

Docket: 2012-3722(EI)

BETWEEN:

JAGIR K. KHAILA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on common evidence with *B.B.K. Contracting Ltd. v M.N.R.*  
(2012-3778(EI)) on March 28 and November 4, 2013  
at Vancouver, British Columbia

By: The Honourable Justice Judith M. Woods

Appearances:

Agent for the Appellant: Gurdeep Khaila

Counsel for the Respondent: Amandeep K. Sandhu

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**JUDGMENT**

Upon appeal with respect to a decision of the respondent that the appellant was not engaged in insurable employment with B.B.K. Contracting Ltd. for the period from April 18, 2010 to September 10, 2010, the appeal is dismissed and the decision of the respondent is confirmed.

Signed at Toronto, Ontario this 22nd day of November 2013.

“J. M. Woods”

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Woods J.

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(2012-3722(EI)) on March 28 and November 4, 2013  
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Appearances:

Agent for the Appellant: Balbir Singh Khila

Counsel for the Respondent: Amandeep K. Sandhu

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**JUDGMENT**

Upon appeal with respect to a decision of the respondent that Jagir K. Khaila was not engaged in insurable employment with the appellant for the period from April 18, 2010 to September 10, 2010, the appeal is dismissed and the decision of the respondent is confirmed.

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Woods J.

Citation: 2013 TCC 370  
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AND BETWEEN:

B.B.K. CONTRACTING LTD.,

Appellant,

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THE MINISTER OF NATIONAL REVENUE,

Respondent.

### **REASONS FOR JUDGMENT**

Woods J.

[1] These appeals under the *Employment Insurance Act* (the “*Act*”) are from a decision of the Minister of National Revenue that Jagir Khaila (“Jagir”) was not engaged in insurable employment when she was employed as a cook by B.B.K. Contracting Ltd. (“BBK”). Jagir and BBK have each appealed the decision to this Court. The period at issue is from April 18, 2010 to September 10, 2010.

[2] Relying on subsections 5(2) and 5(3) of the *Act*, the Minister concluded that Jagir's employment was not insurable on the basis that: (1) Jagir and BBK were related, and (2) Jagir and BBK would not have entered into a substantially similar arrangement if they were dealing at arm's length.

[3] The appellants take the view that the terms of the employment are arm's length terms. They also submit that the Minister should be satisfied that the terms are arm's length because the same working arrangements were approved by the Minister for other relatives that were hired as cooks in previous years. The appellants also suggest that the Minister should be held accountable for failing to properly inform them of the legal test that has to be satisfied. For example, it was suggested that Jagir could have kept track of her hours if she had known that this was important.

[4] BBK was represented at the hearing by its president, Balbir Khila ("Balbir"), who also testified on the corporation's behalf. Jagir was represented by her son, Gurdeep Khaila ("Gurdeep"), who also testified on her behalf. Jagir did not testify at the hearing despite being advised that this could adversely affect her appeal.

[5] Testimony on behalf of the Minister was provided by three government officials who were involved in the investigation of this matter.

[6] In these reasons, individuals will be referred to by their first names for ease of reference.

### Relevant legislation

[7] Pursuant to s. 5(2)(i) and 5(3)(b) of the *Act*, if an employer and employee are related (as that term is defined), the employment is not insurable unless the Minister is satisfied that the terms of the employment are substantially similar to arm's length terms.

[8] The relevant provisions are reproduced below.

**5. (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.

**5. (3) Arm's length dealing** - 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.

### Background

[9] BBK operates a seasonal silvaculture business, by which it obtains commercial contracts for tree felling, planting and other services. The business typically operates from about April to September.

[10] In the period at issue, the shares of BBK were owned equally by Balbir and his spouse, Rano Khila ("Rano").

[11] Jagir was employed by BBK for the 2010 season as a cook. Her spouse and two children also worked for BBK as members of the crew. At the time of the engagement, Jagir had recently immigrated to Canada.

[12] The families of Jagir and Balbir lived in a duplex that was owned by Balbir.

