Docket: 2010-3092(EI)

BETWEEN:

COREEN GEDDES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on March 31, 2011, at Vancouver, British Columbia.

Before: The Honourable Justice Johanne D'Auray

Appearances:

Counsel for the Appellant:	Gwendoline Allison
Counsel for the Respondent:	Shankar Kamath

JUDGMENT

The appeal pursuant to subsection 103(1) of the *Employment Insurance Act* is dismissed and the decision of the Minister of National Revenue is confirmed.

Signed at Ottawa, Canada, this 8th day of August 2011.

"Johanne D'Auray"

D'Auray J.

Citation: 2011 TCC 381
Date: 20110808
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BETWEEN:

COREEN GEDDES,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

D'Auray J.

[1] The question to be determined in this appeal is whether the appellant had sufficient insurable hours in order to qualify for unemployment benefits.

[2] In order to make this determination, I have to answer the following two questions. The first one is whether the amounts paid to the appellant by the employer as maternity leave top-up constitute insurable earnings. The second one is whether the lump sum received by the appellant for the loss of her employment constitutes a retiring allowance.

FACTS

[3] The appellant started her employment with Lyons Gate Hospital Foundation (**the Foundation**) in February 1999.

[4] The appellant was the Director of Annual Giving for the Foundation and reported to the President of the Foundation, Ms. Savage.

[5] On October 10, 2007, the appellant went on maternity leave following the birth of her daughter that day.

[6] During her maternity leave the appellant received maternity leave top up from the Foundation.

[7] On July 31, 2008, Ms. Savage sent an email to the appellant asking when she would return to work. Ms. Savage also stated in her e-mail:

> We can then arrange to meet to discuss the changes that have taken place in the office over the last year, and your role.

[8] The same day, the appellant responded that she was due to return to work on October 9, 2008.

[9] On August 1, 2008, Ms. Savage responded that there would be no problem for the appellant to return to work on October 9, 2008.

[10] On September 5, 2008, Ms. Savage sent an email to the appellant asking her to attend a meeting on September 9, 2008 to discuss some of the changes to Foundation's organisational structure.

[11] On September 9, 2008, the appellant attended the meeting as requested. However, the meeting took an unexpected turn for the appellant, rather than discussing her return to work and some of the changes made to the Foundation's organisational structure. She was informed by Ms. Savage that her employment was being terminated effective October 9, 2008.

[12] Ms. Savage told the appellant that there had been a reclassification of her position, and as a result, the appellant's position had been eliminated and replaced with a reclassified position.

[13] After the meeting of September 9, 2008 the appellant did not return to work.

[14] As a severance package, the Foundation offered the appellant a continuation of her salary for a period of 5 months (from October 9, 2008 to March 9, 2009) as compensation in lieu of notice: see Exhibit A-1.

[15] The appellant did not accept the initial offer of the Foundation. After negotiations she reached a settlement whereby she would receive a lump sum

equivalent to four months of salary, and additionally 20% of four months' salary in lieu of benefits. Upon the appellant's request, the cheque was to be dated January 1, 2009.

[16] The appellant executed a release in favour of the Foundation, whereby she released the Foundation from any claims arising out of or relating to her employment, the termination of her employment and the loss of any pension.

[17] During the negotiations the Foundation continued to pay the salary of the appellant, namely from October 9, 2008 until December 31, 2008.

[18] On March 9, 2008 the appellant applied for unemployment benefits.

[19] By letter dated May 13, 2009, Human Resources and Skills Development Canada (**HRSDC**) informed the appellant that she did not qualify since she had 345 hours of insurable employment between March 2, 2008 and February 28, 2009 whereas she needed 700 hours to qualify.

[20] On September 16, 2009 following a ruling request by HRDC, the appellant was informed by the Canada Revenue Agency (**CRA**),

> That she did not qualify for insurance employment benefits for the period of October 9, 2008 to December 12, 2008 since you were in receipt of salary continuance and the total insurable hours are 345 as calculated by your employer."[…] "We have also determined that for the period from December 13, 2008 to April 9, 2009 you were in receipt of a lump sum payment. This payment is considered to be a payment in lieu of notice, and is subject to EI premiums, however it does not have any insurable hours attached to it. [1]

Appellant's position

[21] On the question of the treatment of the maternity leave top up, the appellant argues the maternity leave top up and vacation pay are considered to be insurable earnings.

