Federal Court of Appeal | Cour d'appel fédérale

Date: 20220831

Docket: A-111-21

Citation: 2022 FCA 151

CORAM: **RENNIE J.A.**
LASKIN J.A.
MONAGHAN J.A.

BETWEEN:

RISTORANTE A MANO LIMITED

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Halifax, Nova Scotia, on March 23, 2022.

Judgment delivered at Ottawa, Ontario, on August 31, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: RENNIE J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] The appellant, Ristorante a Mano Limited, operates a restaurant in Halifax and employs wait staff (servers) to provide table service to its customers. Those customers sometimes pay gratuities (i.e., tips) in cash, which the servers are free to keep without advising the appellant. More typically, customers pay their restaurant bills using a debit, credit or gift card (electronic payment) and include the tip (electronic tip) at the time of payment, so that the electronic

payment received by the appellant includes the tip. However, through arrangements with the appellant, the servers receive a portion of the electronic tips paid by customers they served.

[2] The appellant does not consider any part of the electronic tips received by servers to be pensionable salary and wages for purposes of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, or insurable earnings for purposes of the *Employment Insurance Act*, S.C. 1996, c. 23 [*EIA*]. Accordingly, in 2015, 2016 and 2017, when computing its liability to make payments under that legislation, the appellant did not take into account any portion of the electronic tips.

[3] The Minister took a different view and assessed the appellant on the basis a portion of the servers' electronic tips for 2015, 2016 and 2017 should have been taken into account. After its appeal to the Minister failed, the appellant appealed those assessments to the Tax Court of Canada. The Tax Court (2021 TCC 22, *per* Russell J.) dismissed the appeal and upheld the assessments.

[4] The appellant now appeals that decision to this Court.

[5] The standard of review in this case is the appellate standard. Questions of law are determined on the standard of correctness, while questions of fact and of mixed fact and law (excluding extricable questions of law) are determined on the basis of a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33; and *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215.

[6] For the reasons that follow, I would dismiss the appeal.

I. The Legislation

[7] Both the *Canada Pension Plan* and *EIA* are part of Canada's legislated social security system. Both are contributory regimes requiring employers and employees to make payments, called contributions under the *Canada Pension Plan* and premiums under the *EIA*, based on the employee's earnings from the employer, in each case subject to a maximum annual amount per employee.

[8] Under the *Canada Pension Plan*, the employer's contribution is determined by applying a contribution rate to the "contributory salary and wages of the employee … paid by the employer" less certain deductions: s. 9(1)(a) of the *Canada Pension Plan*. Contributory salary and wages is income from pensionable employment computed in accordance with the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.) [*ITA*]: s. 12(1) of the *Canada Pension Plan*.

[9] Under the *EIA*, the employer's premium is a multiple of the employee's premium, which in turn is based on the employee's "insurable earnings": s. 67 and s. 68 of the *EIA*. "Insurable earnings" are "the total of all amounts, received or enjoyed by the insured person [i.e., employee] that are paid to the [employee] by the…employer in respect of that [insurable] employment": s. 2(1) of the *Insurable Earnings and Collection of Premiums Regulations*, S.O.R./97-33 [*Regulations*].

[10] Thus, both statutory regimes are concerned with amounts "paid by the employer" to the employee. The *EIA* expressly states that the amounts must be paid "in respect of" the employee's insurable employment. While the *Canada Pension* Plan does not include the "in respect of" phrase, it adopts the same concept: only income from employment that is pensionable employment (as computed under the *ITA*) and that is paid by the employer gives rise to employer contributions.

II. Background to the Appeal

[11] Most of the appellant's restaurant patrons paid their restaurant bills (including tip) electronically. While the total electronic payment therefore was deposited in the appellant's bank account, the appellant transferred a portion of the electronic tips to the servers based on an established procedure.

[12] At the end of each shift, each server printed a "summary of sales" from the appellant's point of sale system. That summary reported, for that server alone, food sales, beverage sales, the cash received in satisfaction of restaurant bills, the electronic payments for restaurant bills, the electronic tips, and certain other details. Each server used this information to prepare a "cash out sheet".

