

Dockets: 2008-3139(EI)  
2008-3140(CPP)

BETWEEN:

ANDREW WYSEMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LAURA RUIZ-WYSEMAN,

Intervenor.

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Appeal heard on October 7, 2009 at London, Ontario

By: The Honourable Justice Judith Woods

Appearances:

For the Appellant:                      The Appellant himself

Counsel for the Respondent:        Julian Malone

Agent for the Intervenor:            Andrew Wyseman

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**JUDGMENT**

The appeal with respect to a decision of the Minister of National Revenue under the *Employment Insurance Act* that Laura Ruiz-Wyseman was not engaged in insurable employment with the appellant for the period from January 1, 2004 to December 7, 2007 is dismissed, and the decision is confirmed.

The appeal with respect to a decision of the Minister of National Revenue under the *Canada Pension Plan* that Laura Ruiz-Wyseman was engaged in pensionable employment with the appellant for the period from January 1, 2004 to December 7, 2007 is allowed, and the decision is vacated.

Each party shall bear their own costs.

Signed at Ottawa, Canada this 14<sup>th</sup> of October 2009.

“J. M. Woods”

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Woods J.

Citation: 2009 TCC 512  
Date: 20091014  
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2008-3140(CPP)

BETWEEN:

ANDREW WYSEMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent,

and

LAURA RUIZ-WYSEMAN,

Intervenor.

### **REASONS FOR JUDGMENT**

#### **Woods J.**

[1] This is an appeal in respect of decisions made by the Minister of National Revenue under the *Employment Insurance Act* and the *Canada Pension Plan* for the period from January 1, 2004 to December 7, 2007.

[2] At the beginning of the hearing, the appellant withdrew the appeal with respect to the decision under *Employment Insurance Act*, with the intervenor's consent. It is not necessary, then, that I consider this matter further. This part of the appeal will be dismissed and the decision of the Minister will be confirmed.

[3] The remaining issue concerns a determination made under the *Canada Pension Plan* that Laura Ruiz-Wyseman, the appellant's spouse, was engaged in pensionable employment.

[4] Mr. Wyseman operates a financial planning business as a sole proprietor. Mrs. Wyseman was engaged to provide certain specified administrative services in connection with the business in the relevant period.

[5] The question to be determined is whether Mrs. Wyseman was engaged as an employee or an independent contractor. Mr. and Mrs. Wyseman maintain that she was an independent contractor. The respondent submits that the relationship was one of employment.

[6] The essential question is whether Mrs. Wyseman was engaged in business on her own.

[7] In prior judicial decisions, courts have recognized several factors as being relevant to this determination. Included in these are the tests of control, tools, profit and loss, integration, and the intention of the parties.

[8] As for the factor of intention, it is relevant in this case to consider a written agreement that the parties implemented to document the arrangement. It does not state that Mrs. Wyseman is intended to be an independent contractor, but the terms of the agreement corroborate the Wysemans' testimony that this was their intent. Overall, the evidence is relatively clear that the intent was that Mrs. Wyseman be an independent contractor and not an employee.

[9] That is not the end of the matter, however. The question remains whether the facts are consistent with this intention: *Royal Winnipeg Ballet v. MNR*, 2006 FCA 87, 2006 DTC 6323, para. 64. It is necessary, therefore, to consider the other factors listed above.

[10] Based on the evidence presented, I am satisfied that the facts are, on balance, consistent with an independent contractor relationship.

[11] A significant factor is that Mrs. Wyseman had complete freedom to determine when to perform the administrative duties. The tasks given had deadlines assigned, but the work could be done at any time provided that the deadlines were met. The work was part time and a sideline for Mrs. Wyseman. She had regular employment elsewhere.

[12] A second factor is that Mrs. Wyseman's duties were limited. Her duties were task specific – filing once a month, preparing forms for clients to sign, and arranging client events. Further, Mrs. Wyseman generally worked from home and accordingly

she was not available at Mr. Wyseman's office to handle a number of general tasks that administrative assistants traditionally take care of, such as answering phones and handling general correspondence.

[13] Another factor is that Mrs. Wyseman was paid a fixed annual amount, which would not vary depending on the time that it took to complete the tasks.

[14] In my opinion, the evidence presented was sufficient to establish on a balance of probabilities that Mrs. Wyseman was engaged as an independent contractor.

[15] Before concluding, I would briefly mention that a number of the assumptions made by the Minister in making his decision were demolished at the hearing. In particular, I would mention the following:

- 10(g) *The Worker could not refuse work from the Appellant.* Based on the written contract, I would conclude that Mrs. Wyseman could refuse work if it was outside the tasks listed in the agreement.
- 10(j) *The appellant made office space available to the Worker to perform her duties.* The office space regularly used was in the home. Mrs. Wyseman did not have separate office space specifically for her use at her husband's place of business.
- 10(m) *The Worker was required to report to the Appellant when documents were to be picked up or dropped off.* Based on the limited evidence presented, I have concluded that Mrs. Wyseman did not report to her husband when work was completed. She did provide the completed work to her husband, however.
- 10(n) *The Worker was required to obtain approval from the Appellant prior to taking certain actions.* There was very little evidence presented that would suggest that Mr. Wyseman's approval was routinely required to perform the tasks assigned.
- 10(o) *The Worker received written instructions from the Appellant on how to complete the forms and documents.* Based on the evidence, the instructions provided to Mrs. Wyseman were quite limited.

- 10(x) *The Appellant provided all the required supplies, materials, computer, phone, fax machine, scanner and photocopier, at no cost to the Worker. I am satisfied that the equipment and supplies used by Mrs. Wyseman were paid for using the Wysemans' joint bank account.*
- 10(cc) *The rate of pay was based on the number of hours required to complete the work. Although the estimated time to complete the work was used to determine the annual contract fee, the pay was not directly based on hours.*
- 10(ii) *The Worker was hired for an indefinite period of time. The written agreement provides for an annual engagement which can be renewed.*

[16] For the reasons above, the appeal with respect to the decision of the Minister of National Revenue made under the *Canada Pension Plan* will be allowed, and the decision that Mrs. Wyseman was engaged in pensionable employment will be vacated.

[17] Each party shall bear their own costs.

Signed at Ottawa, Canada this 14<sup>th</sup> October 2009.

“J. M. Woods”

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Woods J.

CITATION: 2009 TCC 512

COURT FILE NOs.: 2008-3139(EI)  
2008-3140(CPP)

STYLE OF CAUSE: ANDREW WYSEMAN and THE  
MINISTER OF NATIONAL REVENUE and  
LAURA RUIZ-WYSEMAN

PLACE OF HEARING: London, Ontario

DATE OF HEARING: October 7, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice J. M. Woods

DATE OF JUDGMENT: October 14, 2009

APPEARANCES:

For the Appellant: The Appellant himself

Counsel for the Respondent: Julian Malone

Agent for the Intervenor: Andrew Wyseman

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

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