Federal Court  Cour fédérale

Date: 20130917

Docket: T-38-12

Citation: 2013 FC 955

Ottawa, Ontario, September 17, 2013

PRESENT: The Honourable Mr. Justice Harrington

SIMPLIFIED ACTION

BETWEEN:

MARTHA NEWCOMBE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] There are two issues in this case. The first is whether the amount paid by the Federal Department of Justice in Halifax to its departing employee, Ms. Newcombe, was taxable at source. The second is whether this Court has jurisdiction to determine that issue.

[2] Briefly put, Ms. Newcombe's position is that the money paid to her was by way of liquidated damages in settlement of several outstanding grievances, and thus not taxable. The

Department considers that the payment was in lieu of notice of termination, or failing that, a retirement allowance. In either case, the payment was taxable income. It was required by law to deduct at source, remit a portion thereof to the Canada Revenue Agency (CRA) and issue a T4 form (Statement of Remuneration Paid).

[3] The Department adds that in its pith and substance this action is a collateral attack on a Notice of Assessment issued by the CRA. The Tax Court of Canada has exclusive jurisdiction. Ms. Newcombe counters that this is an action against the Crown for breach of contract in which the prime remedy sought is a writ of *mandamus* requiring the Crown to issue an amended T4. In accordance with s. 17 of the *Federal Courts Act*, this Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown. Furthermore, the Federal Court has exclusive jurisdiction to issue a writ of *mandamus* against any federal board, commission or other tribunal in accordance with s. 18 of its enabling Act.

[4] It is necessary to come to some understanding of the facts and the applicable law before it can be determined what the true subject matter of the action is, and whether this Court has jurisdiction.

THE FACTS

[5] Ms. Newcombe joined the Department of Justice in Halifax as a legal assistant in 1996. She left following the death of her husband, but then returned in the year 2000. According to her uncontradicted testimony, all went well until 2004. At that time, new personnel joined the Department. She was harassed, given poor performance reviews and spent, on doctor's orders, some time on stress leave. Come June 2006, she had filed a number of grievances against her employer which were at the first, second and third levels. These grievances included claims of harassment, and contestation of performance reviews.

[6] She enlisted the aid of her union as both she and the Department were more than willing to part ways. By agreement signed at Halifax June 12, 2006, Ms. Newcombe resigned and agreed not to apply for work at the Department of Justice in the future. She also agreed to withdraw any and all grievances which she had brought, any and all outstanding appeals relating thereto and not to file any further complaints by grievance, action or otherwise.

[7] For its part, the Department agreed to pay her "the lump sum of one year's salary (12 months) total amount, $46,290, less the applicable statutory deductions", and further sums representing outstanding superannuation deficiencies and death benefit deficiencies. The Department also agreed not to recover any sick leave credits and to remove and destroy from Ms. Newcombe's personnel file any documentation reflecting workplace issues with the employer.

[8] Within days, the Department deposited $35,466.65 into her bank account. Ms. Newcombe said her mind was in a bad place and she did not realize moneys had been deducted at source until the T4 form was issued in February 2007.

[9] Not surprisingly, the Notice of Assessment issued May 30, 2007 listed reported income as set out in the T4 slip, which comprised her salary up to her resignation in June 2006, and the lump sum payment.

[10] This is where matters began to go wrong. Ms. Newcombe should have filed a Notice of Objection to the Notice of Assessment. She did not. Rather, she called CRA to say that the T4 form was wrong and had to be amended. The CRA pointed out that it could not amend the form, only the employer could. If an amended form was received, her tax liability would be reconsidered.