[13] On the cash out sheet, the server recorded the server's total electronic tips, the cash received in satisfaction of restaurant bills, a kitchen staff "tip-out" (equal to 1% of the server's net food sales), and an amount equal to 2% of the electronic tips (the processing charge). As described below, the appellant retained the latter two amounts, the first "as a gratuity to be

passed on to its kitchen staff", and the latter to "reimburse itself for its bank's charge for converting electronic tip dollars to cash" (Reasons at para. 17). I refer to the amount by which a server's electronic tips exceeds the sum of these two amounts as the server's net electronic tip.

[14] If none of the server's customers paid their restaurant bills in cash, the appellant transferred an amount equal to the server's net electronic tip to the server, typically the next business day. In early years, the servers received the amount by cheque drawn on the appellant's bank account; in later years, the servers received it through direct deposit to their bank accounts from the appellant's bank account. The Tax Court referred to the amount transferred to the server as the "due-back" (Reasons at para. 17).

[15] While the Tax Court's reasons do not reflect this detail, it is accepted that in some circumstances a server's due-back was less than the server's net electronic tip. Where a server received cash from customers in payment of their restaurant bills, the server did not turn that cash over to the appellant. Rather, having reported it on the cash out sheet, the server retained it and the server's due-back took that cash into account. Thus the due-back was net of that cash. In other words, in that circumstance, the server's net electronic tip was received from two different sources—cash received from customers payable to the appellant for their restaurant bills and the due-back received from the appellant.

[16] At the end of each shift, each server also prepared two envelopes or zip-lock bags in which they placed cash to "tip out" the onsite restaurant management (the restaurant manager and assistant manager) and the support staff (bussers, hosts/hostesses and bartenders) who

worked with the server on the shift. These tip-outs were based on the server's net food and beverage sales: 2% for restaurant management and 1% per support staff person to a maximum of 3%. To the extent a server did not have sufficient cash from customers to meet these obligations, the server was required to use their own cash.

[17] Each server delivered their summary of sales, their cash out sheet, and the two envelopes or zip-lock bags to the onsite manager at the end of their shift. The onsite manager was responsible for later distributing the cash tip-outs to support staff and restaurant managers. The summary of sales and cash out sheet were set aside and picked up by someone from the appellant's accounting team the next business day to facilitate payment of the due-backs to the servers.

[18] The Minister's assessment treats the due-backs as amounts paid by the appellant to the servers in respect of their employment and so contributory salary and wages for purposes of the *Canada Pension Plan* and insurable earnings for purposes of the *EIA*.

[19] Accordingly, this appeal is not concerned with cash tips servers may have received and kept. Similarly, this appeal is not concerned with tip-outs received by kitchen staff, on-site restaurant management, or support staff. Finally, this appeal is not concerned with the servers' net electronic tips—an amount that might exceed the due-back because servers retained cash received for restaurant bills under the process described above.

[20] The only issue before this Court is whether the Tax Court erred when it concluded that the appellant paid the due-backs to the servers in respect of their employment and therefore that the due-backs were contributory salary and wages for purposes of the *Canada Pension Plan* and insurable earnings for purposes of the *EIA*.

III. The Appeal

[21] While the appellant asserts three grounds of appeal in its memorandum of fact and law, only two were addressed at the hearing of the appeal. I have addressed the third ground briefly, based on the written submissions.

A. *Are the Due-Backs in respect of the Server's Employment?*

[22] The appellant points out that, in defining insurable earnings, the *Regulations* refer to amounts paid by an employer to employees "in respect of" their employment. The appellant submits that the due-backs are not paid in respect of a server's employment and so are not insurable earnings. This is so, says the appellant, because a server's due-back bears "little or no relation to the server's net tip—it is simply the difference between cash payments for meals and electronic tips owing. Put differently, it is not an amount paid in respect of the employee's employment. It is an amount paid in respect of the difference between cash received and tips." (Appellant's MFL, para. 57).

