Docket: 2008-3223(IT)G

BETWEEN:

JOE RAE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on January 19, 2010, at Toronto, Ontario.

Before: The Honourable Justice Patrick Boyle

Appearances:

For the appellant:	The appellant himself
Counsel for the respondent:	Thang Trieu

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* with respect to the appellant's 2007 taxation year is allowed in part, with costs, and the matter is referred back to the Minister of National Revenue for reconsideration and reassessment in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 8th day of March 2010.

"Patrick Boyle"

Boyle J.

Citation: 2010 TCC 130
Date: 20100308
Docket: 2008-3223(IT)G

BETWEEN:

JOE RAE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Boyle J.

[1] The issues in this case are whether, and to what extent, a payment made by the taxpayer's employer or an affiliated company was received in respect of a loss of employment for purposes of the definition of "retiring allowance" in subsection 248(1) of the *Income Tax Act* (the "*Act*") and if so, to what extent it would be required to be included in his income by virtue of subparagraph 56(1)(*a*)(ii). In this case Mr. Rae had fully disclosed his receipt of the amount in his tax return for the year of receipt and set out his position that the amount should not be subject to tax.

I. Facts

[2] Mr. Rae is a Chartered Accountant. In 2006 he was working in this professional capacity as Controller for a large Canadian corporation and had been there for several years. He enjoyed a good income including an annual bonus of up to 10%.

[3] In 2006 Mr. Rae was offered and accepted a position with Weir Canada, Inc. ("Weir Canada") as Corporate Controller North America. Weir Canada is a related corporation to Weir North America Inc. and to The Weir Group PLC. The Weir

Group PLC is a publicly traded corporation in the United Kingdom. As Corporate Controller North America, Mr. Rae reported to the Vice-President of Finance of Weir Canada who in turn reported to the UK Divisional Director of Finance.

[4] Mr. Rae's base salary as Corporate Controller North America was virtually unchanged from that of his position with his previous employer. However, his bonus entitlement in his new position was up to 30% of his base salary. This was an important part of the Weir offer to Mr. Rae. The bonus pool was a function of business profitability. Before accepting, Mr. Rae sought both assurances and written evidence that the maximum 30% bonus had been paid out to Weir Canada employees participating in the bonus pool for each of the three preceding years because the business had met or exceeded the necessary financial targets under the bonus plan.

[5] Mr. Rae accepted the position of Corporate Controller North America. There was a period of some months' overlap and transition with his predecessor who was scheduled to retire.

[6] Very shortly after taking on his Controller responsibilities at Weir Canada, Mr. Rae developed serious concerns about financial impropriety in the financial statements of the Canadian company. I should be clear that there was no evidence that Mr. Rae's allegations of financial impropriety were ever proven, or even pursued outside the corporate group, and I do not need to make any finding in this regard to resolve Mr. Rae's dispute with the Canada Revenue Agency ("CRA"). It is sufficient that Mr. Rae's concerns, which I believe he genuinely held in good faith throughout, clearly formed the basis for the relevant exchanges of requests, demands, documents, and ultimately money, releases and reporting between him, his employer Weir Canada, Weir North America and The Weir Group PLC.

[7] Mr. Rae had significant concerns that several items were not going to be shown on the Weir Canada financial statements in accordance with Canadian generally accepted accounting principles ("gaap"), proper business and commercial principles, applicable Canadian tax law, nor with the Weir corporate group's own policies. According to Mr. Rae, the concerns were in the millions of dollars and represented a significant percentage of annual divisional profits. He raised his concerns with his superiors but felt pressured to go along with the proposed treatment. Mr. Rae felt certain this would be a breach of his professional obligations and made it clear he would not go along.

[8] If these matters were recorded as management wished, senior management including Mr. Rae would receive large bonuses. If, instead they were recorded as

Mr. Rae felt appropriate, the management bonuses including his own would be significantly adversely affected. These concerns led Mr. Rae to conclude that Weir Canada had made serious misrepresentations to him as part of its inducements to him to join as Controller.

[9] Mr. Rae is a cautious and prudent person. Before raising his concerns with his Vice-President of Finance, whom he believed was part of the problem, Mr. Rae had obtained an alternate offer of employment as controller with another Canadian company at virtually the same base salary but a lesser bonus potential. He was prepared to take this position if Weir Canada did not address his financial statement concerns to his satisfaction. The written offer from the prospective employer is dated March 20, 2007.

