Federal Court of Appeal | Cour d'appel fédérale

Date: 20100128

Docket: A-203-09

Citation: 2010 FCA 33

CORAM: **NADON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

TORONTO TRANSIT COMMISSION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Toronto, Ontario, on January 18, 2010.

Judgment delivered at Ottawa, Ontario, on January 28, 2010.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] The question to be decided in this appeal is whether long-term disability benefits paid to employees of the Toronto Transit Commission ("TTC") under an employer-funded program are subject to an employer's contribution under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("CPP"). Liability to make an employer's contribution is governed by subsection 9(1) of the CPP. It provides that an employer must make an employer's contribution for the year in which "remuneration for the pensionable employment is paid to the employee". Two questions of interpretation arise from this provision.

[2] First, do the disability benefits paid to the employees constitute "remuneration for the pensionable employment" within the meaning of subsection 9(1) of the CPP? Second, were the employees in question in "employment" as defined by subsection 2(1) of the CPP at a time when they were excused from performing services for the TTC because of their disabilities? Only if both questions are answered in the affirmative is the TTC liable to make an employer's contribution.

[3] This is an appeal by the TTC from a decision of the Tax Court of Canada: *Toronto Transit Commission v. Minister of National Revenue*, 2009 TCC 198. In this decision, Deputy Judge Weisman dismissed an appeal by the TTC from a determination by the Minister of National Revenue that the monthly disability payments constitute remuneration for pensionable employment and are subject to an employer's contribution under the CPP.

[4] The Judge concluded that provisions of the CPP should be interpreted harmoniously with those of related statutory schemes, namely, employment insurance and income tax. He held that, even though they were regarded as on a leave of absence and were not performing services because of their disability, the employees were in "employment" at that time, and the benefits paid to them constituted "remuneration for the pensionable employment".

[5] In my respectful opinion, the Judge erred in his interpretation of the legislation. Subsection 2(1) defines "employment" as an activity: the performance of services under a contract of service. Subsection 9(1) provides that "remuneration" paid by an employer to an employee must be for the pensionable employment in order to require an employer's contribution. The payments in this case

were not for the pensionable performance of services but were, as the terms of the plans make clear, an indemnity for the wages lost by employees who could not work. I can find nothing in either the context of the provisions or the statutory objectives of the CPP to displace the most obvious meaning of its text. Accordingly, I would allow the appeal.

B. FACTUAL BACKGROUND

[6] The two TTC employees in question in this appeal, Hershell Green and Nancy Murphy, are in receipt of permanent disability benefits. Mr Green, a unionized employee, commenced work for the TTC on October 18, 1979, and became disabled in 2005. His last day of work was June 18, 2005, and he qualified for long-term benefits under the union plan on April 14, 2006. Ms Murphy started work with the TTC on April 20, 1986, and become disabled in 2003. Her last day of work was August 4, 2003. She is a non-unionized employee and qualified for long-term disability benefits under the staff plan on April 6, 2004.

[7] The TTC fully funds both plans. The terms of the union plan are negotiated by the TTC and the employees' bargaining agent, and form part of the collective agreement. The staff plan was put in place unilaterally by the TTC and is included in employees' contracts of employment.

[8] The TTC has contracted with Sun Life Assurance Company of Canada ("Sun Life") to administer the plans as agent of the TTC, not as an insurer. Under this agreement, Sun Life determines claimants' eligibility and the amount of any payments, and makes the payments, for which the TTC reimburses it. The TTC retains ultimate control over the disability income plans and,

when a dispute with an employee arises, makes the final decisions on such issues as employees' eligibility, their right to receive benefits and the amount owing.

[9] The terms of the plans relevant to this appeal are broadly similar. Both entitle employees to a percentage of their wages or salary after exhausting other prescribed benefits and vacation pay. Employees are only eligible for long-term disability after completing a specified period of time in active employment. Payments cease at age 65 or on retirement. Disability benefits are stated to be fully taxable.

[10] Employees on long-term disability are transferred to "inactive" status and new employees may be hired to replace them. Nonetheless, they remain employees of the TTC, but on personal leaves of absence. They also retain certain benefits, including seniority, health and dental benefits, and transportation privileges. In addition, TTC disability benefits are subject to a cost of living adjustment.