[23] The due-back, says the appellant, is not determined by the number of hours worked, or the server's sales, or the electronic tips paid by the server's customers, but is dependent on

whether the server's customers pay their restaurant bills with cash or by electronic means and so the due-back is not in respect of the server's employment.

[24] In addressing this same argument, the Tax Court noted that in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 39, the Supreme Court stated that the words "in respect of" have wide scope and import such meanings as "in relation to", "with reference to" and "in connection with". Relying on that case, the Tax Court concluded that "any tips paid to [appellant's] employed servers, particularly including if paid by [the appellant] itself, readily [can] be said to have been so paid 'in respect of [their] employment'" (Reasons at para. 14). While the Tax Court went farther than it had to for purposes of the appeal (addressing not only the due-backs, but all tips paid to the servers), I agree with its conclusion. Put another way, "but for" their employment as servers by the appellant, the servers would not receive any tips paid to them.

[25] The same is true of the due-backs notwithstanding that they constituted only a portion of the electronic tips received from the server's customers. The arrangements between the appellant and its servers that permitted servers to retain cash received in payment of restaurant bills, thereby reducing their due-backs, does not affect the conclusion that a server's due-back was in respect of the server's employment. But for their employment with the appellant, the servers would not have received the due-backs from the appellant.

[26] Moreover, nothing in the legislation suggests that, to qualify as an amount in respect of employment, the amount must be calculated in a particular way, or with reference to hours worked or sales or any other measurable factor. The only relevant question for determining

whether an amount is in respect of employment is whether that amount was received in relation to, with reference to, or in connection with employment. I agree with the Tax Court that the due-backs were so received.

B. *Are the Due-Backs Paid by the Appellant?*

[27] The second issue addressed by the Tax Court was whether the due-backs were paid by the appellant. If they were not, then even if received in respect of employment, they would not give rise to employer liability for contributions under the *Canada Pension Plan* or premiums under the *EIA*.

[28] Before this Court, the appellant submits that two lines of cases deal with the treatment of tips in the context of the *Canada Pension Plan* and the *EIA*. The first, which the appellant calls the "distribution cases", consists of cases where the employer received all of the tips and decided what portion would be distributed among the employees and how. The second category consists of what the appellant calls the "conversion cases"—those where the employer did not take the cash tips and merely converted the electronic tip into cash and paid the cash over to the employee. Distribution cases, says the appellant, give rise to employer liability for contributions and premiums, but conversion cases do not. This case, says the appellant, is a conversion case, not a distribution case, and so it has no liability for contributions or premiums based on the due-backs.

[29] I disagree.

[30] In its reasons, the Tax Court considered each of the cases the appellant submitted to this Court, describing *Canadian Pacific Ltd. v. Canada*, [1986] 1 S.C.R. 678 [*Canadian Pacific*], as the leading decision.

[31] *Canadian Pacific* considered whether gratuities paid to hotel employees were insurable earnings under the *Unemployment Insurance Act, 1971,* S. C. 1970-71-72, c. 48, the predecessor to the *EIA*. Organizers of functions (such as banquets or conferences) hosted at the Château Frontenac, a hotel owned by Canadian Pacific Ltd (CPL), paid CPL, without obligation, gratuities for distribution to its employees. Under the terms of the governing collective agreement, 80% of those gratuities were distributed to the hotel employees governed by the collective agreement who worked during the relevant function.

[32] In *Canadian Pacific*, the Supreme Court said the meaning of "insurable earnings" is what was important. At that time, the relevant regulation defined a person's insurable earnings as "the amount of his remuneration, whether wholly or partly pecuniary, paid by his employer in respect of a pay period, and includes…any amount paid to him by his employer as, on account or in lieu of payment of, or in satisfaction of … a gratuity".