[11] After her departure from the Department, Ms. Newcombe applied for employment insurance benefits. Human Resources and Skills Development Canada expressed some concern that she had simply resigned and thus was not entitled to benefits. Theodore K. Tax, Senior Regional Director, Atlantic Regional Office, Department of Justice Canada, who had signed the agreement with Ms. Newcombe, wrote with reference to that agreement. He said:

> At the time that we entered into negotiations, the employee had several legal matters outstanding with the employer which are mentioned in paragraph 4 of the Agreement. From the employer's perspective, the settlement resolved all legal issues relating to the employee's employment with our Department. The settlement also ensured that there were no further grievances, appeals or further legal proceedings.
>
> In exchange for a settlement of all actions and in exchange for a letter of resignation which terminated the employment relationship,

> the employer agreed to pay a negotiated settlement lump sum amount. The lump sum amount was based on a review of similar court or adjudication decisions or settlements. The reference to any salaried amount was for guideline purposes only based on a review of what might be viewed as possible judgments, litigation costs and contingencies in these circumstances. I would point out that in no way did the parties intend that the settlement amount be viewed or intended as salary of earnings owed to Ms. Newcombe.

[12] Following receipt of that letter, Human Resources approved Ms. Newcombe's claim for benefits "because we consider that she voluntarily left her employment with just cause as she had no reasonable alternative, having regard to all circumstances."

[13] From that point on, until the institution of this simplified action in January 2012, matters went from bad to worse. She, or from time to time counsel on her behalf, was in communication with the Department of Justice and the CRA. Mr. Tax, now Judge Tax of the Nova Scotia Provincial Court, was subpoenaed. He testified that he had no hand whatsoever in the issuance of the T4 form, or other financial documents. They would have been issued by personnel people in either Halifax or Ottawa. Indeed, the T4 form was issued by Public Works. The Department of Justice in Halifax made inquiries. It appears that in requesting monies, the Department used a "code 088". Public Works replied that code 088 is for a lump sum taxable income payment: "If this was not the code that should have been used then what code were you supposed to use? The T4 was done correctly by the system based on what was input in the system. A separate T4 is not issued for this type of entitlement."

[14] Ultimately, the position was taken by Public Works that the settlement payment was processed appropriately and that the T4 form was correctly issued. Meanwhile, this lump sum

payment together with her salary from January through June 2006 put her in a higher tax bracket. Penalties and interest were assessed and her salary at her new employer was garnished.

THE TRIAL

[15] There were only two witnesses at trial: Judge Tax, as aforesaid, and Ms. Newcombe. The Department did not call witnesses.

[16] The agreement resulted from negotiations involving the Department, including Mr. Tax, Ms. Newcombe and her union representative. With respect to clause 7: the agreement to pay "less the applicable statutory deductions", Mr. Tax has no specific recollection of discussions pertaining thereto. He is adamant that he would not have offered any advice with respect to income tax liabilities. For her part, Ms. Newcombe is quite clear that the subjects of income tax and employment insurance were never broached. There was a discussion with respect to payment of union dues and health insurance.

DISCUSSION

[17] Lump sum payments to an employee may be considered as employment income, retirement allowance, or liquidated damages, or indeed a payment may have a dual purpose depending on the circumstances. See for instance *Forest v The Queen*, 2007 FCA 362, 2008 DTC 6506, [2007] FCJ No 522 (QL) and *Dunphy v The Queen*, 2009 TCC 619, 2010 DTC 1028, [2009] TCJ No 506 (QL).

[18] The Department's position is that on the plain reading of the agreement, at least some amount was intended to represent income because the payment was for $46,290 "less the applicable statutory deductions". Event absent that language, if the payment in whole or in part represented employment income or a pension allowance, the Department would have been obliged under the *Income Tax Act* to make a deduction at source and to issue a T4 form. However, either there are statutory deductions or there are not. The parties do not admit the law.

[19] The other point asserted by the Department is that the preamble of the agreement states:

> AND WHEREAS THE PARTIES wish to terminate the employment relationship and have entered into a negotiation to determine the terms and conditions governing the termination of the employment relationship;

[20] This, it is submitted, is a clear statement that the focus was on employment. I disagree. Drawing upon the interpretation of statutes, only minimal weight is attached to preambles (*Attorney General v HRH Prince Ernest Augustus of Hanover*, [1957] AC 436, [1957] 1 All ER 49 and *Sullivan on the Construction of Statutes*, 5th edition, pp 381 and ff).

