

Docket: 2009-3765(EI)

BETWEEN:

RONALD W. TAYLOR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 3, 2010 at Toronto, Ontario

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant: The Appellant himself
Counsel for the Respondent: Rita Araujo

JUDGMENT

The Appellant's appeal from the decision of the Minister that a premium of \$168.54 was payable under the *Employment Insurance Act* in relation to the payment made to the Appellant in 2007 is dismissed, without costs.

Signed at Ottawa, Canada, this 18th day of June, 2010.

“Wyman W. Webb”

Webb, J.

Citation: 2010TCC333
Date: 20100618
Docket: 2009-3765(EI)

BETWEEN:

RONALD W. TAYLOR,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The issue in this appeal is whether the Appellant was obligated to pay a premium under the *Employment Insurance Act* (the “*EI Act*”) in relation to a payment that was made to him in 2007.

[2] The Appellant started work as a police officer with the Toronto Police Department in 1967. He retired in February 2000. After his retirement it was determined that a certain amount would be paid to individuals who were members of the Toronto Police force during the period from 1973 to 1989 (based on the number of months that such individuals were employed during this period). Since the Appellant was a member of the Toronto Police force throughout this period of time he received a payment of \$9,363. While he was working with the city of Toronto Police Department his employer was the Toronto Police Services Board. After his retirement the pension benefits that he received (and continues to receive) were paid to him by the Metropolitan Toronto Police Benefit Fund. The payment that he received in 2007 was made by the Toronto Police Association.

[3] When the lump sum payment was made to him in 2007, the sum of \$168.54 was deducted therefrom and remitted as a premium payable by the Appellant under the *EI Act*. It is the position of the Appellant that he was not working in 2007 and

therefore no amount should be payable by him under the *EI Act* in relation to the payment he received in 2007.

[4] There was confusion on the part of both the Appellant and counsel for the Respondent in relation to how the amount of \$168.54 was determined. The Appellant was under the understanding that since he had paid the maximum premium that would have been payable under the *EI Act* for each year during the period from 1973 to 1989, that no premium should be payable in relation to this lump sum payment.

[5] Counsel for the Respondent had indicated that the premiums payable under the *EI Act* in relation to this lump sum payment were dealt with in the ruling that had been obtained by the Toronto Police Association from the Canada Revenue Agency. She indicated that the ruling confirmed that the premium that was payable under the *EI Act* in relation to the lump sum payment was only the difference between the premiums that would have been payable under the *EI Act* for the years to which the payment was related (if the amount would have been received during these years) and the amounts that were paid during these years (which is the same as the Appellant's understanding). This would raise the question of how the payment of \$9,363 would be allocated to the years 1973 to 1989.

[6] However the advance income tax ruling that was filed during the course of the hearing does not address any issues arising under the *EI Act*. As well it seems obvious to me that the \$168.54 is simply 1.8% (which was the employee premium rate for 2007 under the *EI Act*) of the amount paid in 2007¹. Therefore it seems obvious to me that the amount was simply determined by multiplying the employee premium rate in effect for 2007 by the amount of the payment made in 2007 and it has nothing to do with the amount of employee premiums paid (or payable) during the period from 1973 to 1989.

[7] Section 67 of the *EI Act* provides that:

67. Subject to section 70, a person employed in insurable employment shall pay, by deduction as provided in subsection 82(1), a premium equal to their insurable earnings multiplied by the premium rate set under section 66 or 66.3, as the case may be.

¹ 1.8% of \$9,363 = \$168.53 which is only \$0.01 less than the amount withheld. In the Reply it is stated that the lump sum payment was \$9,363. If the actual payment was \$9,363.06 to \$9,369.49 (which rounded to the nearest dollar would be \$9,363), 1.8% of such amount would be \$168.54.

[8] Therefore in order for a premium to be payable by the Appellant under the *EI Act* in relation to the payment that he received in 2007, he would have to be employed in insurable employment and the amount received would have to be insurable earnings.

[9] “Insurable earnings” is defined in subsection 2(1) of the *EI 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;

[10] Subsection 108(1) of the *EI Act* (which is in Part IV of that 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;

[11] Subsection 2(1) of the *Insurable Earnings and Collection of Premiums Regulations* (“IECPR”), provides, 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

...

[12] In the Reply, the following assumptions were made, which were not challenged by the Appellant:

8. In making his decision, the Minister relied on the following assumptions of fact:

...

(g) in 2007, the Appellant received a lump-sum payment from the [Toronto Police Association], in respect of his former employment with the [Toronto Police Services Board];

...