C. LEGISLATIVE FRAMEWORK

[11] Subsection 2(1) of the CPP defines "employer" and "employment" for the purposes of the Act.

"employer" means a person liable to pay salary, wages or other remuneration for services performed in employment, …	« employeur » Personne tenue de verser un traitement, un salaire, ou une autre rémunération pour des services accomplis dans un emploi. ….
"employment" means the performance of services under an express or implied	« emploi » L'accomplissement de services aux termes d'un contrat de louage de

contract of service or apprenticeship, and includes the tenure of an office;	services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.

[12] Subsection 6(1) defines categories of "pensionable employment", each of which involves "employment".

6. (1) Pensionable employement is	6. (1) Ouvrent droit à pension les emplois suivants :
(a) employment in Canada that is not excepted employment;	*a)* l'emploi au Canada qui n'est pas un emploi excepté;
(b) employment in Canada under Her Majesty in right of Canada that is not excepted employment; or	*b)* l'emploi au Canada qui relève de Sa Majesté du chef du Canada, et qui n'est pas un emploi excepté;
(c) employment included in pensionable employment by a regulation made under section 7.	*c)* l'emploi assimilé à un emploi ouvrant droit à pension par un règlement pris en vertu de l'article 7.

[13] Subsection 9(1) is the "charging section" which imposes on employers a duty to make an employer's contribution, and governs the calculation of the amount of the contribution. However, since the amount is not relevant to this appeal, I have not included those provisions of the subsection.

9. (1) Every employer shall, in respect of each employee employed by the employer in pensionable employment, make an employer's contribution for the year in which remuneration for the pensionable employment is paid to the employee …	9.(1) Tout employeur doit, à l'égard de chaque personne employée par lui dans un emploi ouvrant droit à pension, payer pour l'année au cours de laquelle est payée à l'employé …

D. ISSUES AND ANALYSIS

[14] It is common ground that on an appeal from a decision of the Tax Court correctness is the standard of review of questions of law. This appeal turns exclusively on a question of law: the interpretation of the CPP. The standard of review is therefore correctness.

Issue 1: Do long-term disability payments under an employer-funded benefits plan constitute "remuneration for the pensionable employment" within the meaning of subsection 9(1)?

[15] Statutes must be interpreted by reference to their text, context and purpose, and in a manner that strives for harmony among the constitutive elements of the scheme, and between those elements and the scheme as a whole. I turn first to the text of the CPP.

(i) *statutory text*

[16] "Remuneration" is not defined in the CPP. The categories of "pensionable employment" are set out in subsection 6(1). The category relevant to the present case is found in paragraph 6(1)(*a*): "employment in Canada that is not excepted employment". Since "pensionable employment" is a subset of "employment" it is also necessary to determine the meaning of "employment". This is defined in subsection 2(1), which for convenience I set out again.

"employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;	« emploi » L'accomplissement de services aux termes d'un contrat de louage de services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.

[17] Thus, to qualify as “remuneration” for the purpose of subsection 9(1), disability payments must have been made to employees for the pensionable performance of services under a contract of service. In my view, the payments by the TTC were in the nature of a partial indemnity for wages or salary lost by the employees because they were unable to perform services under their contracts of service by reason of long-term disability: see *Minister of National Revenue v. Visan*, [1983] 1 F.C. 820 at 829. The benefits payments were therefore not “for” the performance of services. I would only add by way of parenthesis that in reaching this conclusion I have attached no significance to the fact that the payments to the employees were made by Sun Life because they were made on behalf of, and reimbursed by, the TTC.

[18] In my opinion, the word “for” in subsection 9(1) indicates that the remuneration must be closely connected to the performance of services by employees. It is not enough that either the payments were made only to employees who had performed services at one time under their contracts, or the TTC’s duty to pay benefits arose out of a contract of employment.