[21] Far more paramount are clauses 2 through 6 by which Ms. Newcombe:

a. agreed to sign a letter of resignation in the form attached;

b. agreed not to work for the Department in the future;

c. withdrew any and all grievances and any and all outstanding appeals;

d. released the employer and its employees of any and all actions, claims and demands, which she then may have had including defamation or harassment, and that should she commence any legal proceedings in the future, including a human rights

> complaint, such would be in breach of contract so that the employer would be entitled to recover amounts paid under the agreement as liquidated damages and costs on a solicitor/client basis; and
>
> e. would not make any request to the Access to Information Office.

[22] In my opinion, the case most on point is the decision of Mr. Justice Rip, now Chief Justice of the Tax Court of Canada, in *Fournier v Canada*, [1999] 4 CTC 2247, [1999] TCJ No 495 (QL). In that case, Ms. Fournier left her employment, when various grievances and complaints were still outstanding. The employer made source deductions considering that the payment was a retirement allowance.

[23] Mr. Justice Rip determined that the payment was not made in respect to a loss of employment. "The payments were made due to the fact that employees of the Ministry were harassing the appellant and that the appellant had a valid claim for damages against the Ministry due to the actions of its employees." Whether or not the employer admitted the claim was not relevant. The reason for the payment was the outstanding complaints. He said at paragraph 13:

> As far as her agreeing to resign is concerned, that is simply a way for the Ministry to get rid of an employee. Ms. Fournier did not receive any payment in consideration of, or on account of, her agreeing to leave the employment of the Ministry, she did not receive these amounts as damages for any stress, medical or other injuries she sustained as result of the termination of her employment

He held that the payment did not fall within the ambit of the "ordinary concept of income". So it is in this case.

[24] I agree with the Department that the agreement speaks for itself and is not ambiguous. Should I be wrong on that point, there are two documents which support Ms. Newcombe. One is the letter from Mr. Tax intended to deal with employment insurance issues. Although on its face it supports Ms. Newcombe, the Department argues it does not touch upon what the payment might have been apart from payment in lieu of notice. For instance, it says nothing about the possibility of the payment representing a retirement allowance. However, the Department led no evidence whatsoever to support that proposition.

[25] The second is a form proffered to Ms. Newcombe on June 13, 2006, the day after execution of the agreement. It is titled *Disposition of a Retiring Allowance, A Return of Contributions and a Transfer Value Payment*. It referred to the payment as a retirement allowance. That line, however, was scratched out by Ms. Newcombe, who inserted lump sum payment. The agreement had already been made. The fact of the matter is, there is no T4 form for this type of payment, as it was not remuneration, but rather liquidated damages.

[26] The T4 form was issued in error. The error arose because the Department of Justice coded the payment incorrectly. Ms. Newcombe asks that I order the issuance of an amended T4 form and that she be held harmless in one fashion or another from what she considers to be the consequences of that error. She was put in a higher tax bracket for 2006, and interest and penalties were imposed upon her.

[27] Unfortunately, I cannot give Ms. Newcombe any of the relief she seeks. I have come to the conclusion that this is in its pith and substance a tax assessment matter, over which this Court has no

jurisdiction. The issue is not the incorrect T4 form, but rather the Notice of Assessment. Under s. 152(8) of the *Income Tax Act*, the assessment is deemed to be valid notwithstanding any error, defect or omission until it is varied or vacated on objection or appeal. See Canada (Minister of National Revenue) *v MacIver*, 172 FTR 273, 99 DTC 5524, [1999] FCJ No 1182 (QL) and *Canada (Minister of National Revenue-MNR) v Arab*, 2005 FC 264, 2005 DTC 5134, [2005] FCJ No 333 (QL).