[10] The following day, Mr. Rae sought to set up a meeting with the Vice-President of Finance. In his email he mentions serious concerns with the company's accounting practices and being stressed due to "a unique corporate culture that I have not been exposed to in my past experience". He states his position that as Corporate Controller he must be in compliance with the requirements of the chartered accountancy profession and Weir's Codes of Conduct relating to financial information.

[11] The Vice-President of Finance did not reply to the email. Mr. Rae confronted him and the two met the following day. Mr. Rae was told by the Vice-President of Finance that he would be let go. However it turned out that decision required the approval of the UK Divisional Director of Finance, which was not immediately forthcoming. Mr. Rae continued to discuss his concerns with the retiring Controller as well as with the UK Divisional Director of Finance.

[12] On April 2, 2007 Mr. Rae was placed on leave with pay from the company while the issues he raised were investigated. The letter setting this out went on "If during the six weeks following April 13, 2007 (up until May 25, 2007) the investigation has not concluded and you elect to resign your role, the organization will provide you with the severance/termination package as outlined in your letter of offer." The letter of offer of employment had provided that: "In the event that the Company must adjust its workforce, and is obliged to terminate your employment without cause, you will be entitled to reasonable notice or pay in lieu of notice per year of service with a minimum entitlement of (6) months. In all cases, you will receive at least the minimum entitlement prescribed by labor standards in your province of employment."

[13] On April 13, 2007 Mr. Rae accepted his alternate offer of employment and resigned from Weir Canada.

[14] Also on April 13, 2007 Mr. Rae's employment lawyer sent a letter to Weir Canada maintaining he was constructively dismissed and requested payment equal to 12 months' salary, an additional $50,000 determined by reference to what Mr. Rae would have received from his previous, stable employment plus legal expenses. Nothing came from this claim and, on July 25, 2007, Mr. Rae's lawyer advised Weir Canada's outside counsel that Mr. Rae was thereafter representing himself. On August 1, Weir Canada's counsel wrote briefly to Mr. Rae asking that he be contacted to discuss the resolution of this matter. The following day Mr. Rae replied that, unless Weir Canada lived up to its employment contract and paid six months' salary immediately, he had no interest in pursuing the constructive dismissal claim. Weir Canada's counsel promptly replied that the six-month payment referred to in the employment contract was not payable since he was not terminated but resigned. It had earlier been pointed out to Mr. Rae that he resigned on April 13, one day before the six-week period following April 13 in which he was permitted to resign if the internal investigation had not concluded and be entitled to the six-month payment as set out in the April 2 letter placing him on leave with pay.

[15] Nothing further was done by either side to directly pursue Mr. Rae's wrongful constructive dismissal claim. He appears to have resigned and accepted new employment one day too early to receive the six-month payout extended to him upon being placed on leave with pay. He was not terminated without cause as part of an adjustment to Weir Canada workforce and was not entitled to the six-month notice referred to in his offer of employment. Mr. Rae commenced new employment at the same base salary immediately upon resigning from Weir Canada which largely mitigated any direct damages except for such things as the difference in the bonus and other benefit programs.

[16] Mr. Rae's next step was to write a letter on August 8 to the Chairman of the Audit Committee, the Group Finance Director, and the Internal Audit Director at The Weir Group PLC. His couriered copy of the letter and attachments was delivered August 15, 2007. In his letter he recounted his concerns in detail and summarized the reprisals Weir Canada had taken against him. He took the position that his actions were protected under the UK *Public Interest Disclosure Act* ("*PIDA*") which, amongst other things, protects whistleblowers raising concerns of financial impropriety. He then referred to the Guidance on the *PIDA* published by the UK Financial Services Authority ("FSA"), the UK financial services and markets regulator. He further pointed out that qualifying disclosures for which whistleblowers

are protected under the *PIDA* can expressly involve actions or failures in countries other than the UK. He went on to quote several times from the FSA Guidance that the FSA would regard as a serious matter any evidence that a firm had acted to the detriment of a worker because he made a protected disclosure about matters relevant to the functions of the FSA, and that such could call into question the fitness and propriety of the firm or its officers required under the suitability provisions of applicable regulatory legislation.

[17] In his letter to The Weir Group PLC detailing his concerns of financial impropriety, Mr. Rae also referred to the Weir Codes of Conduct, gaap, the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario, the *Criminal Code* provision dealing with fraud and the *Act*. In his letter he complained that he did not receive his six-month severance but acknowledged he had resigned a day too early to claim it. He closed his letter by asking that The Weir Group PLC respond to him by mid-September on the results of its investigation of his concerns and confirmation that appropriate discipline has been administered to the offenders. Failing this, he threatened to present his concerns to the FSA directly.