[19] On the other hand, I have little doubt that a bonus paid in one year in respect of services rendered in the previous year would constitute “remuneration” in the year of payment, in respect of which an employer’s contribution would be payable. I would also expect vacation pay to be treated as part of an employee’s “remuneration” for the performance of services. For instance, an employee is normally entitled on termination to pay in *lieu* of vacation not taken, and the number of weeks of vacation pay is also commonly linked to the length of an employee’s employment. A short vacation break from work does not mean that an employee ceases to be an active employee.

[20] The wording of subsection 9(1) of the CPP is different from the analogous subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations*, SOR/97-33, issued in connection with the *Employment Insurance Act*, S.C. 1996, c. 23. It provides:

2 (1) For the purposes of the definition "insurable earnings" in subsection 2(1) of the Act and for the purposes of these Regulations, the total amount of earnings that an insured person has from insurable employment is	2 (1) Pour l'application de la définition de « rémunération assurable » au paragraphe 2(1) de la Loi et pour l'application du présent règlement, le total de la rémunération d'un assuré provenant de tout emploi assurable correspond à l'ensemble des montants suivants :
(*a*) the total of all amounts, whether wholly or partly pecuniary, received or enjoyed by the insured person that are paid to the person by the person's employer in respect of that employment, …	*a*) le montant total, entièrement ou partiellement en espèces, que l'assuré reçoit ou dont il bénéficie et qui lui est versé par l'employeur à l'égard de cet emploi;

[21] This provision has been considered in several cases decided by this Court where payments have been made to employees at a time when they were not performing services. It has been held that benefits paid by an employer under a wage loss indemnity plan may constitute "insurable earnings" for employment insurance purposes, even though no services were being performed.

[22] Thus, for example, in *Université Laval v. Canada (Minister of National Revenue*), 2002 FCA 171, 300 N.R. 294, the Court concluded that payments made to employees under a short-term, employer-funded wage loss indemnity plan constituted "insurable earnings". However, writing for the Court, Décary J.A. noted (at para. 15) that he had underscored the words "in respect of such employment" when reproducing the text of subsection 2(1) of the Regulations, in order "to point out that the courts have consistently held that the expression "in respect of", « à l'égard de », is

particularly broad." See also *National Bank of Canada v. Canada (Minister of National Revenue)*, 2003 FCA 242 at para. 3.

[23] Consequently, in my opinion, this decision is of limited assistance to the Minister in the present case, where Parliament has indicated through its use of the word "for", rather than "in respect of", that a close connection must exist between the payment and the performance of services.

(ii) *context*

[24] The Minister argues that the employment insurance scheme and the CPP are related and that provisions of one should be interpreted similarly to corresponding provisions of the other. And, as noted above, since disability payments made by employers to indemnify employees unable to work have been found to be "insurable earnings" for employment insurance purposes, similar payments should be found to be "remuneration" for the purpose of the CPP.

[25] I do not agree. It is difficult to avoid the conclusion that, when Parliament uses different words in analogous provisions of related statutes, it intends the words to have different meanings. Indeed, to the extent that the contextual argument is based on the related nature of the two schemes, the different wording of the relevant provisions seems to me to reinforce the argument based on the text of subsection 9(1) of the CPP.

(iii) *statutory purpose*

[26] Counsel for the Minister also argued that it would be inconsistent with the purpose of the CPP to interpret subsection 9(1) so narrowly as to exclude from "remuneration" the disability benefits paid in this case. He relied on the following statement by Strayer J.A. when writing for the Court in *Bear v. Canada (Attorney General)*, 2003 FCA 40, [2003] 3 F.C. 456, at para. 7:

> It is equally useful to note that the CPP was deliberately designed as a universal, mandatory, pension scheme to which, with few exceptions, anyone 18 years of age or over would have to contribute if they had taxable income.

[27] It is agreed that the disability benefits paid to employees by the TTC are taxable in the hands of the recipients, apparently as employment income under paragraph 6(1)(*f*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). However, the issue in *Bear* was very different from that in the present case. It concerned a challenge to the constitutional validity of a statutory amendment which removed the former exclusion from the CPP of Indians whose income arose from employment on a reserve and was therefore non-taxable. The Court rejected the argument that the amendment was unconstitutional because it was not retroactive.

