

Docket: 2008-2634(EI)

BETWEEN:

MILDRED SPILLER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 27, 2009, at Montreal, Quebec.

Before: The Honourable Justice Paul Bédard

Appearances:

Agent for the Appellant: Gary Spiller

Counsel for the Respondent: Simon Petit

JUDGMENT

The appeal from the assessment made under the *Employment Insurance Act* for the period from July 30, 2006 to July 27, 2007 is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23th day of March 2009.

“Paul Bédard”

Bédard J.

Citation: 2009 TCC 125
Date: 20090323
Docket: 2008-2634(EI)

BETWEEN:

MILDRED SPILLER,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Bédard J.

[1] This is an appeal against a decision by the respondent that from July 30, 2006 to July 27, 2007 (the “relevant period”), Ms. Karen Tower (the “worker”) accumulated 2,203 insurable hours and that, for the last 27 pay periods of the relevant period, she received \$11,220.12 in insurable earnings while working for Mrs. Mildred Spiller (the “payer”).

[2] The facts on which the respondent relied to explain and justify his decision are set out in paragraph 5 of the Reply to the Notice of Appeal, as follows:

- a) The Appellant is an elderly person who required home’s [sic] care;
- b) Mr. Garry [sic] Spiller, son of the Appellant, represent [sic] the Appellant;
- c) On April 1st, 2006, the Appellant and the Worker signed a contract of employment;

- d) The Worker has hired by the Appellant's son, Garry [sic] Spiller, as caregiver in the home of the Appellant;
- e) The contract only specified that the Worker shall work 32 hours per week for a salary of \$315 per week without any other specification except other than the fact that she had to take care of the Appellant from 8 AM to 5 PM;
- f) [B]oth parties agree that, during the period under review, the Worker provided services as an employee of the Appellant;
- g) [T]he tasks of the Worker were to monitor the Appellant, accompany her at [sic] the shopping center and at the Foyer Dorval, ensure that she was taking his [sic] medication, prepare meals, wash the dishes, doing laundry, cleaning the bathroom, help the Appellant to dress and to go to bed;
- h) The Appellant said that, during the period under review, the Worker worked from Sunday 5 PM to Thursday 5 PM; 4 days per week, 8 hours per day for a total of 32 hours per week;
- i) In addition to her salary of \$315 per week, the Worker requested an allowance in view of the fact that she had a van that could be used for errands and shopping;
- j) Both parts [sic] agreed that the Worker will [sic] receive an allowance of \$152 every 2 weeks as a weekly personal care supplement of \$76 per week and an addition [sic] \$34 per week as a car allowance advance;
- k) During the period under review, the Worker received a weekly cheque of \$425 from the Appellant;
- l) In her notice of appeal, the Worker says she was doing much more than 32 hours a week because she had to monitor the Appellant 24 hours a day;
- m) Following her layoff, the Worker claims [sic] to [sic] the Payer 120 hours per week over 5 days;
- n) [T]he Worker did not complete any time sheet and did not record her alleged hours of work;
- o) [T]he Worker holds no evidence or document who [sic] can certify her claim;

- p) [T]he Worker did not made [sic] a complaint to the Commission des Normes du Travail (the Commission) to receive her alleged full salary from the Appellant;
- q) [T]he Payroll statement of the Appellant confirms that the Worker received a net salary of \$425 per week divided as follow [sic]: a net salary of \$275.56, a personal allowance of \$140 and a car allowance of \$9.44;
- r) From [sic] the total of \$425 per week paid to the Worker, the respondent considers that only the amount of \$9.44, paid as a car allowance, is not to [sic] part of the insurable earnings of the Worker;
- s) During the last 27 pay periods of the period under review, the Respondent established the total insurable earnings of the Worker at \$11,220.12 ($\$425 - \$9.44 = \415.56×27 periods) as per the *Insurable Earnings and Collection of Premiums Regulations*[:]
- t) During the period under review, the Respondent established the total insurable hours of the Worker at 2,203 ($\$415.56/\$10.00 = 41.56$ hours per week $\times 53$ periods = 2,203 hours) as per the *Employment Insurance Regulations*.