[18] On August 22 the Chairman of the Audit Committee wrote Mr. Rae to confirm that an investigation was underway led by the Group Company Secretary, a solicitor, aided by Internal Audit staff. The Group Company Secretary also wrote Mr. Rae that same day to the same effect. He wrote Mr. Rae again on September 3 asking if he would be able to meet with Mr. Rae on that Saturday afternoon and Sunday if he flew to Toronto. He wrote Mr. Rae again the following day confirming their Saturday meeting and proposing an agenda which included as its last point “contractual entitlement / claims against the Company”.

[19] At the Saturday meeting with the Group Company Secretary, Mr. Rae presented a one-page outline of his financial claim headed “Tort Claim – Negligent Misrepresentation Damages”. His numbers included amounts for:

(i) bonuses and other amounts he would have received from his previous employer had he not accepted Weir Canada’s offer;

(ii) legal and others costs resulting from or relating to his constructive dismissal from Weir Canada; and

(iii) loss mitigation expenses which include the one-year salary difference between the Weir Canada’s position and his new position as well as amounts incurred relating to his new employment.

[20] The specified amounts totalled $166,000. In addition, his schedule claimed an unspecified amount of “Aggravated and Exemplary Damages” relating to the Weir Group’s handling of “the entire process of the PIDA/FSA/CRA constructive dismissal claim”.

[21] Mr. Rae met again the following day with the Group Company Secretary. At the Sunday meeting, it was agreed Mr. Rae would be paid $160,000. That day a Memorandum of Settlement was signed by Mr. Rae and Weir North America Inc. as employer. It was signed by an officer of Weir Canada, Inc. on behalf of the employer identified as Weir North America Inc. The recitals set out that Mr. Rae resigned from his employment and that the settlement resolves all matters arising from Mr. Rae’s employment and the cessation of that employment. At the same time Mr. Rae signed a Full and Final Release in favour of Weir North America Inc. as employer as well as its affiliates and subsidiaries. In addition, at the Sunday meeting the Group Company Secretary gave a written confirmation that The Weir Group PLC would inform Mr. Rae by December 31, 2007 of the outcome of the investigation into his allegations and inform him of the actions taken or proposed as a result of the investigation.

[22] I do not know why Weir North America Inc. was identified as the employer and not Weir Canada, Mr. Rae’s actual employer. I do not know when the $160,000 was paid nor do I know whether it was paid by Weir North America Inc. as required by the Memorandum of Settlement or by Weir Canada. I do know that Weir Canada issued a 2007 T4A to Mr. Rae for the $160,000 amount and that he fully disclosed the Weir Canada T4A in his tax return for that year.

[23] In late December Mr. Rae wrote again to the Group Company Secretary reminding him to provide the results of the investigation and the resulting actions by month-end as required and extending the December 31 date to January 15, 2008. In that letter Mr. Rae reminds his addressee that his release was in consideration of the $160,000 payment and a thorough investigation being completed by The Weir Group PLC and providing him a summary of actions taken or proposed. He states that if he does not receive signed correspondence on the results of the investigation, he will conclude that The Weir Group PLC did not take his allegations seriously, thereby causing a breach of their agreement and entitling him to pursue matters with the FSA.

[24] In early January Mr. Rae received a written report from the Group Company Secretary detailing the findings of the investigation and the resulting actions taken. Notably, the Vice-President of Finance at Weir Canada had been replaced and was

no longer with the company. A number of the corrective actions suggested by Mr. Rae in his initial letter to The Weir Group PLC had also been implemented.

II. Law

[25] Subparagraph 56(1)(*a*)(ii) of the *Act* provides that a retiring allowance is to be included in income. A retiring allowance is defined in subsection 248(1) of the *Act* to include "an amount . . . received . . . in respect of a loss of an office or employment . . . 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 . . . ".

III. Analysis

[26] It is the Crown's position that the entire $160,000 was received in respect of Mr. Rae's loss of employment since, but for the loss of employment it would not have been paid and the purpose of the payment was to compensate him for his loss of employment.

