TAX COURT OF CANADA

IN RE: the Employment Insurance Act

BETWEEN:

**Giacomo (Jack) Tassone, Anne Marie Tassone,
Joanne Fazari**

Appellants,

- and -

The Minister of National Revenue

Respondent

**[2003] T.C.J. No. 624
Court File Nos. 2002-401(EI), 2002-399(EI), 2002-397(EI)**

**Held before Mr. Justice Weisman of the Tax Court of Canada,
at Toronto, Ontario, on July 30, 2003.**

Statutes Cited:

**Employment Insurance Act, s. 5(3), 5(3)(b).
Income Tax Act, s. 251, 251(2)(iii).**

Counsel:

**H.J. Alpert, for the Appellants.
A'Amer Ather, for the Respondent.**

JUDGMENT:--The appeal is allowed and the decision of the Minister is vacated.

REASONS FOR JUDGMENT

1. **WEISMAN T.C.J.** (Orally):-- I have heard three appeals which were heard together, on consent and on common evidence by Joanne Fazari, Giacomo (Jack) Tassone and Anne Marie Tassone against determinations made by the Respondent Minister of National Revenue, that the three Appellants were not in insurable employment while engaged by T.N.T. Metal Fabricating Inc.

2. During the periods of employment which varied between the three workers; in the case of Joanne Fazari, it was June 12, 2000 to November 24, 2000. She is the daughter of the sole shareholder of the Payor. With respect to Giacomo (Jack) Tassone, the son of the sole shareholder, there were two periods of employment: January 12, 1998 to October 23, 1998, and then September 13, 1999 to December 29, 2000. It is noted in the pleadings that he was in receipt of employment insurance benefits between those two periods of employment. Finally, there is the period of employment of the daughter-in-law of the sole shareholder, Anne Marie Tassone, January 12, 1998 to November 10, 2000.

3. The reason given for the adverse determination was that the three named Appellants were not dealing at arm's length with the Payor during the various periods of employment.

4. In this connection, I am not permitted to simply replace my view of this matter for that of the Minister, unless I first find that the exercise of Ministerial discretion was unlawful. According to Jencan, (1997), 215 N.R. 352, and Bayside Drive-in, (1997), 218 N.R. 150, both from the Federal Court of Appeal, there are only three ways in which the exercise of Ministerial discretion can be found unlawful. The first being the exercise of bad faith, or having acted for an improper motive; the second that the Minister failed to take into account the relevant circumstances mandated by section 5(3)(b) of the Employment Insurance Act; and/or third that the Minister took into account irrelevant factors.

5. The cases of Legare v. the Minister of National Revenue, [1999] F.C.J. No. 879, in the Federal Court of Appeal, and Perusse v. the Minister of National Revenue, [2000] F.C.J. No. 310, also of the Federal Court of Appeal, have added to the jurisprudence traditionally relied upon in this court as it existed prior to the two cases, and these two judgments are somewhat elliptical and cryptic. It is not clear to me whether the language spoken by the Federal Court of Appeal about the exercise of Ministerial discretion having to be objectively reasonable is a fourth grounds for finding the exercise unlawful, or whether, as the counsel for the Minister contends, that it is something that only comes into play once the Ministerial discretion is found unlawful on the aforementioned three grounds. In the absence of binding jurisprudence, it is my reading of the two cases, Legare and Perusse, that the objectively reasonable standard is a fourth way in which the exercise of Ministerial discretion can be found unlawful.

6. In the matter before me, the Appellants do not contend that the exercise of Ministerial discretion was effected in bad faith or for an improper motive, but they do rely on the remaining three grounds: the failure to take into account the relevant circumstances, taking irrelevant circumstances into account, and that the exercise of discretion was not objectively reasonable. Turning now to section 5(2) of the Employment Insurance Act, which provides that insurable employment does not include employment if the employer and employee are not dealing with each other at arm’s length. And in 5(3):

> "For the purposes of paragraph 5(2)(i), 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."

