

Docket: 2007-1154(EI)

BETWEEN:

MANUEL PIRES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on April 30, 2008 at Toronto, Ontario

Before: The Honourable Justice T. O'Connor

Appearances:

Agent for the Appellant: Dean Lindsay
Counsel for the Respondent: Laurent Bartleman

JUDGMENT

The appeal is dismissed and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada this 29th day of May, 2008.

"T. O'Connor"

O'Connor, J.

Citation: 2008TCC325
Date: 20080529
Docket: 2007-1154(EI)

BETWEEN:

MANUEL PIRES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

O'Connor, J.

ISSUE:

[1] The issue in this appeal is whether amounts paid to the Appellant, Manuel Pires (“Pires” or “Appellant”), by his former employer, TDS Automotive Canada Inc. o/a Oshawa Reduced (“Payer”), of \$4,999 per month for a period of six months from May 19, 2005 to November 17, 2005 (“Settlement Award”) pursuant to a Memorandum of Settlement of grievances dated May 3, 2005, which grievances were dated January 31, 2003 and July 25, 2003 and filed by Pires with the assistance and instruction of the union, CAW-Canada, constituted insurable earnings entitling Pires to employment insurance benefits under the *Employment Insurance Act* (“*EI Act*”) and the *Employment Insurance Regulations* (“*EIR*”) or whether the Settlement Award constituted a retiring allowance or damages, in which case Pires would not be so entitled.

FACTS:

[2] The Appellant stopped working for the Payer in March 2002 and was terminated by letter dated July 24, 2003.

[3] The Memorandum of Settlement dated May 3, 2005 contained the following resolutions:

- a) the termination letter dated July 24, 2003 was rescinded and removed from the Appellant's employment record and the Appellant was to be considered for all purposes as reinstated;
- b) the Appellant was considered to be on unpaid leave for medical reasons from July 25, 2003 to May 3, 2005;
- c) the Appellant was to receive payments in the amount of \$4,999 per month for a period of six months commencing May 19, 2005. Upon completion of the payments the Appellant was to receive a record of employment ("ROE") from the employer stating he was "laid off"; and
- d) the Appellant was reinstated for coverage in the employer's drug, extended health, and dental plans for a period with certain modifications.

[4] As a result of a Human Resources and Social Development Canada ("HRSDC") request, T. Matheson, a CPP/EI Rulings Officer at the Scarborough Tax Service Office determined that the Appellant was not an employee of the Payer, during the period of May 19, 2005 to November 17, 2005. Both parties were advised of the decision by letter dated July 28, 2006.

[5] The Appellant disagreed with the CPP/EI Rulings Officer's decision and filed an appeal on October 31, 2006.

[6] The Appellant appealed the ruling to the Respondent for the determination of the question of whether or not the Settlement Award received from the Payer, during the period in question, was insurable earnings within the meaning of the *EI Act*.

[7] By letter dated November 30, 2006, the Respondent informed the Appellant and the Payer that it had been determined that the Settlement Award received by the Appellant, during the period in question, was not considered insurable earnings under

the *EI Act* nor pursuant to paragraphs 1(1)(b) and 2(3)(b) of the *Insurable Earnings and Collection of Premiums Regulations* (“*IECPR*”).

[8] The Appellant disagreed with the Minister’s decision and filed an appeal to the Tax Court of Canada on February 23, 2007.

SUBMISSIONS:

Submissions of the Appellant:

[9] The CAW-Canada representative, a Mr. Dean Lindsay, assisted the Appellant with this appeal. He referred to the terms of the Settlement Agreement and concluded therefrom that the Appellant was an employee during the period in question and was therefore entitled to employment insurance benefits. He stated further that this Settlement Award should be considered as earnings under section 36(11) of the *EIR*.

Submissions of the Respondent:

[10] He submits that the Settlement Award received by the Appellant, during the period referred to herein, was not insurable earnings under the *EI Act* nor pursuant to paragraphs 1(1)(b) and 2(3)(b) of the *IECPR*.

[11] He requests that the appeal be dismissed.

ANALYSIS:

[12] Generally, section 7 of the *EI Act* states that there are two requirements to be met for an individual to qualify for benefits, a claimant must suffer an interruption of earnings and have obtained a minimum amount of insurable hours.