[27] It is Mr. Rae's position that:

(i) none of it was paid in respect of a loss of employment since he resigned after he was constructively dismissed and, relying upon *Ahmad v. The Queen*, 2002 DTC 2065, a constructive dismissal claim cannot give rise to a retiring allowance as there is continued employment (see paragraph 20 of Miller J.'s decision);

(ii) payment of it was paid in settlement of his tort claim for express misrepresentation of Weir Canada's prior years' financial performance and its implicit misrepresentation that he would not be expected to participate in financial impropriety amongst other things; and

(iii) part of it was paid for the release of his rights to raise his concerns and seek redress in the UK under the *PIDA* for having been subject to detriment and retaliation in the face of being relieved of duties and walked to the door while remaining an employee on leave with pay for his internal whistleblowing actions which were protected disclosures under the *PIDA*.

[28] Having heard and considered all of the evidence, I find that the $160,000 amount was paid to Mr. Rae in part in respect of his loss of employment and that the balance was received in respect of the tort claim he was advancing for misrepresentation prior to the contract of employment being entered into, and in respect of the claim he was advancing under UK whistleblower protection legislation. He would have been entitled to advance these two latter claims even had his employment continued and had he not resigned following what he alleged to be his constructive dismissal. Amounts in respect of these two claims would not constitute a retiring allowance. The issue is therefore one of allocating an appropriate portion of the $160,000 payment as having been paid in respect of his loss of employment.

[29] Express and implicit pre-contractual misrepresentations made in the course of negotiating an employment contract can give rise to tort liability independent of the contract: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87. This Supreme Court of Canada decision is discussed by Miller J. in *Grant v. The Queen*, 2008 TCC 163, 2008 DTC 3035. At issue in *Grant* was whether all or part of a retiring allowance was properly a settlement of a misrepresentation claim. I agree with Miller J. when, in his analysis, he wrote: "In effect, if the pre-contractual representations went to something that did not become part of the employment contract, then it may be a separate cause of action." In *Grant*, Miller J. found that was not the case since the represented five-year term found its way into the employment contract. In Mr. Rae's case, the express representations of the company's prior three years' financial results, which encouraged Mr. Rae to believe he could expect the company to continue to pay maximum bonuses, were not part of the employment contract and it would be reasonable for the Group Company Secretary to seek to settle the negligent misrepresentation claim he was presented with by Mr. Rae.

[30] If Mr. Rae was constructively dismissed, as he was also claiming in his written schedule presented to the Group Company Secretary, it was not his resignation from employment that constituted his constructive dismissal, but rather the Weir Canada actions of keeping him on as an employee at full salary upon relieving him of all duties and not allowing him on the premises and the related actions. This occurred prior to his resignation. According to the Ontario Court of Appeal in *Mifsud v. MacMillan Bathurst Inc.* (1989), 70 O.R. (2d) 701, it is generally reasonable to expect a constructively dismissed employee who is offered the same salary in similar conditions to accept the offered position in mitigation of damages during a reasonable notice period or until acceptable employment is found elsewhere. Exceptions are where the new work is demeaning or where personal relationships are acrimonies.

[31] In *Ahmad*, Miller J. concluded that since constructive dismissal, by its very term, denotes no actual loss of employment, he did not consider a constructive dismissal payment during the period of continuing employment to be a retiring allowance.

[32] It appears from reported decisions that amounts awarded to whistleblowers under the *PIDA* in the UK are in respect of actions and reprisals for whistleblowing, whether or not termination of employment ensues. In Mr. Rae's case, these included being walked out of his office and the building during office hours when relieved of all duties and being paid to remain idle. These happened prior to his resignation.

[33] I find that this case is governed by the approach taken and principles set out by the Federal Court of Appeal in *Forest v. The Queen*, 2007 FCA 362, 2008 DTC 6506. *Forest* involved a lawyer working for a municipality who had been declared surplus following the amalgamation of a number of neighbouring municipalities and assigned to a new position. M^{e} Forest filed an unjust dismissal claim over the reclassification which gave rise to a number of related proceedings. He also contended that, as a result of his claims in the proceedings, his managers began harassing him and he brought a court action in respect of the alleged harassment. Thereafter, a settlement was reached pursuant to which M^{e} Forest was paid $165,000 in exchange for his resignation from employment with the city and his full release in respect of all and any actions by reason of his employment.

[34] On the facts of *Forest*, the Federal Court of Appeal held that the Tax Court of Canada should have allocated the amount received between M^{e} Forest leaving his employment and his harassment claim since one of the purposes of the payment was to obtain his resignation. Similarly, in Mr. Rae's case a portion of the payment was paid to be released from his claim for constructive dismissal leading to his resignation.