[28] Furthermore, the Department is out-of-pocket for the entire sum. Section 153(3) of the *Income Tax Act* provides that when an amount has been deducted or withheld, it is nevertheless deemed to have been received by Ms. Newcombe. In addition, s. 227(1) of the Act provides that no action lies against any person for deducting or withholding any sum in compliance or intended compliance with the Act. Although the Department was in error, there is no question of bad faith. If in breach of contract, there is no remedy against it.

[29] I can well understand why Ms. Newcombe focused on the incorrect T4 form. However, neither the original T4 form, nor an amendment thereto, would be binding on the CRA. Ms. Newcombe's remedy was to file a Notice of Objection. Ignorance of the law cannot help her.

[30] If not satisfied with the results of her objection, her further recourse lay in an appeal to the Tax Court of Canada. Section 12 of the *Tax Court of Canada Act* states that the Court has exclusive original jurisdiction to hear and determine references and appeals on matters arising under the *Income Tax Act*.

[31] Thus, even though framed as an action against the Crown with a writ of *mandamus* component, the action is an impermissible collateral attack upon the assessment (*Canada v Roitman*, 2006 FCA 266, 2006 DTC 6514, [2006] FCJ No1177 (QL); *Verdicchio v Her Majesty the Queen*, 2010 FC 117, 2010 DTC 5036, [2010] FCJ No 130 (QL); *Canada v Addison & Leyen Ltd*, 2007 SCC 33, [2007] 2 SCR 793; and *Moise v Canada (Revenue)*, 2012 FC 1468, [2012] FCJ No 1581 (QL)).

[32] Should I be wrong with respect to jurisdiction, I still cannot give Ms. Newcombe the remedies she seeks. *Mandamus* is a discretionary remedy. No valid purpose would be served by ordering the issuance of an amended T4 form, as it would not be binding on the CRA. Ultimately, it falls upon it, subject to appeal, to determine the true nature of a transaction, irrespective of what the parties say or do. For instance, there are situations in which it is in the financial interest of both the employer and the employee to treat the employee as an independent contractor.

[33] Whatever recourse Ms. Newcombe may still have, it is not one before this Court. For instance, s. 152(4.2)(a) of the *Income Tax Act* provides:

(4.2) Notwithstanding subsections (4), (4.1) and (5), for the purpose of determining, at any time after the end of the normal reassessment period of a taxpayer who is an individual (other than a trust) or a testamentary trust in respect of a taxation year, the amount of any refund to which the taxpayer is entitled at that time for the year, or a reduction of an amount payable under this Part by the taxpayer for the year, the	(4.2) Malgré les paragraphes (4), (4.1) et (5), pour déterminer, à un moment donné après la fin de la période normale de nouvelle cotisation applicable à un contribuable — particulier, autre qu'une fiducie, ou fiducie testamentaire — pour une année d'imposition le remboursement auquel le contribuable a droit à ce moment pour l'année ou la réduction d'un montant payable par le contribuable pour l'année

Minister may, if the taxpayer makes an application for that determination on or before the day that is ten calendar years after the end of that taxation year,	en vertu de la présente partie, le ministre peut, si le contribuable demande pareille détermination au plus tard le jour qui suit de dix années civiles la fin de cette année d'imposition, à la fois :
(a) reassess tax, interest or penalties payable under this Part by the taxpayer in respect of that year; and	a) établir de nouvelles cotisations concernant l'impôt, les intérêts ou les pénalités payables par le contribuable pour l'année en vertu de la présente partie;

[34] Being without jurisdiction, I cannot order that an amended T4 form be issued, but perhaps the Minister will decide to do the right thing and help her.

[35] Quite apart from what Ms. Newcombe's ultimate liability for tax may be, s. 220(3.1) of the *Income Tax Act* authorizes delegated officials of the CRA to waive or cancel penalties and interest. Details are to be found in the CRA, Income Tax Information Circular titled *Tax Payer Relief Provisions No ICO7-1*, issued May 31, 2007. A negative decision in that regard is subject to judicial review in this Court, not the Tax Court of Canada.

[36] In my discretion, I am not prepared to award the defendant costs.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the action is dismissed without costs.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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