[OFFICIAL ENGLISH TRANSLATION]

2001-3252(IT)I

BETWEEN:

JACQUES PÉPIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 28, 2002, at Montréal, Quebec, by

the Honourable Judge Louise Lamarre Proulx

Appearances

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Nancy Dagenais

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 1998 taxation year is dismissed, in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of September 2002.

"Louise Lamarre Proulx"

J.T.C.C.

[OFFICIAL ENGLISH TRANSLATION]

Date: 20020904
Docket: 2001-3252(IT)I

BETWEEN:

JACQUES PÉPIN,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Lamarre Proulx, J.T.C.C.

[1] This is an appeal under the informal procedure for the 1998 taxation year.

[2] At issue is whether an indemnity of $20,000 received by the appellant in settlement of a dispute between the Commission scolaire Saint-Hyacinthe ("the Commission scolaire") and the Syndicat de l'enseignement Richelieu-Yamaska ("the Syndicat") must be included in computing the appellant's income under sections 3, 5 and 56 of the *Income Tax Act* ("the *Act*").

[3] In making the reassessment, the Minister of National Revenue ("the Minister") relied on the following assumptions of fact set out in paragraph 5 of the Reply to the Notice of Appeal ("the Reply"):

> [TRANSLATION]
>
> (a) from 1990 to June 30, 1996, the appellant taught English as a second language to adults as an employee of the Commission scolaire Saint-Hyacinthe;

(b) on June 10, 1996, citing disciplinary reasons, the Commission scolaire Saint-Hyacinthe notified the appellant in writing that at the time of the July 1, 1996, update his name would be removed from the recall list of general adult training teachers;

(c) on June 20, 1996, the Syndicat de l'enseignement Richelieu-Yamaska responded for the appellant by filing a notice of grievances and arbitration for non-rehiring;

(d) according to a copy of an April 3, 1998, court decision, the Honourable Jean Marquis, J.S.C., determined, first, that the June 10, 1996, letter from the Commission scolaire Saint-Hyacinthe to the appellant constituted a notice of non-rehiring for the 1996-1997 school year and, second, that the said Commission scolaire had not respected the prescribed time limits for serving notice of non-renewal of contract by letter on the appellant;

(e) in settlement of the dispute between the Commission scolaire Saint-Hyacinthe and the Syndicat de l'enseignement Richelieu-Yamaska, an April 14, 1998, out-of-court agreement stipulated that:

(i) the appellant was to be reinstated in his teaching duties with no indemnity or compensation;

(ii) the removal of the appellant's name from the recall list was to be changed to a disciplinary measure;

(iii) the appellant's name was to be put back on the recall list and the parties were to agree that his name had never been removed from the said list; and

(iv) in consideration of the foregoing, the Syndicat de l'enseignement Richelieu-Yamaska was to abandon a series of procedures in exchange for an indemnity of $20,000;

(f) the Minister obtained no information on how the indemnity of $20,000 was calculated;

(g) during the 1998 taxation year, the Syndicat de l'enseignement Richelieu-Yamaska paid the said amount of $20,000 to the appellant, even though the appellant was not employed by the said Syndicat.

[4] The appellant's Notice of Appeal states, [TRANSLATION] "... the amount of damages paid to me by my Commission scolaire was not severance pay in any

way since I am still employed by my Commission scolaire, where I have since been made a permanent employee and where I am pursuing my career. This amount was paid to me following the decision by the Tribunal du travail recognizing that my fundamental rights as an employee had been infringed upon and that the Commission scolaire and its representative (the director of personnel) were obliged to pay me damages. This amount was paid to me out of court in compensation for damages and harm."

[5] The witnesses were the appellant and Robert Saint-Germain. Mr. Saint-Germain testified at the request of counsel for the respondent.

[6] The appellant is a teacher. He admitted the truth of subparagraphs 5(a) to 5(e) and 5(g) of the Reply. The court decision referred to in subparagraph 5(d) was adduced as Exhibit I-1. The April 3, 1998, Superior Court decision overturned a May 26, 1997, arbitration award, adduced as Exhibit I-2. That arbitration award was in favour of the employer for not following the non-rehiring procedure set out in the collective agreement because apparently the procedure applied only to full-time teachers. The court decision overturned the arbitration award and determined that the employer was required to follow the non-renewal procedure for part-time teachers as well because the relevant clause of the collective agreement did not distinguish between the two categories.

