Federal Court of Appeal  Cour d'appel fédérale

Date: 20141201

Docket: A-336-13

Citation: 2014 FCA 280

CORAM: **DAWSON J.A.**
WEBB J.A.
SCOTT J.A.

BETWEEN:

PATRICK JOSEPH BARRY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at St. John's, Newfoundland and Labrador, on November 3, 2014.

Judgment delivered at Ottawa, Ontario, on December 1, 2014.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] In the 2008 and 2009 taxation years the appellant had two jobs: a permanent position as a full-time teacher and a part-time position as a group home counsellor with the Eastern Residential Support Board Inc. (ERSB). The ERSB operates a number of group homes in the St. John's area and the appellant could be told to report to one of a number of them for a particular shift.

[2] The Minister of National Revenue denied certain expenses claimed by the appellant in respect of the 2008 and 2009 taxation years, namely:

i. Motor vehicle expense claims.

ii. Cell phone expense claims.

iii. Employee and Partner GST/HST rebates associated with the disallowed expenses.

[3] For reasons cited as 2013 TCC 221, 2013 DTC 1176 a judge of the Tax Court of Canada dismissed the appellant's appeal from the Minister's reassessments. This is an appeal from that decision.

[4] Before turning to the substantive issues raised on this appeal, at the commencement of the hearing of the appeal the appellant made an oral motion, without notice, asking that the Court admit new evidence. The new evidence consisted of:

i. A letter dated March 10, 2011, from the appellant to the Chief of Appeals responding to the reassessments at issue, and attaching correspondence with the Canada Revenue Agency.

ii. An e-mail chain between the appellant and the ERSB from April 2011 in which they exchange views on the reassessments.

iii. A letter dated May 30, 2011 from the appellant to the Income Tax Rulings Directorate about paragraphs 8(1)(*h*) and (*h.1*) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (Act).

[5] After hearing oral submissions on the motion, for reasons of time management, the Court reserved its decision on the admissibility of the correspondence. What follows is my reason for proposing that the motion to admit new evidence be dismissed.

[6] The correspondence and e-mail chains are nothing more than position statements made from time to time by the appellant, representatives of the Minister and the ERSB. As such, they provide no assistance to the resolution of the issues raised on this appeal. They, therefore, do not meet the test for the admission of new evidence (*Shire Canada Inc. v. Apotex Inc.*, 2011 FCA 10, 414 N.R. 270, at paragraph 17).

[7] On this appeal the appellant frames the issues as follows:

i. The Judge erred in interpreting paragraph 8(1)(*h.1*) of the Act.

ii. The Judge erred in finding that travel expenses, which the appellant incurred when commuting to and from various group homes, were not incurred in the performance of his employment duties.

iii. The Judge erred in law or unreasonably found that the appellant was not required by his employment contract to have a cell phone.

[8] For the following reasons, I am satisfied that the Judge did not err as asserted by the appellant.

[9] First, paragraph 8(1)(*h.1*) provides:

8. (1) In computing a taxpayer's income for a taxation year from an	8. (1) Sont déductibles dans le calcul du revenu d'un contribuable tiré, pour

office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto	une année d'imposition, d'une charge ou d'un emploi ceux des éléments suivants qui se rapportent entièrement à cette source de revenus, ou la partie des éléments suivants qu'il est raisonnable de considérer comme s'y rapportant :
[…]	[. . .]
(h.1) where the taxpayer, in the year,	h.1) dans le cas où le contribuable, au cours de l'année, a été habituellement tenu d'accomplir les fonctions de son emploi ailleurs qu'au lieu d'affaires de son employeur ou à différents endroits et a été tenu, aux termes de son contrat d'emploi, d'acquitter les frais afférents à un véhicule à moteur qu'il a engagés dans l'accomplissement des fonctions de sa charge ou de son emploi, les sommes qu'il a dépensées au cours de l'année au titre des frais afférents à un véhicule à moteur pour se déplacer dans l'exercice des fonctions de son emploi, sauf s'il a, selon le cas :
(i) was ordinarily required to carry on the duties of the office or employment away from the employer's place of business or in different places, and	
(ii) was required under the contract of employment to pay motor vehicle expenses incurred in the performance of the duties of the office or employment,	
amounts expended by the taxpayer in the year in respect of motor vehicle expenses incurred for travelling in the course of the office or employment, except where the taxpayer	
(iii) received an allowance for motor vehicle expenses that was, because of paragraph 6(1)(*b*), not included in computing the taxpayer's income for	(i) reçu une allocation pour frais afférents à un véhicule à moteur qui, par l'effet de l'alinéa 6(1)*b*), n'est pas incluse dans le calcul de son revenu

the year, or	pour l'année,
(iv) claims a deduction for the year under paragraph 8(1)(*f*);	(ii) demandé une déduction pour l'année en application de l'alinéa *f*);

[10] The Judge made no reviewable error when she interpreted paragraph 8(1)(*h.1*) to require the appellant to be required under his contract of employment with the ERSB to personally pay the motor vehicle expenses. The Judge's interpretation of the provision was consistent with its plain meaning and with the jurisprudence of this Court (*The Queen v. Henry Cival*, [1983] 2 F.C. 830). The appellant's interpretation would require words to be read into subparagraph 8(1)(*h.1*)(ii) to the effect that the taxpayer "was required under the contract of employment to pay motor vehicle expenses or chose to use their own vehicle when the duties effectively required the employee to use their own vehicle."

[11] Finally on this point, Canada Revenue Agency administrative documents relied upon by the appellant may represent the Canada Revenue Agency's interpretation of the relevant provision of the Act, but such statements do not supplant judicial interpretation of the Act.

[12] Second, the Judge found that the appellant's contract of employment did not require him to have a car. This finding of mixed fact and law was amply supported by the terms of the relevant collective bargaining agreement, and by the testimony of the Director of Corporate Services of the ERSB, Mr. English.

[13] I have carefully considered the appellant's reliance on the decision of the Federal Court in *Rozen v. Canada*, [1985] F.C.J. No. 1002, 85 DTC 5611. However, as the Judge noted at

paragraph 22 of her reasons, *Rozen* is distinguishable from the present case. There, the Federal Court noted that to determine whether a taxpayer was required to pay travelling expenses "[o]ne must consider the terms of the contract of employment […]". In the absence of an express written term, the Federal Court implied a term that a taxpayer was required to pay travelling expenses. In the present case, the terms of the collective bargaining agreement are express and were supported by Mr. English's testimony that the appellant was not required to pay motor vehicle expenses.

[14] Third, the Judge made no error in finding that motor vehicle expenses, which the appellant incurred when commuting from his home to his assigned group home, and then from whichever group home he was at when he finished his shift to his home, were not incurred in the performance of the appellant's duties. The appellant failed to show that he was performing any services or employment obligations while commuting. He was simply getting himself to work. It is this lack of evidence that distinguishes this case from *Evans v. The Queen*, 1998 CanLII 148 (T.C.C.), 99 DTC 168, another case relied upon by the appellant.

[15] Travel expenses incurred by a taxpayer travelling between his home and place of employment are generally considered to be personal expenses. They are not generally travelling costs encountered in the course of a taxpayer's employment duties.

[16] Fourth, the Judge made no error in interpreting subparagraph 8(1)(*i*)(iii) of the Act as it applied to cell phone expenses. As the Judge correctly held, for an expense to be deductible

under this provision, an employee must be "required by the contract of employment" to incur the expense.

[17] Finally, the Judge made no palpable and overriding error in finding the appellant was not required by his employer to own a cell phone. This finding was supported by the testimony of Mr. English.

[18] For these reasons, I would dismiss the appeal with costs.

"Eleanor R. Dawson"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-336-13
STYLE OF CAUSE:	PATRICK JOSEPH BARRY v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	ST. JOHN'S, NEWFOUNDLAND AND LABRADOR
DATE OF HEARING:	NOVEMBER 3, 2014
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	WEBB J.A. SCOTT J.A.
DATED:	DECEMBER 1, 2014

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