[13] There does not appear to be a dispute between the parties as to whether the Appellant had an interruption of earnings or obtained the minimum insurable hours, rather the Respondent is questioning the characterization of the Settlement Award, stating that it represents a “retiring allowance”.

[14] “Retiring allowance” is defined in paragraph 1(1)(b) of the *IECPR* and reads as follows:

1. (1) The definitions in this subsection apply in these Regulations.

“Act” means the *Employment Insurance Act. (Loi)*

“Minister” means the Minister of National Revenue.
(*ministre*)

“pay period” means the period in respect of which earnings are paid to or enjoyed by an insured person. (*période de paie*)

“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. (allocation de retraite)

(2) For the purposes of Part IV of the Act and for the purposes of these Regulations, “employer” includes a person who pays or has paid earnings of an insured person for services performed in insurable employment.

[Emphasis added]

[15] Additionally, paragraph 2(3) of the *IECPR* states the following:

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

...

(3) For the purposes of subsections (1) and (2), “earnings” does not include

(a) any non-cash benefit, other than the value of either or both of any board or lodging enjoyed by a person in a pay period in respect of their employment if cash remuneration is paid to the person by their employer in respect of the pay period;

(a.1) any amount excluded as income under paragraph 6(1)(a) or (b) or subsection 6(6) or (16) of the *Income Tax Act*;

(b) **a retiring allowance**;

[Emphasis added]

[16] The Appellant has relied on subsection 36(11) of the *EIR* to establish that amounts received as a Settlement Award were insurable earnings. The provision reads as follows:

36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.

(2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.

...

(11) Where earnings are paid or payable in respect of an employment pursuant to a labour arbitration award or the judgment of a tribunal, or as a settlement of an issue that might otherwise have been determined by a labour arbitration award or the judgment of a tribunal, and the earnings are awarded in respect of specific weeks as a result of a finding or admission that disciplinary action was warranted, the earnings shall be allocated to a number of consecutive weeks, beginning with the first week in respect of which the earnings are awarded, in such a manner that the total earnings of the claimant from that employment are, in each week except the last week, equal to the claimant's normal weekly earnings from that employment.

[17] The allocation referred to in subsection 36(11) of the *EIR* is, however, limited by the determination made in section 35 of the *EIR* that the amounts were earnings.

[18] Earnings are very broadly defined as anything the worker derives in the form of pecuniary benefits from his work, past or present.

[19] Determining the nature of amounts received is a factual analysis particularly when a determination must be made as to whether a payment is a “retirement allowance” or a “retirement pension” or a “wrongful dismissal settlement”.

[20] Justice Décary, in *Canada v. Plasse*, [2000] F.C.J. No. 1671, stated what determinations are to be made in assessing whether a settlement constituted insurable earnings:

18 If a settlement encompasses both an acceptance of lost wages and a renunciation of a right to reinstatement granted by the appropriate authority, only the former constitutes "earnings" and only the value attributable to the former is allocated pursuant to section 57 of the Regulations. It would of course be open to the Commission in any given case to make sure that a purported settlement is not a mere sham to circumvent the unemployment insurance scheme by disguising compensation for lost wages as something else. Such questions of fact may be raised to give proper effect to the legislation, the object of which has been described as follows by Pratte J.A. in *Attorney General of Canada v. Walford*, [1979] 1 F.C. 768 at 772 (C.A.):

The Unemployment Insurance Act, 1971 sets up an insurance scheme under which the beneficiaries are protected against the loss of income resulting from unemployment. The **purpose of the scheme is obviously to compensate unemployed persons for a loss; it is not to pay benefits to those who have not suffered any loss.** Now, in my view, **the unemployed person who has been compensated by his former employer for the loss of his wages cannot be said to suffer any loss.** A loss which has been compensated no longer exists. The Act and Regulations must, therefore, in so far as possible, be interpreted so as to prevent those who have not suffered any loss of income from claiming benefits under the Act.