[13] According to the testimony of Balbir and/or Gurdeep, Jagir cooked East Indian food for BBK's crew, which was comprised of 10 to 12 persons. The food was cooked in the kitchen in Balbir's residence and taken to the job site, although food was also available in the home before or after work. The testimony indicated that some of the crew did not like the East Indian cuisine in which case BBK would provide other food.

[14] Balbir estimates that Jagir's duties, which included laundry and dishes, took roughly 10 hours per day for six or seven days each week. According to Balbir's testimony, Jagir received \$100 per day for these duties.

Are Jagir and BBK related?

[15] The appellants submit that the employment is insurable because the terms of the employment are similar to arm's length terms. The relevant provision, s. 5(3)(b), first requires a determination that Jagir and BBK are related. The parties did not raise this as an issue, but it is worth mentioning because the applicable legislation appears to be complex.

[16] The following facts are relevant in determining whether Jagir and BBK are related:

(a) Balbir is Jagir's brother-in-law, that is, Jagir's spouse and Balbir are brothers, and

(b) the shares of BBK are owned equally by Balbir and his spouse, Rano.

[17] The meaning of the term "related" for this purpose is set out in the *Income Tax Act*. Under this legislation, Jagir is related to BBK only if she is related to both shareholders, Balbir and Rano (s. 251(2) of the *Income Tax Act*).

[18] I will examine separately the relationship between Jagir and the two shareholders.

[19] The analysis for Jagir and Balbir being related is relatively straightforward. They are related by marriage because Jagir is married to Balbir's brother (s. 251(6)(b)).

[20] The analysis as to whether Jagir and Rano are related is more complicated and requires two steps. First, Jagir is deemed to be Balbir's sister and therefore related by blood because Jagir is married to Balbir's brother (s. 252(2)(c)(ii)). It then follows that Jagir and Rano are related by marriage because Rano is married to a person who is connected by blood to Jagir (s. 251(6)(b)).

[21] Since Jagir is related to both Balbir and Rano, and since Balbir and Rano each own 50 percent of the shares of BBK, then Jagir and BBK are related.

[22] The relevant provisions for purposes of the analysis above are s. 251(2)(a) and (b), 251(6) and 252(2)(c) of the *Income Tax Act*, which are reproduced in part below.

**251. (2) Definition of "related persons"** - For the purpose of this Act, "related persons", or persons related to each other, are

- (a) individuals connected by blood relationship, marriage or common-law partnership or adoption;
- (b) a corporation and
  - (i) a person who controls the corporation, if it is controlled by one person,
  - (ii) a person who is a member of a related group that controls the corporation, or
  - (iii) any person related to a person described in subparagraph (i) or (ii); and

[...]

**251. (6) Blood relationship, etc.** - For the purposes of this Act, persons are connected by

- (a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
- (b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;

[...]

**252. (2) Relationships** - In this Act, words referring to

[...]

- (c) a sister of a taxpayer include a person who is
  - (i) the sister of the taxpayer's spouse or common-law partner, or
  - (ii) the spouse or common-law partner of the taxpayer's brother;

[...]

Are terms of employment arm's length?

[23] The second issue is whether it is reasonable to conclude that the terms of the employment are substantially similar to arm's length terms.

*Applicable principles to be applied*

[24] In the last ten years, the Federal Court of Appeal has consistently adopted the legal principle set out in *Pérusse v MNR*, (2000), 261 NR 150. The test is summarized by Richard C.J. in *Denis v MNR*, 2004 FCA 26:

[5] The function of the Tax Court of Canada judge in an appeal from a determination by the Minister on the exclusion provisions contained in subsections 5(2) and (3) of the Act is to inquire into all the facts with the parties and the witnesses called for the first time to testify under oath, and to consider whether the Minister's conclusion still seems reasonable. However, the judge should not substitute his or her own opinion for that of the Minister when there are no new facts and there is no basis for thinking that the facts were misunderstood (see *Pérusse v. Canada (Minister of National Revenue - M.N.R.)*, [2000] F.C.J. No. 310, March 10, 2000).

[25] Based on my review of judicial decisions since *Pérusse*, there appears to be some ambiguity regarding the *Pérusse* test which has led to uncertainty as to the extent to which the Tax Court of Canada must determine and analyze the facts as found by the Minister.