[28] In these circumstances, I cannot regard Strayer J.A.'s explanation of the purpose of the CPP as having much bearing on the particular issue before us. The question in the present case is whether the purpose of the CPP is to provide a regular pension to "inactive" employees in receipt of long-term disability benefits from their employer, as well as to those actively engaged in the workforce, and thus to require an employer's contribution in respect of employees providing no services to the employer because of their disability.

[29] The CPP contains no objectives clause, and its long title, included below, provides little guidance.

An Act to establish a comprehensive program of old age pensions and supplementary benefits in Canada payable to and in respect of contributors.	Loi instituant au Canada un régime général de pensions de vieillesse et de prestations supplémentaires payables aux cotisants et à leur égard

(iv) *conclusion*

[30] I can find nothing in either the broader statutory context or the objectives of the CPP to indicate that the words of subsection 9(1) do not have their most obvious, or "plain and ordinary" meaning. It is for Parliament to decide whether the terms of the CPP, as interpreted, should be amended to include employer-funded disability benefits within "remuneration" and thus to require an employer to pay an employer's contribution on them.

ISSUE 2: Is an employee on long-term disability in "employment" within the meaning of subsection 2(1) of the CPP?

[31] My determination of the first issue is sufficient to dispose of this appeal. Nonetheless, the definition of "employment" reinforces the conclusion that the CPP does not include employees who are not actively employed. Subsection 2(1) provides:

"employment" means the performance of services under an express or implied contract of service or apprenticeship, and includes the tenure of an office;	« emploi » L'accomplissement de services aux termes d'un contrat de louage de services ou d'apprentissage, exprès ou tacite, y compris la période d'occupation d'une fonction.

[32] The most obvious meaning of this provision is that an employee who is not performing services (because of a long-term disability, for example) is not in "employment", and is thus not in "pensionable employment" for the purpose of subsection 9(1).

[33] In other words, "employment" involves an activity, not just the status or position of being employed under a contract of service. In this respect, the contrast with the definition of "employment" in the *Income Tax Act* is striking. It provides:

"employment" means the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) …	« emploi » Poste qu'occupe un particulier, au service d'une autre personne (y compris Sa Majesté ou un État ou souverain étrangers); …

[34] The definition of "employment" in the *Employment Insurance Act* is in similar vein.

"employment" means the act of employing or the state of being employed;	« emploi » Le fait d'employer ou l'état d'employé.

[35] Counsel for the Minister argued that subsection 12(1) of the CPP indicates that "employment" is not limited to employees' active performance of services. Paragraph 12(1)(*b*) excludes from "pensionable salary and wages" income received by an employee from pensionable employment while in receipt of a disability pension under the CPP or a provincial plan. It is unlikely, he said, that such employees would be performing services under their contracts of employment. If "employment" requires the performance of services, he submitted, paragraph 12(1)(*b*) would not have been necessary. Statutory provisions are presumed not to be redundant.

[36] While there is some force in this argument, I do not regard it as sufficient to displace the most obvious meaning of the CPP's definition of employment. For example, some provincial plans may provide pensions to persons who are not totally prevented by their disability from being actively engaged in employment. Statutory provisions may also be included in a complex statutory scheme to remove doubt on a particular issue.

[37] As for the argument that subsection 12(1) incorporates the *Income Tax Act* and its definitions into the Plan, I would note that this is only for the purpose of computing a person's income for the year from pensionable employment. The *Income Tax Act* does not determine whether the person was in pensionable employment; this is a matter for the CPP itself.

E. CONCLUSIONS

[38] For these reasons, I would allow the appeal with costs in this Court.

"John M. Evans"

J.A.

"I agree
M. Nadon J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-203-09
(APPEAL FROM THE ORDER OF THE DEPUTY JUDGE HON. N. WEISMAN OF THE TAX COURT DATED APRIL 21, 2009, FILE NO. 2008-1378 (CPP))	
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REASONS FOR JUDGMENT BY:	Evans J.A.
CONCURRED IN BY:	Nadon and Stratas JJ.A.
DATED:	January 28, 2010

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