Docket: 2006-2082(EI)

BETWEEN:

RAYMOND EDWARD LINSEMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 23, 2007
at Ottawa, Canada

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Ryan Hall

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed.

Signed at Ottawa, Canada this 19th day of February 2007.

"Wyman W. Webb"

Webb, J.

Citation:2007TCC97
Date: 20070219
Docket: 2006-2082(EI)

BETWEEN:

RAYMOND EDWARD LINSEMAN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The Appellant has appealed to this Court pursuant to section 103 of the *Employment Insurance Act* from a ruling by the Minister of National Revenue ("the Minister") that certain amounts received by the Appellant were retiring allowances and not insurable earnings for the purposes of the *Employment Insurance Act*. The Appellant also raised the issue of when his benefit period should commence under the *Employment Insurance Act*. Section 103 of the *Employment Insurance Act* provides, in part, as follows:

> **103**. (1) . . . a person affected by a decision on an appeal to the Minister under section 91 . . . may appeal from the decision to the Tax Court of Canada in accordance with the *Tax Court of Canada Act* and the applicable rules of court made thereunder . . .

[2] Section 91 of the *Employment Insurance Act* provides that:

> **91.** An appeal to the Minister from a ruling may be made by the Commission at any time and by any other person concerned within 90 days after the person is notified of the ruling.

[3] Section 90 of the *Employment Insurance Act* provides that:

> **90.** (1) An employer, an employee, a person claiming to be an employer or an employee or the Commission may request an officer of the Canada Revenue Agency authorized by the Minister to make a ruling on any of the following questions:

> (a) whether an employment is insurable;
>
> (b) how long an insurable employment lasts, including the dates on which it begins and ends;
>
> (c) what is the amount of any insurable earnings;
>
> (d) how many hours an insured person has had in insurable employment;
>
> (e) whether a premium is payable;
>
> (f) what is the amount of a premium payable;
>
> (g) who is the employer of an insured person;
>
> (h) whether employers are associated employers; and
>
> (i) what amount shall be refunded under subsections 96(4) to (10).

[4] Subsection (1) of section 90 limits the matters that can be the subject of a ruling to those matters that are listed therein and as a result the matters that can be appealed to the Minister under section 91 and then to the Tax Court of Canada under section 103 will be limited to the same matters.

[5] The issue of whether certain amounts received by the Appellant are included in insurable earnings is a matter that can be the subject of a ruling under section 90 and then appealed to the Minister and to this Court. The determination of the benefit period under Part I of the *Employment Insurance Act* is not, however, one of the matters listed in subsection 90(1) of the *Employment Insurance Act* and hence is not one of the matters that can be the subject of a ruling under section 90 of the *Employment Insurance Act* and therefore is not a matter that can be the subject of an appeal to the Minister under section 91 of the *Employment Insurance Act* nor to this Court under section 103 of the *Employment Insurance Act*.

[6] Therefore the only issue that is applicable in this case is whether the amounts in question are included in insurable earnings for the purposes of the *Employment Insurance Act*.

[7] The Appellant was employed by SCI Brockville Corp. and its predecessor companies for approximately 30 years prior to 2002. By letter dated January 25, 2002 the Appellant received notice that the plant where he was working would be closing

permanently and his employment would be terminated no later than October 18, 2002. By letter dated May 24, 2002, the Appellant was informed that his employment would be terminated effective August 16, 2002. His employment was terminated effective August 16, 2002.

[8] A class action was commenced against SCI Brockville Corp. and this action was settled and as a result of this settlement the Appellant was entitled to various amounts. The amount related to his loss of salary was determined as:

> (3 weeks per year of service minus 15 weeks) x his salary at termination.

[9] In the Appellant's case, since he had been employed for 30.5 years, he was entitled to 91.5 weeks minus 15 weeks or 76.5 weeks x his salary. The reduction for 15 weeks represented the 15 weeks during which he was working and being paid and for which notice of the termination of his employment had been provided (12 weeks from May 24, 2002 to August 16, 2002 and a three week credit for the letter dated January 25, 2002) (the "working notice"). There were also adjustments for overtime loss, benefits loss, and loss in pension growth, all calculated based on the same formula. The total amount payable was $134,532. The amount payable was paid in two installments - $31,356 was paid on the termination of employment and identified as the "statutory severance paid" and the balance of $103,176 was paid in 2004. Any amount deducted from this payment and remitted as a source deduction in relation to the Appellant's income tax liability, or any other liability of the Appellant, would still be considered to be an amount paid to the Appellant (*Morin* v. *R.* (FCTD) [1975] C.T.C. 106, 75 DTC 5061).

[10] The issue is whether the amounts paid for the period following the termination of the employment of the Appellant pursuant to the settlement, including the amount paid for the loss of salary, were insurable earnings for the purposes of the *Employment Insurance Act*. The amounts paid represented compensation for the amounts that the Appellant would have received if he would have continued working for the additional notice period specified in the settlement documents but were not paid as consideration for services rendered or work performed by the Appellant.

[11] Insurable earnings are defined in subsection 2(1) of the *Employment Insurance Act* as follows:

> "insurable earnings" means the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment;

[12] Paragraph 108(1)(g) of the *Employment Insurance Act* (which is in Part IV of this *Act*) provides that:

> **108.** (1) The Minister may, with the approval of the Governor in Council, make regulations
>
> (g) for defining and determining earnings, pay periods and the amount of insurable earnings of insured persons and for allocating their earnings to any period of insurable employment;

[13] Subsections 2(1) and (3) of the *Insurable Earnings and Collection of Premiums Regulations* provide, in part, that:

> **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
>
> (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, and
>
> . . .
>
> 3. For the purposes of subsections (1) and (2), "earnings" does not include
>
> (b) a retiring allowance

[14] Subsection 1(1) of these Regulations provides that a retiring allowance means:

> "retiring allowance" means an amount received by a person
>
> (a) on or after retirement of the person from an office or employment in recognition of the person's long service, or
>
> (b) in respect of a loss of an office or employment of the person, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal.