[35] In *Forest*, the Federal Court of Appeal wrote at paragraph 25:

> However, *Schwartz* also teaches us that once it has been established that a payment has a dual purpose, the bar for determining apportionment must not be set too high. As Mr. Justice La Forest explains (*Schwartz*, *supra*, at paragraph 41), the party that has the burden (in that case, the Minister)
>
> > . . . should not have the burden of presenting, in every case where the apportionment of a general award is at issue, specific evidence amounting to an explicit expression of the concerned parties' intention with respect to that question. However, there must be *some* evidence, in whatever form, from which the trial judge will be able to

> infer, on a balance of probabilities, which part of that general award was intended to compensate for specific types of damages.

[36] In *Forest* the Federal Court of Appeal made its allocation of what portion of the payment was in respect of the loss of employment by reference to what the city paid its other redundant employees, one month's salary for each year of service with a minimum of three months.

[37] In Mr. Rae's case I note that, at the time of the settlement with the Group Company Secretary, his employment law constructive dismissal claim was not getting much attention. Discussions between the lawyers had stalled. The employer's lawyer pointed out that Mr. Rae had resigned one day too early to receive the six-month payout. Mr. Rae acknowledged this. Mr. Rae had a new position with the same base pay but only one third of the possible bonus so his losses were largely mitigated with a maximum shortfall of approximately $30,000 per year on the bonus. Mr. Rae had only worked for Weir Canada, Inc. for a period of months.

[38] In contrast, Mr. Rae's *PIDA* letter to the Chairman of the publicly traded UK parents' Audit Committee received prompt attention including a hastily arranged weekend trip to Toronto from the UK of the Group Company Secretary, who was also a solicitor and director of the company, to quickly negotiate a final settlement. Recalling these were the days of Enron, WorldCom and Sarbanes-Oxley, this is hardly surprising. This indicates to me that it is reasonable to assume that a major purpose of the settlement was to be able to deal with Mr. Rae's allegations of financial impropriety and his resulting detrimental treatment internally to the greatest extent possible.

[39] I do not believe Mr. Rae was making his *PIDA*/FSA threats in the UK as a way of collaterally advancing his Canadian constructive dismissal claim. If he were, there would have been no reason for him to insist upon getting the information on the results of the investigation and the resulting actions in addition to his payment, much less following up on those items and being prepared to go to the FSA after he had received the payment.

[40] At their weekend settlement meetings, the Group Company Secretary did not go through a process of discussing each individual amount on Mr. Rae's schedule making up the total amount. I do not accept that in these circumstances the Group Company Secretary heeded the individual amounts specified in the schedule over the unspecified amounts claimed therein for the *PIDA* retaliatory actions or the tortuous

misrepresentations. I highly doubt that a number of the items listed by Mr. Rae would have been compensable in a wrongful dismissal claim.

[41] As noted above, Mr. Rae had largely mitigated his losses from ending his employment with Weir Canada by taking a new employment elsewhere at the same base salary. His only shortfall would be a maximum of $30,000 of annual bonus. Assuming Mr. Rae was successful in establishing he was entitled to a six-month notice in his wrongful dismissal claim, $15,000 of the $160,000 payment should be allocated to his loss of employment for his diminished bonus. There was also a shortfall in some of the other benefits at his new job. Further, an Ontario court may have awarded him an additional amount to compensate him for how his termination was handled. I find that, for these reasons, $45,000 of the payment constituted a retiring allowance.

[42] The other $115,000 received by Mr. Rae should properly be allocated to the release of his other claims. It appears from the reported *PIDA* whistleblower redress decisions to which I was referred that such claims alone can result in awards of such magnitude.

[43] I should add, as an aside, that it seems odd in these circumstances that the respondent has characterized a number of expense reimbursement amounts as a retiring allowance.

[44] The taxpayer's appeal is allowed in part, with costs, and referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that Mr. Rae received a retiring allowance in 2007 of only $45,000.

Signed at Ottawa, Canada, this 8th day of March 2010.

"Patrick Boyle"

Boyle J.

CITATION:	2010 TCC 130
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STYLE OF CAUSE:	JOE RAE v. HER MAJESTY THE QUEEN
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APPEARANCES:

For the appellant:	The appellant himself
Counsel for the respondent:	Thang Trieu

COUNSEL OF RECORD:

For the appellant:

Name:

Firm:

For the Respondent: John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada