However, I suggest that when the interviewees have a maternal language other than English and it is apparent they are not fluent in discussing matters surrounding their employment that a CRA officer who speaks and understands that particular language become involved either as the interviewer or as interpreter. Even during Huang's testimony, it was necessary to interrupt and ask her to clarify certain matters particularly when dealing with more than one subject when describing a sequence of events. I note Amundsen did not present her typed notes of the conversations with Huang and Zhu even though she testified she had referred to them on three different occasions prior to testifying. Also, the statements of income and expense filed by Zhu with his income tax returns filed in which he reported business income were not available for examination yet Amundsen stated this was an important factor in deciding Zhu had operated an acupuncture business prior to opening the Clinic at White Rock on April 1, 2007 and that Huang was working for him without pay during this earlier period.

[29] I am satisfied on the evidence that Huang was fully paid for her services by Zhu. Both testified the May 4, 2007 cheque was dated incorrectly and that it should have been dated June 4, 2007. It was negotiated on June 6 and the only anomaly was with respect to the July pay cheque which was not issued until August 13 and negotiated 5 days later. Therefore, Huang did not receive an advance on her pay and 4 of the 5 cheques were issued in a timely fashion and negotiated by Huang.

[30] To intervene or not to intervene, that is the question; whether 'tis propitious to let stand the decision of the Minister, clothed in presumptive righteousness and shielded by the deference commanded to be accorded by those sitting in High Places, or to declare it fit for demolition because of egregious damage done to pillars and foundation and thereafter to commence afresh the inquiry demanded by statute.

[31] In *Birkland, supra*, Justice Bowie provided a summary of the state of the jurisprudence and commented as follows at the end of paragraph 4 of his Judgment:

4. ... 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.

[32] It is apparent the Minister proceeded incorrectly on the basis Huang had provided various services to Zhu between December, 2006 and April 1, 2007 for which she was not paid and assumed Zhu had been carrying on the same type of business from their residence that he conducted later at the Clinic in White Rock. It is also clear this misunderstanding was the most important factor in arriving at the decision that Huang's employment was not insurable. The additional matter of the apparent pay advance after being employed only one month also played a part in the determination as did the assumption Huang was not fully recompensed for her services. In view of those errors, the decision of the Minister is no longer reasonable. I must intervene and will analyze the evidence to decide whether the Appellant was in insurable employment with Zhu during the relevant period. It is helpful to re-state the wording of paragraph 5(3)(b):

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.

Remuneration:

[33] The Appellant was paid the sum of \$2,300.00 per month which was based on the approximate rate of \$15.00 per hour for 40 hours a week for 4.3 weeks each month. In view of Huang's experience in performing office work together with her ability to create a website, conduct a local advertising and marketing campaign and otherwise handle all aspects of promotion for a new enterprise in an area with existing competition, that rate of remuneration was reasonable. She did not receive vacation pay and it is probable neither party addressed this aspect of employment, perhaps because her pay was in the form of a monthly salary.

Terms and conditions:

[34] Some of the work was performed off-site, including at the residence of Huang and Zhu where there was an internet connection in the name of the Clinic. She performed certain services as required at the Clinic office such as answering the phone, booking appointments and designing advertising for insertion in various publications. Other work was done away from the office when Huang attended meetings to promote the Clinic and to attend at Seniors' Centres, libraries, churches, community events, local service clubs and summer beach displays in order to make the public aware of Zhu's new Clinic. As assumed by the Minister, she also did banking, provided interpretation when required, published a newsletter and ran errands. The hours of work were consistent with those required by the operation of the new Clinic.

Duration:

[35] Although there was no specific period established at the outset of Huang's employment, it was obvious she would not be working past September as she was due to deliver a child during that month. It was also apparent to both that the marketing, advertising and promotion to get the Clinic up and running – while extremely important – would not require someone to perform those specific services on an ongoing basis and the work performed by an Office Assistant would depend on the volume of patients attending the Clinic. An alternative would have been for Zhu to retain the services of a marketing and advertising agency but he rejected that because of the expense associated with that service coupled with the need to also hire someone to perform the services of an Office Assistant during the establishment of his new business for an unspecified period.

Nature and importance of the work performed:

[36] From the perspective of Zhu who had not been involved earlier in the operation of his own acupuncture and TCM business, it was important to make himself known in the White Rock and surrounding areas, particularly since there were 9 or 10 others offering similar services. He did not have any experience in designing and placing advertising in appropriate publications nor was he capable at that point of communicating sufficiently in English with members of the general public, business organizations, service groups and the advertising media to handle his own promotions. He knew Huang was capable of designing a website and could discuss with her the properties of the various herbs and other products to be displayed on said site or as the subject of comment in advertising and newsletters. The ability to speak, write and understand Mandarin was essential to that task. Huang had the ability to display the products in the Clinic and to ensure the office was capable of functioning properly during the first few months of operation. As it turned out, Zhu did not have to hire another employee because he was able to handle the office work himself even though the volume of patients increased. The Minister relied on the fact (subparagraph 6(nn) of the Reply) that the gross business income of the Clinic increased after the Appellant started her maternity leave. The relevant numbers are set forth in the table below subparagraph 6(o) of the Reply and indicate the gross sales during the entire period Huang was employed was only \$4,054.91. The sales in September and October were \$3,766.18 and \$3,814.04, respectively. The Clinic continues to operate and one could draw the logical inference that the marketing strategies employed by Huang were successful. It is normal for any new business or professional practice to start out slowly and – often - the costs of operation will exceed revenue for the first year or more. In my view of the evidence, the entire body of work performed by Huang was important to the establishment of that new Clinic if it was to be accorded a reasonable opportunity to succeed.

[37] I have taken into account that Huang published the Clinic website to the server sometime in September after she had ceased to work for Zhu. Huang testified this final part of the process occupied about 20 to 30 minutes of her time using the Clinic internet connection from their residence. She was not paid for this work but it is an integral part of the earlier work for which she was remunerated as part of her monthly salary. Huang testified the website design occupied a greater amount of time because she was performing so many other duties and had to take the digital photographs and write explanatory copy whenever she was not occupied otherwise.

[38] In the case of *Docherty v. Minister of National Revenue*, [2000] T.C.J. No. 690, I commented – at paragraph 25 as follows:

[25] The template to be utilized in making a comparison with arm's length working relationships does not require a perfect match. That is recognized within the language of the legislation because it refers to a "substantially similar contract of employment". Any time the parties are related to each other within the meaning of the relevant legislation, there will be idiosyncrasies arising from the working relationship, especially if the spouse is the sole employee or perhaps a member of a small staff. However, the object is not to disqualify these people from participating in the national employment insurance scheme provided certain conditions have been met. To do so without valid reasons is inequitable and contrary to the intent of the legislation.

[39] Sometimes it is relevant when deciding these cases based on a specific set of facts to compare it to the circumstances of employment which were the subject of other appeals. For example, in the within appeal, the Appellant did not perform services outside the period of employment other than to post the website to a server. In the case of *Hatami v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No. 268; 2007 TCC 428, Justice Miller found the employment situation was akin to that of a wife who helped her husband to get a business up and running by working sporadically without pay and agreeing not to cash pay cheques until the cash flow of the business had improved. Justice Miller had concerns about the duration of the work – 2 months – particularly in light of her previous employment – 5 months – with her husband, both times when she was pregnant. Justice Miller also discounted the significance of timesheets submitted by the Appellant in that case as having been created after the fact as "window-dressing."

[40] In the case of *Forget v. Canada (Minister of National Revenue – M.N.R.)*, [2003] T.C.J. No. 575; 2003 TCC 733, Campbell, J. found that the Appellant waited to receive her pay until the company could afford to pay and had done so only because she was the spouse of her employer.

[41] In *Samson v. Canada (Minister of National Revenue – M.N.R.)*, [2005] T.C.J. No. 290; 2005 TCC 383, Little, J. dealt with an appeal wherein the Appellant had made 135 bank deposits and prepared and signed a total of 623 cheques during a period she was not on the payor's payroll and had signed a number of invoices. In Justice Little's view, that work was clear evidence that person who was at arm's length with the payor would not have performed activities of that "magnitude and nature" and concluded the Minister was correct in deciding the employment of that Appellant was not insurable.

[42] Taking into account the whole of the evidence and applying the jurisprudence to the facts as determined in these Reasons, the appeal is hereby allowed and the decision of the Minister is varied to find that:

Jin Hua Huang was employed in insurable employment with Jun Hua Zhu from April 1, 2007 to August 31, 2007.

Signed at Sidney, British Columbia, this 26th day of January, 2009.

“D.W. Rowe”

Rowe D.J.

CITATION: 2009TCC35

COURT FILE NO.: 2008-562(EI)

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