[15] The term "retiring allowance" is also a defined term for the purposes of the *Income Tax Act.* In that *Act*, "retiring allowance" is defined in subsection 248(1) as follows:

> "retiring allowance" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv)) received
>
> (a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or
>
> (b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,
>
> by the taxpayer or, after the taxpayer's death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer;

[16] The definition of "retiring allowance" in subsection 248(1) of the *Income Tax Act* is not materially different from the definition of "retiring allowance" in subsection 1(1) of the *Insurable Earnings and Collection of Premiums Regulations* for the purposes of this case since the amounts in issue are not a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(a)(iv) of the *Income Tax Act*.

[17] In the case of *Overin* v. *The Queen*, 98 DTC 1299, Rip, J. made the following comments in relation to whether an amount received should be included as a retiring allowance:

> [16] The use of the words "in respect of" in the definition of retiring allowance has been recognized as conveying a connection between a taxpayer's loss of employment and the subsequent receipt. In order for the retiring allowance provision to have real meaning, however, some limit must be placed on the ambit or scope of the required connection between a receipt and a loss of employment. In this regard two decisions may be of some assistance. First, in *Merrins, supra*, Pinard, J. observed at 6670:
>
> > There is no doubt that the amount was received by the plaintiff in respect of the loss of his employment with AECL. Had there been no loss of employment, there would have been no grievance, no settlement, no award and, therefore, no payment of the sum to the plaintiff.
>
> What is implied from Pinard, J.'s analysis is that in determining the limit to be placed on the connection between a payment and a loss of employment, the appropriate test is to ask "but for the loss of

> employment would the amount have been received?" If the answer to that question is in the negative, then a sufficient nexus exists between the receipt and the loss of employment for the payment to be considered a retiring allowance.
>
> . . .
>
> [18] It is quite clear then that in addition to the "but/for" test, where the purpose of a payment is to compensate a loss of employment it may be considered as having been received "with respect to" that loss.

[18] In this case it is clear that the amounts that the Appellant received under the settlement for the 76.5 week period following the termination of the employment of the Appellant, including the amount received for the loss of salary for this period, were in respect of the loss of the employment of the Appellant and not for services rendered or work performed by the Appellant. If the employment of the Appellant had not been terminated he would not have received this compensation since he did not provide any services to SCI Brockville Corp. during these 76.5 weeks. As well it is clear that he received these amounts with respect to that loss since the settlement was in relation to the class action lawsuit that was commenced. The Statement of Claim for this action provided, in part, that:

> 1. The Plaintiff claims on his own behalf and on behalf of all members of the Plaintiff class against the Defendant:
>
> (a) damages arising from the failure to provide reasonable notice of termination of their employment or payment in lieu thereof, including:
>
> i. loss of salary and other monetary compensation during the reasonable notice period;
>
> ii. loss of benefits during the reasonable notice period; and
>
> iii. pension loss;

[19] The compensation that the Appellant received for the 15 weeks "working notice" was, however, received as compensation for services rendered and hence would have been received regardless of whether his employment had been terminated and therefore would not be a retiring allowance.

[20] As a result, the amounts received by the Appellant under the settlement for the 76.5 week period following the termination of the employment of the Appellant, including the amount received for the loss of salary for this period, were retiring allowances of the Appellant and hence not insurable earnings for the purposes of the *Employment Insurance Act*. Any amount deducted from the total of $134,532 that was payable to the Appellant and remitted on account of the Appellant's income tax liability (or any other liability of the Appellant) would still be considered to have been received by the Appellant for the purposes of the definitions of "retiring allowance", "earnings" and "insurable earnings" as these amounts were paid for the benefit of the Appellant (*Morin* v. *R.* (FCTD) [1975] C.T.C. 106, 75 DTC 5061).

[21] It should also be noted that subsection 14(3) of the *Employment Insurance Act* provides as follows:

> (3) Insurable earnings in the rate calculation period shall be established and calculated in accordance with the regulations and include earnings from any insurable employment, regardless of whether the employment has ended.

[22] While the closing words of this subsection might suggest that insurable earnings for the purposes of subsection 14(3) would include a retiring allowance, in my opinion, if "insurable earnings" for the purposes of subsection 14(3) of the *Act* were to include a retiring allowance, clearer language would be required in subsection 14(3) because of the specific exclusion of such amounts in the *Insurable Earnings and Collection of Premiums Regulations.* The reference to "regardless of whether the employment has ended" would require the inclusion of such amounts as retroactive increases in earnings for the period prior to the termination that are not determined and paid until after the employment has terminated. In any event, section 14 of the *Employment Insurance Act* provides for the determination of the rate of weekly benefits and the rate of weekly benefits is not one of the matters that can be the subject of a ruling request under section 90 and then appealed to the Minister and then this Court. As a result this Court has no jurisdiction to deal with the rate of benefits payable.

[23] The Appellant's appeal is dismissed.

"Wyman W. Webb"

Webb, J.

CITATION:	2007TCC97
COURT FILE NO.:	2006-2082(EI)
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APPEARANCES:

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COUNSEL OF RECORD:

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Name:

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