[7] Under cross-examination, counsel for the respondent asked the appellant to explain what he meant in stating in the Notice of Appeal that his fundamental rights had been infringed upon. According to the appellant's response, he meant that, by removing his name from the recall list, the Commission scolaire was severing his only link to the employer since he was a part-time teacher. He lost all his employment-related rights.

[8] The appellant also stated that in April 1996 he informed the Commission scolaire, as he occasionally did, that he did not wish to be recalled during the 1996-1997 school year because he wanted to take that year off. However, in a June 10, 1996, letter the Commission scolaire notified him that his name would be removed from the recall list and that he would not be rehired.

[9] Robert Saint-Germain is a union advisor. It was he who, on June 20, 1996, submitted to arbitration a grievance concerning the non-rehiring of the appellant by the Commission scolaire. This notice of arbitration submitted to the chief arbitrator of the Greffe des tribunaux d'arbitrage du secteur de l'éducation was adduced as

Exhibit I-4. The first request of the grievance was acknowledgement that the non-rehiring procedure had not been followed.

[10] As we already know, the May 26, 1997, arbitration award was not in favour of the Syndicat. The subsequent April 3, 1998, Superior Court decision was in favour of the Syndicat.

[11] The April 14, 1998, out-of-court agreement between the Syndicat and the Commission scolaire was adduced as Exhibit I-5. The main points of this agreement are as follows:

> [TRANSLATION]
>
> ...
>
> 1. Mr. Jacques Pépin shall be reinstated in his teaching duties at the Commission scolaire de Saint-Hyacinthe with a full teaching load (part-time contract) on or around April 1, 1998, with no indemnity or compensation.
>
> 2. The removal of Mr. Jacques Pépin's name from the recall list shall be changed to a disciplinary measure within the meaning of clause 5-6.00 and ...
>
> 3. Mr. Jacques Pépin's name shall be put back on the recall list for all legal purposes, and the parties shall agree that his name was never removed from the said list.
>
> 4. In consideration of the foregoing, the Syndicat de l'enseignement Richelieu-Yamaska shall abandon all the above-captioned procedures and all the above-mentioned grievances in exchange for an indemnity of $20,000 to be paid by the Commission scolaire to the Syndicat as liquidated and compensated damages.
>
> ...
>
> 7. The Commission scolaire de Saint-Hyacinthe and the Syndicat de l'enseignement Richelieu-Yamaska hereby give each other final and irrevocable discharge with respect to any action relating to the facts surrounding the grievances and remedies referred to in this agreement.
>
> ...

[12] Counsel for the respondent asked Mr. Saint-Germain to explain the nature of the indemnity received. Mr. Saint-Germain answered that usually, in a non-rehiring case before the arbitration tribunals, [TRANSLATION] "*what is provided for is that the person is entitled to the salary lost during that period plus the interest provided for in the Labour Code. At that point, what we were claiming was reimbursement for the salary lost during the two years the dispute lasted. Did $20,000 represent what the appellant would have lost during those two years? At the time the case was settled out-of-court, the non-rehiring had been put on hold for a year and three-quarters. Back then, Mr. Pépin was earning approximately $40,000 annually, so we arrived at an amount of approximately $70,000, plus the interest provided for, which was probably around 10 per cent at the time.*"

[13] Mr. Saint-Germain explained that it is ultimately up to the complainant to decide whether the proposed amount is acceptable.

Arguments

[14] The appellant has argued that he was not compensated for a loss of employment because his name was put back on the recall list and he is now a full-time teacher. The indemnity is therefore not a retiring allowance. He reiterated that he had decided to be on sabbatical during the 1996-1997 school year and had submitted the relevant document in April 1996. The indemnity received could therefore not be compensation for the remuneration lost during that year. He was reinstated in his duties on or around April 1, 1998.

[15] Counsel for the respondent has referred to the decision by Dussault J. of this court in *Leest v. Canada (Minister of National Revenue – M.N.R.)*, [1991] T.C.J. No. 744 (Q.L.), in which the facts are very similar to those in the present case. *Leest* involved loss of employment at the time a trucking business was acquired by another firm. The Canada Labour Relations Board determined that the acquiring firm had become a successor employer. The appellant was reinstated and was paid compensation for the amounts lost by reason of his lay-off.

[16] Counsel for the respondent has quoted certain passages at page 7:

> As there is no doubt in my mind that the appellant lost, for all practical purposes and effect his employment for a lengthy period, although not permanently as he was later reinstated by the Arbitration Board, I also conclude that the award of damages by

> the Arbitration Board was directly related to that loss and directed at compensating it.
>
> In that sense, the amount was "with respect of" the loss of employment. This being so, such damages can rightly be considered a "retiring allowance" as that term is now defined by subsection 248(1) of the Act. They are thus taxable by virtue of subparagraph 56(1)(*a*)(ii) of the Act.
>
> ...
>
> Secondly, I think that the language used in the definition of "retiring allowance" in subsection 248(1) of the Act is unequivocal. I fail to see the reference to a loss of employment as importing the meaning of a permanent loss of employment. Such words are not in the statute and in my opinion should not be inferred when Parliament has not seen fit to use them.

Conclusion

[17] Subsection 5(1), subparagraph 56(1)(*a*)(ii), and the definition of "retiring allowance" set out in subsection 248(1) of the *Act* read as follows:

> 5(1) **Income from office or employment** — Subject to this Part, a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year.
>
> 56(1) **Amounts to be included in income for year —** Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year,
>
> (*a*) P**ension benefits, unemployment insurance benefits, etc**. — any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,
>
> (i) ...
>
> (ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,
>
> ...

> 248(1) **"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,
> ...

[18] The decision of Dussault J. in *Leest* (*supra*) is particularly relevant since it was reached in circumstances very similar to those in the present case. Even though the employee was reinstated in his duties, the amount received was a retiring allowance since it was paid in respect of the loss of the taxpayer's employment, even if that loss of employment had been temporary.

[19] I would also refer to a decision of St-Onge J. of this court in *Abramovici v. M.N.R.*, 80 DTC 1151. Mr. Abramovici was a teacher employed by the Eastern Townships Regional School Board. As a result of a grievance filed by the Eastern Townships Association of Teachers on the ground that the School Board had not hired the required number of teachers during the school year, an out-of-court settlement was reached for a lump sum of which Mr. Abramovici received his share. The judge determined that the amount received was income from employment within the meaning of subsection 5(1) of the *Act*.

[20] Therefore, even if the amount received was not a retiring allowance, it would still be an amount to be included in computing income from employment within the meaning of subsection 5(1) of the *Act*.

[21] Damages are determined on the basis of the harm caused to the person entitled to the compensation. For teachers, as Mr. Saint-Germain noted, these damages are calculated on the basis of unjustified salary loss. The appellant claimed the indemnity because the employer had severed the only link between

him and the employer; what was involved was loss of employment. The decision by the Superior Court re-established the appellant's rights as a part-time employee with his employer, the Commission scolaire.

[22] The appellant accepted $20,000. This amount appears to be the income lost corresponding to the part of the 1997-1998 school year during which he did not work. Before receiving his notice of non-rehiring, the appellant had informed his employer that he would take the 1996-1997 school year off. He would therefore have lost employment income for the first part of the 1997-1998 school year.

[23] That said, it is necessary, not to explain how the damages were calculated, but simply to note that the damages were paid in compensation for the loss of income resulting from the loss of employment.

[24] The wording of the definition of retiring allowance set out in subsection 248(1) of the *Act* is clear. An amount received by a taxpayer in respect of a loss of employment, whether or not received as payment of damages or pursuant to an order of a competent tribunal, is a retiring allowance. The amount received by the appellant in this case is a retiring allowance.

[25] Even if that amount were not a retiring allowance (which it is), it is an amount received in payment of damages for salary loss and interest or an amount received under an employment contract, which must be included in computing income within the meaning of subsection 5(1) of the *Act*.

[26] Accordingly, the appeal is dismissed.

Signed at Ottawa, Canada, this 4th day of September 2002.

"Louise Lamarre Proulx"

J.T.C.C.