[3] The facts alleged in subparagraphs 5a), 5b), 5c), 5d), 5e), 5f), 5g), 5h), 5i), 5k), 5n), 5p) and 5q) were admitted. The facts alleged in subparagraphs 5j), 5r), 5s) and 5t) were denied. The applicant was not aware of the facts alleged in subparagraphs 5l), 5m) and 5o).

Issue

[4] I would point out immediately that the appellant's representative stated at the hearing that the worker's insurable hours were no longer at issue. Consequently, the only point at issue in this case is the amount of the worker's insurable earnings for the last 27 pay periods of the relevant period. More precisely, the only point at issue here involves determining whether the allowance (\$140 per week) received by the worker (the "personal allowance") is part of her insurable earnings.

Appellant's position

[5] The appellant's position is reflected in paragraphs 4 and 5 of the written declaration on behalf of the appellant (Exhibit A-1) prepared by her accountant. These paragraphs read as follows:

4. In addition she was given a weekly allowance for Personal Assistance at Home paid by the SAAQ due to Mrs Spillers [sic] disability (hydrocephaly) caused by an automobile accident in 1998. Ms Tower understood that this was a separate allowance, non taxable and non insurable to the employer that was passed on to her in recognition for the additional care required due to Mrs Spiller's disability[.]
5. The SAAQ clearly indicated that the Personal Care Allowance of \$78 per week [was] non-taxable provincially and federally and therefore non-insurable. The same applies to the Federal Guaranteed Income Supplement (GIS) from which the remaining \$62 of the \$140 allowance was paid. (source Nancy Dubé – SAAQ Compensation Officer (Phone: 418 646 9884) and GIS information line 1 800 2 9914).

In other words, the appellant maintains that the personal allowance is not part of the worker's insurable earnings for the purposes of the *Employment Insurance Act* (the "Act") since the appellant was simply passing on to the worker (flow-through principle) the two allegedly non-taxable (for the purposes of the *Income Tax Act*) allowances she was receiving during the relevant period.

Analysis and Conclusion

[6] In order to determine the insurable earnings for the purposes of the *Act* we must refer to subsections 2(1) and (3) of the *Insurable Earnings and Collection of Premiums Regulations* (the "*Regulations*"), which read as follows:

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

(b) the amount of any gratuities that the insured person is required to declare to the person's employer under provincial legislation.

[...]

(3) For the purposes of subsections (1) and (2), “earnings” does not include

(a) any non-cash benefit, other than the value of either or both of any board or lodging enjoyed by a person in a pay period in respect of their employment if cash remuneration is paid to the person by their employer in respect of the pay period;

(a.1) any amount excluded as income under paragraph 6(1)(a) or (b) or subsection 6(6) or (16) of the Income Tax Act;

[...]

[7] Subsection 2(1) of the *Regulations* provides that all amounts received or enjoyed by the insured person that are paid to the person by the person’s employer in respect of insurable employment are insurable earnings for the purposes of the *Act*. The only exceptions to that general principle are listed in subsection 2(3) of the *Regulations*. In the present case, the personal allowance received by the worker was clearly paid to the worker by the appellant in respect of insurable employment and I see no provision in subparagraph 2(3) of the *Regulations* that could apply so as to exclude the personal allowance from “insurable earnings”. The fact that money used to pay the personal allowance came from the two allegedly non-taxable allowances received by the appellant is simply irrelevant.

[8] As a result, the appeal is dismissed.

Signed at Ottawa, Canada, this 23th day of March 2009.

“Paul Bédard”

Bédard J.

CITATION: 2009 TCC 125
COURT FILE NO.: 2008-2634(EI)
STYLE OF CAUSE: MILDRED SPILLER and THE MINISTER
OF NATIONAL REVENUE

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: January 27, 2009

REASONS FOR JUDGMENT BY: The Honourable Justice Paul Bédard

DATE OF JUDGMENT: March 23, 2009

APPEARANCES:

Agent for the Appellant: Gary Spiller

Counsel for the Respondent: Simon Petit

COUNSEL OF RECORD:

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