7. If one turns to the Income Tax Act, section 251 says that:

> "For the purposes of this Act, related persons shall be deemed not to deal with each other at arm's length;"

and subsection (2) defines "related persons" as a corporation and a person who controls the corporation, and in subparagraph (iii):

> "…any person related to a person described in subparagraph (i) or (ii)."

8. Clearly, all three Appellants are related to the Payor, and the Appellants and Payor are therefore deemed not to be dealing with each other at arm's length and that deeming is not rebuttable. That was decided in three cases: Thivierge v. the Minister of National Revenue, [1994] T.C.J. No. 876, in the Tax Court of Canada; Simard, v. the Minister of National Revenue, [1994] T.C.J. No. 1202, in the same forum, and Kushnir v. the Minister of National Revenue, [1985], 39 D.T.C. 280, in the Tax Court of Canada. In these circumstances, with this deeming being irrebuttable, the three Appellants were left to rely upon section 5(3)(b) of the Employment Insurance Act, which provides:

> "If the employer is, within the meaning of that Act (meaning the Income Tax 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."

9. And perusing the evidence to see if the Minister committed one of the aforementioned four errors which leads to a finding that the exercise of Ministerial discretion was unlawful, I would start with the observation that counsel, Mr. Alpert, was meticulous and well prepared in the presentation of his case, that all the Appellants' witnesses, Nick Tassone, the father, Joanne Fazari, Anne Marie Tassone and Jack Tassone, were credible and were also internally consistent, which means that their evidence in-chief was consistent with their evidence on cross-examination and they consistently confirmed each other's testimony, although I would note that Jack, or Giacomo Tassone, was the weakest link in the chain in that regard.

10. It is clear law that the burden lies on the Appellants to demolish the Minister's assumptions contained in the three Replies to the Notice of Appeal, and in my view the three Appellants accomplished just that.

11. Starting with assumption 5(g), the issue of the fixed weekly salary, all three Ministerial Replies to the Notice of Appeal were incorrect in assuming that only these related employees received the fixed weekly salary without being required to account for their hours of work, and that there is clear evidence that the plant manager, Kevin Luff, and the plant foreman, Koune Choung, both enjoyed the same benefit.

12. There was the allegation as to the alleged duplication of payments at year-end that was found, just for one example in allegation 5(n) of Giacomo Tassone's Ministerial Reply, but the evidence of Joanne Fazari, who was in charge of the bookkeeping, was very clear and very convincing that there was no duplication; that one pay was for arrears, it being the habitual practice of this corporation to pay one week in arrears; another pay was for the holiday period so that Joanne Fazari would not have to come in over Christmas to prepare pay cheques, and as counsel for the Appellants has pointed out, the first pay of the new year commenced around the 13th or 14th of January, and all employees were treated the same way year in and year out.

13. There was some indication in the pleadings that Joanne Fazari was the recipient of a double pay, but the evidence was clear and convincing that she transferred from the Stripping entity to the Fabricating entity because she was pregnant and wanted to avoid the toxins which might be deleterious to the health of her unborn child at the Stripping facility. There was no duplication, there was no double pay, and the accountant made year-end adjustments between the two companies to duly account for her performing services for both companies over that period.

14. So far as the allegations that the pay scales were somehow arbitrarily fixed by the father Nick Tassone and were not negotiated, it was the clear evidence of that gentleman that his long-term experience in the industry made him quite knowledgeable about the pay scales and he also took the precaution of consulting with the accountant, who confirmed that modus operandi today in the witness box, in order to arrive at the pays given to the three related Appellants, and so those three pays were set pursuant to industry standards and were congruent with pays given by the competition.

15. Then there was the issue of Anne Marie Tassone's reported bonus cheque of $1,150.00, the cheque number being 0003504, for overtime hours, dated December 3, 1999, and it was the clear and uncontradicted evidence of Mr. Nick Tassone that that was remuneration in arrears for having saved him the task of wrapping these small boxes.