[33] While much of the Supreme Court's decision focuses on the meaning of insurable earnings in the context of the legislation as it then existed, the Supreme Court identified the purpose of the legislation as paying "to persons who have lost their employment, benefits calculated in terms of a percentage of their insurable earnings." (*Canadian Pacific*, at para. 25). In that context, the Supreme Court said that "remuneration" should be given a broad meaning

and could include “a tip paid to the employer for distribution to his employees.” The Supreme Court also said “the word ‘paid’…can equally well mean mere distribution by the employer or payment of a debt owing by him” and that “if one gives the word ‘remuneration’ a broad meaning, one must also give a broad meaning to the word ‘paid’.” (Canadian Pacific, at para. 20).

[34] The appellant considers *Canadian Pacific* to be a distribution case. In contrast, it says, its circumstances are closer to *Lake City Casinos Limited v. Minister of National Revenue*, 2006 TCC 225, affirmed 2007 FCA 100, [*Lake City*], a case the appellant characterizes as a conversion case.

[35] In *Lake City*, the issue was whether gratuities patrons of the casinos left with the employees in the form of cash or casino chips were paid to the employees by their employer. The Tax Court concluded they were not. However, *Lake City* was decided based on an agreed statement of facts that the Tax Court said precluded a finding that the casino had the tips to give back to the employees (*Lake City*, TCC, at para. 46). The Tax Court found the tips “never [became] the property of (or even commingled with the property of) the employer” (*Lake City*, TCC, at para. 63). In other words, in *Lake City*, it was agreed that the employer never had possession of the tips and did not transfer them to the employees.

[36] This Court dismissed the *Lake City* appeal from the bench. While brief, this Court’s reasons are clear that the word “paid” should be given a liberal interpretation, consistent with *Canadian Pacific* and, if the tips come into the possession of the employer who then transfers

them to the employees, that is sufficient to conclude they are paid by the employer. Given the agreed facts, this Court agreed it was open to the Tax Court in *Lake City* to hold that the tips were not distributed by the employer.

[37] In contrast, there is no dispute the electronic tips came into possession of the appellant or that the appellant transferred the due-back, representing a portion of those electronic tips, to the servers. The electronic tips were converted to cash and deposited in the appellant's bank account; the appellant used funds from its bank account to pay a portion of those electronic tips, the due-backs, to the servers.

[38] The appellant pointed out, that after *Canadian Pacific*, the definition of insurable earnings was amended. In my view, the amendments to the definition do not affect the principles articulated in *Canadian Pacific*, as reiterated by this Court in *Lake City*. In that regard, I agree with the Tax Court's comments in *Andrew Peller Limited v. M.N.R.*, 2015 TCC 329, at paras. 55-59.

[39] The appellant seeks to draw distinctions between its case and cases in which the employer was found to have paid tips to its employees. To do so, the appellant points to such factors as the tips having been pooled, tips having been shared with others by the employer, the employer coming into possession of both cash tips and electronic tips, and the employer exerting control over the distribution of the tips, suggesting none of these facts are present in its case.

[40] While I do not accept the appellant's contention that none of these factors are present in this appeal, more fundamentally I disagree with the suggestion the distribution cases identified by the appellant were decided on the basis of those factors. Similarly, in my view, nothing turns on the method of payment (cash, direct deposit, set off, direction, or otherwise). Method of payment should not be confused with who has paid.

[41] To be clear, in determining whether a tip is an amount paid by an employer, and whether that amount is in respect of employment, factors such as when the amount is paid (daily, weekly, at the end of a pay period or at some other time), whether the employee is paid all or some portion of their own tips or pooled tips, whether the employer keeps a portion of the tips, or whether the tips are distributed under a collective agreement, a written contract, an oral agreement or otherwise, may be of little or no relevance in a particular case and are not determinative.

[42] Rather, in each case, the question to be answered is whether the employer paid the amounts to the employees in respect of their employment. How it is answered in any particular case depends on the facts as found by the Tax Court based on the evidence in that case.

[43] Here, citing *Canadian Pacific* and *Lake City*, the Tax Court identified the applicable test as "simply, whether it was the employer who 'paid' (liberally construed) the tips to the servers" (Reasons at para. 44). Applying that test, the Tax Court concluded "the subject tips were… 'paid' to the server employees by [the appellant]." In particular, the Tax Court noted that the "electronic tips had not previously been paid to or otherwise [been] in possession of the servers."