[Emphasis added]

REVIEW OF DECIDED CASES:

[21] In *Élement v. Canada (Minister of National Revenue – M.N.R.)*, [1996] F.C.J. No. 718, the Federal Court of Appeal, whose Judgments are binding on this Court, stated as follows:

1 The applicant, a seasonal employee, was not recalled to work when he should have been. Two years later, after a grievance was settled, the employer paid him monetary compensation equal to the amount of wages he would have earned during the period he would normally have worked. However, the applicant did not perform any work during that period.

2 We are all of the opinion that the Minister and the Tax Court of Canada judge reached the proper conclusion when they decided that the applicant did not hold insurable employment during the period in question. Despite Mr. Lepage's very able argument that the applicant's employment contract continued to exist because he had a right to be recalled, the fact remains that a person who does not perform any work or receive any wages does not hold insurable employment within the meaning of paragraph 3(1)(a) of the Act.

[22] In *Forrestall v. Canada (Minister of National Revenue – M.N.R.)*, [1996] F.C.J. No. 1638, the Federal Court of Appeal followed its decision in *Élement*, stating:

3 We are all of the view that the Tax Court judge erred in holding that those eleven days represented insurable employment for the respondent. He did no work in that period. What he received from his employer was, in the words of the arbitrator, "damages"; it was not wages.

4 As we said in *Élément c. M.N.R.*:

... a person who does not perform any work [and] receive[s no] wages does not hold insurable employment within the meaning of paragraph 3(1)(a) of the Act.

[23] In *Linesman v. Canada (Minister of National Revenue – M.N.R.)*, [2007] T.C.J. No. 42, Justice Webb of this Court stated:

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.

REVIEW OF THE EVIDENCE AND CONCLUSIONS THEREFROM OF THE RESPONDENT:

[24] The relevant evidence and questions of counsel for the Respondent are as follows:

Q. The settlement was because they didn't give you a job, right?

A. Yes.

Q. The settlement was because you were fired?

A. That is correct.

...

Under cross-examination, Mr. Pires admitted that he was paid this settlement amount as a result of his termination, as a result of him losing his employment. ...

It is respectfully submitted that the settlement amount at issue here is a retiring allowance, because it was paid as a result of a loss of Mr. Pires' employment.

[25] From the foregoing and other evidence, counsel for the Respondent concludes as follows:

In essence, but for the loss of employment, would he have received the money? If the answer is no, then it is a retiring allowance. The only reason he got the amount of money was because he lost his job. In the words of the appellant in this case, "They bought me off." He lost his job, they bought him off.

...

As a first submission, it is a retiring allowance because he was paid off to compensate him for his loss of employment. But even if your honour finds that that is not what this payment was about, I would submit that it is still not insurable employment because the payment was more in the nature of damages. It was to compensate him, not for work done, not as a result of a contract of employment, but rather for the breach that his employer made of that employment contract. It falls, apparently, squarely on the facts of Forrestall. ...

...

I agree with Mr. Lindsay that paragraph 2, page 2, is critical. However, the issue here is not his status as an employee during the period in question. The question is whether or not the \$4,999 is insurable employment, which is at paragraph 3.

With respect to the fact that he was reinstated for that period of time as quite correctly laid out in paragraph 2, it is submitted that the critical thing for this determination is the fact that, for that period of time, he was on unpaid leave. There were no earnings attributable to being employed during that period of time. He was an employee, but he received no money. If you receive no money, you have no insurable employment.

It is respectfully submitted that that should be sufficient to dispose of the matter.

With respect to the settlement amounts laid out at paragraph 3, as my earlier submissions stated, those amounts are not insurable pursuant to section 3(1) of the regulations I earlier cited because they are either a retiring allowance or, alternatively, they are damages for the breach of the employment contract. They are not compensation for work done.

[26] In my opinion, this appeal is similar to the decided cases and the conclusions of counsel for the Respondent are correct. The amounts paid were to compensate the Appellant for his loss of employment, not to compensate for work done. The payments were in the nature of a retiring allowance or in the nature of damages. The appeal is therefore dismissed.

Signed at Ottawa, Canada this 29th day of May, 2008.

"T. O'Connor"

O'Connor, J.

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STYLE OF CAUSE: Manuel Pires v. MNR
PLACE OF HEARING: Toronto, Ontario
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APPEARANCES:

Agent for the Appellant: Dean Lindsay
Counsel for the Respondent: Laurent Bartleman

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