Is Seasonal Employment of Family Members EI Insurable?



Employment of a relative is generally deemed not to be arm's length and thus not insurable under Employment Insurance (EI). The purpose of this rule is to prevent people from gaming the system and creating fictitious jobs so that relatives can get EI benefits. However, CRA will accept employment of relatives as insurable if the actual terms and conditions of employment are substantially the same as non-related persons dealing at arm's length, even if the employment is seasonal. One factor the CRA considers in such situations is whether the employee continues working during the off-season. This is particularly true if the off-season work is unpaid. These two cases illustrate how the courts decide whether employment is arm's length when related persons also do unpaid work during the off-season.

Employment Is Arm's Length

FACTS

Two Québec brothers work on the family farm owned by their father. They put in 40 to 80 hours per week during the active season from late spring through summer; during the off-season, they do only minor work harvesting wood and maple sugar, and they do about an hour of bookkeeping per month and 10 to 15 hours per week milking cows year-round. The brothers are only paid during the active season at wages comparable to other arm's length farm workers. Their off-season work is unpaid. The CRA rules that the brothers' employment is non-arm's length and thus not EI insurable. The brothers appeal.

DECISION

The Federal Court of Appeal upholds the appeal and finds the employment insurable.

EXPLANATION

The Tax Court had found the employment to be non-arm's length largely on the basis of the unpaid work performed by the brothers during the off-season. The Federal Court of Appeal found the significance of the unpaid work as minimal since most of it was performed only during specific, short periods of the year. The court deemed the year-round work, like milking cows, irrelevant because the work was commonly performed by other family members during the off-season. In determining insurability of employment, said the Appeal Court, the focus should be on the paid work for which

benefits are claimed. And the terms of employment for the paid work in this case were substantially the same as somebody at arm’s length would have accepted. So the Appeal Court overruled the Tax Court and found that the employment was insurable.

Théberge v. Canada (Minister of National Revenue), [2002] FCA 123 (CanLII), Mar. 28, 2002

Employment Is Not at an Arm’s Length

FACTS

From 1999 to 2003, the owner of an inn in Charlevoix, Québec employs his son as chef and wife as assistant manager. Both are paid wages only during the tourist high-season at rates considerably below industry rates for equivalent positions and duties. Both have the same responsibilities year-round (these duties require fewer hours during the low-season). The CRA says that neither employment relationship is arm’s length and thus not EI insurable. The mother and son appeal and the Tax Court upholds the CRA. So they appeal again.

DECISION

The Federal Court of Appeal agrees that the employment isn’t insurable and tosses out the appeal.

EXPLANATION

The Appeal Court relied on 4 factors to consider the impact of unpaid work between related persons: the nature of the paid and unpaid work; the amount of unpaid work performed; its frequency; and the continuity of paid and unpaid work. Although mom and son claimed that their unpaid work was infrequent, minimal and marginal, the evidence showed that it was substantial and basically the same as the work they were paid to do during the high-season, the Court found. There was also virtually no separation in time between the performance of paid and unpaid work. Further, their wages were substantially less than industry standards for those jobs. No unrelated person dealing at arm’s length would have worked under these terms and conditions, the Court concluded. So, the employment wasn’t EI insurable.

Dumais v. Canada (National Revenue), [2008] FCA 201 (CanLII), Oct 8, 2008