16. In so far as Jack Tassone is concerned, the possibility of his having somehow received duplicate pay, the evidence was that the Ministerial assumption with reference to his duties underestimated his duties in that he not only had shipping and receiving responsibilities, but took over quality control for the Payor T.N.T. Again, I found Jack

Tassone's evidence the weakest of the four Appellants' witnesses but still sufficient to satisfy me on a balance of probabilities that the Ministerial assumptions were incorrect.

17. There was also evidence as to the layoff of non-related employees at more or less the same time that Jack Tassone was laid off. Just to name a few, Eric Mettis, Anthony Dawkins, Patel Balwart, Jacques Card and Henry Campazano were all laid off about the same time that Jack Tassone was.

18. It was of some importance that the witnesses were all quite knowledgeable about their various areas of responsibility with the Payor and it was quite clear from their expertise and their knowledge that we were not dealing in this case with the sort of case that Legare talks about on page 4, when the Federal Court of Appeal says that excepted employment is based on the possibility that jobs may be invented or established without real conditions of employment. Section 5(3)(b) of the Employment Insurance Act is to be invoked in cases where the fear of abuse is no longer justified. I saw no such abuse in this case.

19. The Minister was also wrong in his assessment of the raises allegedly received by the Appellants. It was noted in the case of Jack Tassone that it was simply an error that he started off with $400.00. He was not given an immediate $100.00 raise to $500.00. He should have gotten that in the first place; that Anne Marie Tassone's original pay was based on three days a week, and when she started into five days a week her pay was adjusted upward to reflect the increased working hours.

20. Joanne Fazari was an excellent witness for the Appellants. She was clear that she got the same pay at Fabricating as she did in her prior employment with Stripping. She was very consistent as to what her duties were at Stripping and at Fabricating. At Stripping she did bookkeeping, inside sales and plant work. At Fabricating, the plant work function was deleted for the aforementioned fear of toxins, but she then did bookkeeping for both companies and took over inside sales for Fabricating from her father Nick. It was her that made it quite clear that there was no duplication of pays at year-end.

21. MR. ATHER: Your Honour – sorry, Justice, if I may interrupt. I believe – I've reviewed the transcript and I believe that Joanne Fazari said that she kept on bookkeeping for Stripping, but the only new work that she'd taken on was – at Fabricating was for inside sales. I'm just putting that out for your consideration.

22. JUSTICE WEISMAN: Thank you.

23. Now, when she returned from pregnancy, she testified that she gave up all inside sales but did the books for both companies, and she also took over Anne Marie's function of accounts receivable, accounts payable, invoicing and payroll. She clearly refuted allegation 5(n), that there was some duplication of duties between her and her brother Jack, in that she took over Fabricating's bookkeeping from Anne Marie, because unlike Joanne, Anne Marie did not return to work after her maternity leave. She was

also consistent that when she first came to the Fabricating entity, she only did inside sales but still did the books for Stripping, and she was very clear that Jack did nothing during that time for Stripping and did no bookkeeping function whatsoever.

24. I thought allegation 5(p), with reference to Jack, was an example of the Minister relying upon an irrelevant factor, that he got the maximum weekly benefits for the period during which he was receiving employment benefits during his two periods of employment that I earlier set out.

25. In my view the Appellants have succeeded in demolishing the assumptions contained in the three Ministerial Replies to the Notices of Appeal; they have discharged the burden of proof that lies upon them in these proceedings; they have demonstrated on a balance of probabilities that the Minister failed to take into account all the relevant circumstances required by subparagraph 5(3)(b); that it took into account irrelevant factors; that the exercise of Ministerial discretion was not objectively reasonable and was not therefore lawful. It should be obvious that my own review of the evidence satisfied me that the parties would have entered into a substantially similar contract of employment if they had been dealing with each other at arm's length and, accordingly, all three appeals will be allowed and the three determinations of the Minister of National Revenue vacated.

26. I thank you both for your assistance.

27. I meant to add that I took the precaution, as is my habit, on the 25th of February of making extensive notes of the evidence and my impressions of the evidence so that there would not be any possibility of something having gotten lost in the intervening months.

28. Thank you both.