Do Wage Payment Delays Render Employment Not Insurable?

Section 5(2)(i) of the *Employment Insurance Act* says that employment is not insurable for Employment Insurance (EI) purposes if the “employer and employee are not dealing with each other at arm’s length.” The Act requires the CRA to consider all of the circumstances, including remuneration, terms, and conditions, and judge whether this is the kind of employment arrangement that parties dealing with each other at arm’s length would reasonably be expected to make. One of the key terms the CRA considers in making this determination is **when** wages are paid. Delays in paying wages suggest that employment is not at arm’s length; after all, employees in arm’s length employment generally expect to be paid promptly. But a payment delay isn’t always a slam dunk. It depends on the length and cause of the delay, among other things. Here are 2 cases showing how these factors play out in real life.

Employment Not at Arm’s Length

In this case, failure to pay wages promptly rendered an employment arrangement uninsurable for EI purposes.

Situation

A small oil services firm in Alberta receives a demand from its biggest client: Get somebody in your office who can answer our calls from 8 to 5 each day or we’re pulling our account. The owner hires his daughter to do the job. Her other duties include secretarial work and maintaining the firm’s computer databases. The CRA acknowledges that the $12 per hour the daughter receives is (or at least was at that time) an arm’s length rate for these services. But she’s paid on an irregular basis and only after long delays. Consequently, the CRA rules that her employment isn’t insurable. The daughter appeals.

Ruling

The Tax Court upholds the CRA’s ruling.

Reasoning

The “consistent” and “substantial delays” in payment were justification of the determination that the terms of employment weren’t arm’s length, according to the court. Although some of the delays were brief, others dragged on for months. For example, the firm didn't issue her paycheques for services rendered between February and July 2003 until August; paycheques for August thru December weren't issued until December. The daughter claimed that the delays were the result of the firm's cash flow problems and that other employees not related to the owners were also paid late. But the court noted that the delays the daughter endured were much longer and went beyond what "most employees would tolerate."

Camilleri v. M.N.R., 2005 TCC 602 (CanLII)

Employment Is Arm's Length

Employment may still be insurable even when the employer doesn't pay wages promptly, as illustrated by the following case.

Situation

The owner of an oil furnace service business in Cape Breton, Nova Scotia, hires his wife to answer the phone, dispatch workers for service calls, type, file, and perform other secretarial work. The wife works only in the winter season when the firm is at its busiest. In addition to putting in an 8-to-5 day, she's available to field calls in the middle of the night from customers who are having problems with their furnaces. Her pay is $12 per hour. The CRA rules that the employment isn't insurable, noting that the wife delayed cashing 3 of her 12 paycheques and failed to cash one at all. The wife appeals.

Ruling

The Tax Court says that the CRA's ruling is unreasonable and that the employment is insurable.

Reasoning

The wife's failure to cash cheques dated February 3rd, 9th, and 15th, 2006 until March 20th, 30th, and May 2nd, 2006, respectively, didn't prove the employment wasn't at arm's length. The winter of 2006 was unusually mild and the business was struggling to meet payroll, the court explained. When an employer is having financial trouble, even arm's length employees might have to wait a few weeks to be paid. This is especially true in high unemployment locations like Cape Breton where getting another job isn't an option. The court also noted that the delays in this case were much shorter than those endured by the daughter in the Alberta case. As for the uncashed cheque, the wife had a nervous breakdown when it was issued and cashing her paycheque "was probably not a significant concern to her at the time."

Williams v. M.N.R., 2007 TCC 265 (CanLII)

Takeaway

Keep in mind that employment standards laws require employers to issue paycheques by a specific deadline. However, employers may still ask employees to delay cashing their paycheques. However, in doing so, they may bring the issue of employment insurability into play. While the above cases are old, the law of arm's length employment and factors in determining how wage payment delays affect insurability remain valid. Moreover, the analysis is especially timely during difficult economic periods where companies experience cash flow challenges that force them to delay wage payments to their employees. As the *Williams* court explained:

“In areas of high unemployment there are limited options for arm’s length employees to seek alternate employment and therefore in my opinion, it would be reasonable to expect that an arm’s length employee who had worked on a seasonal basis for an employer for 23 years would be willing to wait a few weeks before cashing his or her paycheque when that employer is experiencing financial problems due to circumstances beyond their control and the employee is in an area of high unemployment. Cape Breton has unfortunately been an area of high unemployment for several years.”

Employers in other high unemployment areas may use the same argument to defend the arm’s length status of seasonal and even full-year employees who are willing to wait a while before cashing their own paycheques when the company is struggling.