Rather, the appellant's customers "had tendered to [the appellant] their electronic tips (as an added part of each patron's single electronic payment made to [the appellant] in settling [the appellant's] dining invoice)" (Reasons at para. 45). There was ample evidence before the Tax Court to support these conclusions.

[44] Accordingly, the Tax Court concluded the due-backs were "contributory salary and wages of the employee paid by the employer" for purposes of the Canada Pension Plan and "insurable earnings" for purposes of the *EIA*.

[45] I see no error in the Tax Court's articulation of the test or in its application to the facts as found by it.

C. *Did the Tax Court Make a Finding not Supported by the Evidence?*

[46] In oral argument, the appellant addressed only what it submits are errors of law made by the Tax Court. However, in its memorandum of fact and law, the appellant states that to the extent that the Tax Court made a finding that the restaurant customers intended that the electronic tips be the property of the appellant, that finding is not supported by the evidence.

[47] I first observe that the *Federal Courts Act*, R.S.C. 1985, c. F-7, limits the grounds of appeal under the *Canada Pension Plan* and *EIA*. Paragraphs 27(1.3)(d) of the *Federal Courts Act* is relevant to the appellant's third ground. It provides:

> The only grounds for an appeal under subsection (1.2) are that the Tax Court of Canada
>
> …

> (d) based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

There is no suggestion the Tax Court based its decision on an erroneous finding made in a perverse or capricious manner.

[48] In support of its position that the Tax Court may have made a finding not supported by the evidence, the appellant points to paragraph 15 of the Tax Court's reasons: "A patron would add the server's gratuity to the billed dining room invoiced amount and then pay the resultant total, by credit or debit card, solely to the favour of [the appellant]". As the appellant itself points out, elsewhere in its reasons, the Tax Court described the electronic tips as "tendered to [the appellant]…(as an added part of each patron's single electronic payment made to [the appellant] in settling the [appellant's] dining invoice)" (Reasons at para. 45).

[49] In my view, these statements do not constitute findings of fact concerning the intentions of the restaurant's customers or ownership of the electronic tips and are not findings on which the Tax Court's decision is based. Rather, they are descriptions of the effect of an electronic payment that included a tip: the electronic payment, including the electronic tip, was deposited to the appellant's bank account. The appellant does not dispute that.

IV. Additional Comments

[50] As described above, servers received the full amount of their net electronic tips, albeit from two different sources: (i) the cash received directly from customers, and retained rather than remitted to the appellant, on account of restaurant bills, and (ii) the due-backs received from

the appellant. Moreover, the appellant withheld the kitchen tip-out for distribution among its kitchen staff; servers made tip-out payments to restaurant management and support staff. The Tax Court described this tip-out process as one the appellant was more than passively aware of, to the extent of warning of significant disciplinary actions if the established process were not followed (Reasons at para. 21).

[51] Questions posed by the panel at the hearing of this appeal led to significant discussion about the Minister's decision to assess the appellant on the basis she did—that is, that the due-backs, rather than some other amount, were contributory salary and wages and insurable earnings paid by the appellant. Nonetheless, these reasons should not be viewed as expressing any opinion about the characterization, for purposes of the *Canada Pension Plan* or the *EIA*, of any amounts the appellant's employees received other than the due-backs.

[52] While both the appellant and the respondent invited this Court to address the proper treatment of tips more broadly to bring clarity to the issue, in my view that is neither desirable nor necessary. The test is clear. In each case, the question to be asked is whether, based on the relevant facts in the case, the amount in question is paid by the employer to the employee in respect of their employment.

V. Conclusion

[53] The only issue in this appeal is whether the Tax Court erred in dismissing the appellant's

appeal of the Minister's assessments. In my view, it did not. Accordingly, I would dismiss the appeal with costs.

"K.A. Siobhan Monaghan"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF THE TAX COURT DATED MARCH 18, 2021, NOS. 2019-1216(EI) AND 2019-1217(CPP)

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DATED:	AUGUST 31, 2022

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