(l) the payment represented the Appellant's share of excess contributions made to the OMERS pension fund by the [Toronto Police Services Board];

(m) excessive pension contributions were made during the years 1973 to 1989, by the [Toronto Police Services Board];

(n) the Appellant was neither a member, nor a contributor to the OMERS pension fund;

(o) the Appellant received the benefit because of his former employment with the [Toronto Police Services Board];

[13] In the advance income tax ruling dated June 7, 2007 that was obtained in relation to the payment made to the Appellant and the other recipients, the proposed transactions are described. In this advance ruling it is stated that the amount that was paid to the Appellant was paid from a reserve fund that had been established by the Toronto Police Services Board (the former employer of the Appellant). The reserve fund was established because the Toronto Police Association allowed the Toronto Police Services Board to reduce its pension contributions by a portion of the excess in the pension plan. The payment was made by the Toronto Police Services Board to the Toronto Police Association as representative of the employees and the Toronto Police Association distributed the payment to the Appellant and the other qualified individuals.

[14] In *Toronto Police Services Board et al v. Ontario*, 45 O.R. (3d) 622, 178 D.L.R. (4th) 440, the Ontario Court of Appeal dealt with the OMERS (Ontario Municipal Employees Retirement System) and the excess funds that had accumulated. In paragraph 20 Justice Krever stated that:

20 The Employers agree that the benefit provided through the supplementary agreements arose almost entirely through collective bargaining. I agree with Rosenberg J. that, as a result, it should be assumed that "the cost of these benefits was considered in the overall compensation package at the time of implementation." The benefits may reasonably be thought of as present wages postponed or deferred. Thus to say that the employees have entirely no interest in the application of these funds would be unrealistic.

[15] Subsection 10(1) of the IECPR, provides, in part, that:

10. (1) Where, in any case not coming within any other provision of these Regulations, an insured person works

(a) under the general control or direct supervision of, or is paid by, a person other than the insured person's actual employer, or

...

that other person shall, for the purposes of maintaining records, calculating the insurable earnings of the insured person and paying, deducting and remitting the premiums payable on those insurable earnings under the Act and these Regulations, be deemed to be the employer of the insured person in addition to the actual employer.

[16] As a result it seems clear to me that the payment that the Appellant received in 2007 was funded by the Toronto Police Services Board (the Appellant's former employer) and made to the Appellant by the Toronto Police Association (who was deemed to be an employer in addition to the Toronto Police Services Board as a result of the application of subsection 10(1) of the IECPR for certain administrative purposes including deducting and remitting the premium). This payment was in respect of the employment of the Appellant by the Toronto Police Services Board.

[17] Insurable employment is defined in section 5. This section provides, in part, that:

5. (1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

The employment of the Appellant by the Toronto Police Services Board was clearly insurable employment. Therefore the lump sum payment that the Appellant received in 2007 would be insurable earnings. To be insurable earnings the earnings must be from insurable employment and in respect of that employment.

There is no requirement that the person be engaged in insurable employment at the time that the earnings are received.

[18] In section 67 of the *EI Act* there is a requirement that the Appellant be employed in insurable employment. There is a specific reference to section 70² in section 67 of the *EI Act*. This section provides that:

70. If insurable earnings are paid to a person after the end of the year in which their insurable employment occurred, the insurable employment is, for the purposes of determining insurable earnings and premiums payable, deemed to have occurred in the year in which the insurable earnings are paid.

[19] There is no time period specified in section 70 of the *EI Act* for the payment of insurable earnings after the end of the year in which the insurable employment occurred. Therefore even though the payment was made approximately 7 years after the Appellant retired, as a result of the provisions of section 70 of the *EI Act* his insurable employment is deemed to have occurred in 2007.

[20] Therefore the Appellant received insurable earnings in 2007 and his insurable employment was deemed to have occurred in 2007. As a result, unfortunately, even though he received the lump sum payment seven years after he retired, he is obligated to pay a premium under the *EI Act* in relation to such payment.

[21] The Appellant's appeal is dismissed, without costs.

Signed at Ottawa, Canada, this 18th day of June, 2010.

² Although the Respondent did not refer to section 70 of the *EI Act* in the Reply, since the Respondent did refer to section 67 and since section 67 specifically refers to section 70, in my opinion, the failure to include a specific reference to section 70 in the Reply should not preclude the application of this section in this case.

“Wyman W. Webb”

Webb, J.

CITATION: 2010TCC333

COURT FILE NO.: 2009-3765(EI)

STYLE OF CAUSE: RONALD W. TAYLOR AND
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: May 3, 2010

REASONS FOR JUDGMENT BY: The Honourable Justice Wyman W. Webb

DATE OF JUDGMENT: June 18, 2010

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Rita Araujo

COUNSEL OF RECORD:

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