

Docket: 2007-3133(EI)

BETWEEN:

HALLY ROSE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on November 25, 2008 at Regina, Saskatchewan

Before: The Honourable Justice G. A. Sheridan

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Brooke Sittler

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**JUDGMENT**

In accordance with the attached Reasons for Judgment, the appeal is allowed on the basis that the Appellant's employment for the period May 1 to November 27, 2006 was not "excluded employment" under paragraph 5(3)(b) of the *Employment Insurance Act*.

Signed at Ottawa, Canada, this 9th day of April, 2009.

"G. A. Sheridan"

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Sheridan, J.

Citation: 2009TCC185  
Date: 20090409  
Docket: 2007-3133(EI)

BETWEEN:

HALLY ROSE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Sheridan, J.

[1] The Appellant, Hally Rose, is appealing a decision of the Minister of National Revenue denying him employment insurance benefits on that basis that his employment with Hally's Framing Inc. during the period May 1 to November 27, 2006 was "excluded employment" under the *Employment Insurance Act*.

[2] The applicable legislative provisions are paragraphs 5(2)(i) and 5(3)(b) of the *Employment Insurance Act* :

(2) **Excluded employment** – Insurable employment does not include

...

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

(3) **Arm's length dealing** – For the purposes of paragraph (2)(i),

...

(b) if the employer is, within the meaning of that Act, related to the employee, they are deemed to deal with each other at arm's length if the Minister of National Revenue is satisfied that, having regard to all the circumstances of the employment, including the remuneration paid, the terms and conditions, the duration and the nature and importance of the work

performed, it is reasonable to conclude that they would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length.

[3] As counsel for the Respondent quite correctly submitted, the case law is clear that the legislation gives the Minister the discretion to decide whether the employment is excluded. In doing so, he must take into account all the circumstances of the employment including its remuneration, terms and conditions, duration and the nature and importance to the work done. Absent any new evidence, it is not for the Tax Court of Canada to substitute its own decision for that of the Minister<sup>1</sup>.

[4] The assumptions upon which the Minister relied in making his decision are set out in paragraph 7 of the Reply to the Notice of Appeal:

- (a) the Payor operated a framing business (hereinafter "Business");
- (b) the Business was somewhat seasonal with winter being the slow season;
- (c) the major shareholder of the Payor was Valerie Rose (hereinafter "the Shareholder");
- (d) the Appellant was the husband of the Shareholder;
- (e) the Appellant had previously owned the [sic] operated the Business, however, he went bankrupt and the Shareholder took ownership of the Business;
- (f) the Appellant managed almost all aspects of the Business;
- (g) the Appellant's duties included bidding on jobs, hiring crews, dealing with contractors, coordinating work crews and jobs, overseeing job sites, ordering tools and shop supplies, arranging tool repairs, collecting accounts and advising the Payor of billing amounts;
- (h) the Appellant was employed under a verbal agreement;
- (i) the Appellant earned a set salary of \$1,600 bi-weekly;
- (j) the Appellant [sic] salary was based on \$20 per hour for 80 hours bi-weekly;
- (k) the Payor's arm's length employees were paid by the hour;

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<sup>1</sup> *Pérusse v. Canada (Minister of National Revenue – M.N.R.)*, [2000] F.C.J. No. 310 (Q.L.) (F.C.A.); *Légaré v. Minister of National Revenue*, 246 N.R. 176 (F.C.A.).

- (l) the Appellant set the Payor's employees' wage rates;
- (m) the Appellant's wage rate was reasonable;
- (n) the Payor paid the Appellant on a regular basis;
- (o) the Appellant did not receive over-time pay;
- (p) the Payor's arm's length employees received over-time pay;
- (q) the Appellant normally worked 8:00AM to 5:00PM, Monday to Friday;
- (r) at times during the busy season (summer/fall), the Appellant worked seven days a week and/or worked longer hours per day;
- (s) the Appellant did not keep a record of his hours worked;
- (t) the Payor's arm's length employees kept a record of their hours worked;
- (u) the Appellant was not supervised or instructed;
- (v) the Appellant had many years of experience;
- (w) the Shareholder did not have a full background in the Business;
- (x) the Appellant did not need the Payor's approval for bidding amounts;
- (y) the Appellant did not have access to the Payor's bank account;
- (z) the Appellant did not sign a personal guarantee for the Payor;
- (aa) the Payor provided the Appellant with a company vehicle;
- (bb) the Appellant also used the company vehicle for personal use;
- (cc) the Appellant was employed under a contract of service by the Payor;
- (dd) the Appellant completed an "Application for Benefits" which included the following:

Salary	\$1,600 semi-monthly
Normal hours	8 hours per day, 40 hours per week
Normal days	5 days per week
- (ee) the Payor completed a "Record of Employment" for the Appellant which included the following:

Pay period	semi-monthly
First day worked	May 1, 2006
Last day worked	November 1, 2006
Occupation	site supervisor
Insurable earnings	\$16,000

(ff) the Payor issued T4s to the Appellant which included the following income:

2005	\$11,341
2006	\$21,061

(gg) The Appellant declared the following T4 earnings on his tax returns:

2005	\$ 6,264
2006	\$21,061

(hh) The Appellant ran the Business and made the business decisions;

(ii) the Business carried the Appellant's name;

(jj) the terms and conditions of the Appellant's employment with the Payor were not similar to an arm's length relationship;

(kk) the Appellant was laid-off by the Payor but the Payor continued to operate a crew;

(ll) it was unreasonable for the Appellant to be laid-off while the Payor still operated a crew;

(mm) the Appellant continued to provide services for the Payor after he was laid-off;

(nn) the Appellant [*sic*] duration of employment with the Payor was unreasonable, and

(oo) the Minister considered all of the relevant facts that were made available to the Minister.

[5] The Appellant has the onus of showing that it was not reasonable for the Minister to conclude that he was engaged in excluded employment with Hally's Framing Inc.

[6] The Appellant, the only witness to testify, was credible in his evidence. His testimony brought to light new information in respect of certain assumptions taken

into account by the Minister, specifically (l); (o), (p) and (r); (aa) and (bb); and (kk), (ll) and (mm). In respect of these assumptions, I accept his evidence that:

1. in respect of (l), the arm's length employees' salaries were set by Hally's Framing Inc. in accordance with the standards of the construction industry, not by the Appellant personally;
2. in respect of (o), (p) and (r), when he worked more than his regular hours, he received time off in lieu of overtime pay; this option was also available to arm's length employees but they, for reasons of their own, generally preferred to be paid;
3. in respect of (aa) and (bb), although the Appellant had the use of a company vehicle, so, too, did the foreman, an arm's length employee who held a management-like position equivalent to his own; and
4. in respect of (ll) and (mm), Hally's Framing Inc. continued to operate a crew even after the Appellant was laid off because by November 2006 the construction projects were well underway. At that time, the main work being done by the company was framing. Given that focus, the Appellant's managerial and bidding services were not needed; his duties were either no longer necessary or could be easily handled by the foreman and Val. As the Appellant testified, "Val was a smart gal"; as time went on, she relied less on his assistance. And because of his knee injury in March 2006, he could not just switch roles and join the framing crew. As for the Minister's assumption that he continued to provide services to Hally's Framing Inc. after he was laid off, I accept as reasonable the Appellant's explanation that, as the husband of the directing mind of a small company resident in the same home where the business was located, he would have been hard-pressed never to discuss any aspect of the running of the business with Val. That is not the same, however, as continuing to provide the duties set out in paragraph 7(g) of the Reply to the Notice of Appeal. It was not until July 2007 when, because of the demand created by the construction boom in Regina, he resumed his prior duties with the company.

[7] The Minister based his decision on the answers supplied in a standard form questionnaire and a telephone interview. The Court's role in reviewing the Minister's decision was explained by the Federal Court of Appeal in *Pérusse*<sup>2</sup>:

... The judge's function is to investigate all the facts with the parties and witnesses called to testify under oath for the first time and to consider whether the Minister's conclusion, in this new light, still seems "reasonable" (the word used by Parliament). The Act requires the judge to show some deference towards the Minister's initial assessment and, as I was saying, directs him not simply to substitute his own opinion for that of the Minister when there are no new facts and there is nothing to indicate that the known facts were misunderstood. However, simply referring to the Minister's discretion is misleading.

[8] Having had the benefit of hearing the Appellant's evidence at the hearing, I am satisfied that viewed in this new light, the Minister's decision was not reasonable. For the reasons set out above, the appeal is allowed on the basis that the Appellant's employment for the period May 1 to November 27, 2006 was not "excluded employment" under paragraph 5(3)(b) of the *Employment Insurance Act*.

Signed at Ottawa, Canada, this 9th day of April, 2009.

"G. A. Sheridan"

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Sheridan, J.

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<sup>2</sup> Above, at paragraph 15.

CITATION: 2009TCC185  
COURT FILE NO.: 2007-3133(EI)  
STYLE OF CAUSE: HALLY ROSE AND THE MINISTER OF NATIONAL REVENUE  
PLACE OF HEARING: Regina, Saskatchewan  
DATE OF HEARING: November 25, 2008  
REASONS FOR JUDGMENT BY: The Honourable Justice G. A. Sheridan  
DATE OF JUDGMENT: April 9, 2009

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Brooke Sittler

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

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