[26] At the hearing, counsel for the respondent cited *Porter v The Queen*, 2005 TCC 364 in urging that I must determine and analyse the facts as found by the Minister as well as determining and analyzing facts based on the evidence at the hearing.

[27] The approach suggested by the respondent has some support in the cases but it has not been universally followed. For a contrary approach, I note the following excerpt by Bowie J. in *Birkland v The Queen*, 2005 TCC 291:

[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.

(Emphasis added.)



[28] It would be helpful to have some clarification on this point because determining and analysing two sets of evidence, one based on the Minister's factual findings and the other on Court's factual findings, can lead to a protracted hearing.

[29] Below, I have followed the approach set out in *Birkland*, but my conclusion is generally consistent with the factual findings and analysis by the Minister.

*The Minister's decision is reasonable*

[30] In this case, the Minister assumed that Jagir cooked food mainly for the four family members (Jagir's two sons, her spouse, and Balbir). The Minister also assumed that cooking for family members would not take 10 hours per day, which was the basis of Jagir's remuneration.

[31] According to the testimony of Balbir and Gurdeep, Jagir cooked for the entire crew, which consisted of about 12 persons. I am not persuaded by this testimony. I accept that some of the non-family crew may have eaten Jagir's food from time to time, but the evidence was not persuasive enough to overcome the Minister's assumption that Jagir was cooking mainly for her spouse, her two children and her brother-in-law.

[32] In addition, I am not satisfied that Jagir worked anywhere near 10 hours per day as the appellants suggest. As a result, it is reasonable to conclude that BBK would not employ an arm's length person to perform Jagir's duties at her rate of pay.

[33] In reaching this conclusion, I have taken a number of factors into account.

- (a) The testimony of Balbir and Gurdeep was too vague and incomplete to be persuasive. The evidence did not provide a detailed picture of exactly what work Jagir performed for BBK and when she performed it.
- (b) Jagir did not testify and I would conclude that her testimony would not have been helpful to these appeals.
- (c) The testimony of Balbir and Gurdeep was not consistent with the information that they provided to the government during the investigation and review stages. Some of the discrepancies might have been attributable to difficulty with the English language but this is not a satisfactory explanation for all of the inconsistencies.

- (d) Gurdeep assisted Jagir in preparing a CRA questionnaire that was entered into evidence. The questionnaire indicated that Jagir was a “camp cook” and that she was not related to BBK’s majority shareholders by blood or marriage. Both of those statements are inaccurate, or at the least very misleading. In the absence of a satisfactory explanation, I am not satisfied that these were innocent slips.

[34] In conclusion, I am not satisfied that Jagir worked for BBK anywhere near the 10 hours per day that was represented, and I am also not satisfied that remuneration of \$100 per day was an arm’s length rate for the duties performed.

[35] In light of this conclusion, it has not been necessary to give any weight to hearsay testimony introduced by the respondent regarding interviews that were conducted with non-related crew members. I make no comment as to its admissibility.

[36] The appellants submit that the appeals should be allowed because the Minister’s decision is inconsistent with the Minister’s prior decision regarding other relatives, and further, that the Minister is at fault for not providing guidelines as to the relevant legal tests.

[37] Even if these statements were true, they would not be sufficient grounds to allow these appeals. Consistent treatment by the Minister is not necessary, and even if the Minister provided wrong information as to the applicable law, this would not be grounds for allowing the appeals.

[38] My conclusion is that the Minister’s decision is reasonable and that the appeals should be dismissed.

Signed at Toronto, Ontario this 22nd day of November 2013.

“J. M. Woods”

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Woods J.

CITATION: 2013 TCC 370

COURT FILE NOs.: 2012-3722(EI)  
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PLACE OF HEARING: Vancouver, British Columbia

DATES OF HEARING: March 28 and November 4, 2013

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

DATE OF JUDGMENT: November 22, 2013

APPEARANCES:

Agent for the Appellant,  
Jagir Khaila: Gurdeep Khaila

Agent for the Appellant,  
B.B.K. Contracting Ltd.: Balbir Singh Khila

Counsel for the Respondent: Amandeep K. Sandhu

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