[22] On the question of the treatment of the lump sum payment, she submits that there is no distinction between the payment of salary continuance and the lump sum

[1][1] HRSDC did not have the competence to determine the insurable hours of the appellant. This explains why HRDC asked CRA for a ruling. CRA should have considered the period of October 9, 2008 to December 31, 2008. The insurable hours would however remained the same (345 hours).

payment. In the appellant's view, having accepted one form of payment as insurable, CRA must accept the remainder.

Analysis

[23] In *Mulvenna v. M.N.R.*[2] my colleague Justice Campbell Miller decided that maternity leave top up qualified as insurable earnings.

[24] In light of this decision, I allowed the appeal orally during a conference call held on April 15, 2011. I noticed after that following the decision of *Mulvenna* an amendment was made to the *Insurable Earnings and Collection of Premiums Regulations* (**IECPR**), excluding from insurable earnings the maternity leave top up pursuant to subsection 10.11 of the *Employment Insurance Regulations* (**EIR**) and subparagraph 2(3)(f)(ii) of the IECPR.

[25] Since my judgment was not signed, I asked the Tax Court coordinator on April 19, 2011 to schedule a new conference call so that I could amend my judgment and reasons. The second conference call was held on May 17, 2011.

[26] During the conference call, I advised the appellant that in light of the amendment, I could not consider the maternity leave top up as insurable earnings. I asked her if she wanted to make other submissions. On June 21, 2011, I received written submissions from the Appellant.

[27] In her written submissions, the appellant argues that she qualifies without the maternity leave top up as CRA should have taken in addition to her 345 hours as salary continuation, 241.29 hours for vacation pay and 45 hours for accrued salary. This would amount to 631.29 hours. However, even if I were to accept this submission, she would not qualify since pursuant to section 7 of the *Employment Insurance Act* (**EIA**), she needed 700 hours. [3]

[28] She also submits that the hours associated with the lump sum payment should qualify as insurable hours. She argues that the lump sum payment should be treated by CRA in the same manner as the salary continuation payment from October 9, 2008 until December 31, 2008.

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[2] *Mulvenna v. M.N.R* . 2003 TCC 390 (CanLII)

[3] Since the appellant resided in the Greater Vancouver region, and the rate of employment was 5"1% she needed 7000 hours of insurable employment in qualifying period pursuant to section 7 of the EIA.

[29] I do not agree with the appellant. In my view, the lump sum given by the Foundation for the loss of her employment qualifies as a retiring allowance. Retiring allowances are excluded from insurable earnings by virtue of section 10.11 of the EIR and paragraph 2(3)(b) of the IECPR. The relevant provisions read as follow:

> Section 10.11 of the EIR
>
> For the purpose of section 10.1, the amounts that are excluded from an insured person's earnings from insurable employment by subsection 2(3) of the *Insurable Earnings and Collection of Premiums Regulations* shall not be taken into account in determining the person's hours of insurable employment.
>
> Paragraph 2(3)(b) IECPR
> EARNINGS FROM INSURABLE EMPLOYMENT
>
> (3) For the purposes of subsections (1) and (2), "earnings" does not include
>
> (*b*) a retiring allowance;
>
> Under section 1 of the IECPR, retiring allowance means:
>
> -an amount received by a person
>
> (*a*) on or after retirement of the person from an office or employment in recognition of the person's long service, or
>
> (*b*) in respect of a loss of an office or employment of the person, 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.

[30] The wording of the release signed by the appellant is quite telling as to why the lump sum amount was paid by the Foundation. It reads:

> Forever discharge the Foundation of any action […] arising out of or relating to: the termination of employment of the Releasor by the Releasees […] this is a compromise settlement of a disputed claim […] that this Release is executed and the aforesaid consideration accepted by the Releasor for the purpose of making a full, final and irrevocable settlement of any claims whatsoever […] see Exhibit A-10.

[31] In my view, this demonstrates that the amount received by the appellant as a lump sum is a retiring allowance. The lump sum paid by the Foundation was for the termination of the appellant's employment, it was clearly not paid as a salary

continuation payment.[4] By signing the release, the appellant ceased to be an employee of the Foundation.

[32] It is unfortunate that a woman who loses her employment following a maternity leave cannot receive unemployment benefits, but I do not have a choice other than to apply the law.

[33] The appeal is therefore dismissed.

Signed at Ottawa, Canada, this 8th day of August 2011.

"Johanne D'Auray"

D'Auray J.

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[4] See : *Lefebvre v. M.N.R.* 2004 TCC 131. *Wronski v. M.N.R.* 1999 TCC 319. MerckFrostCanada Ltd v. M.N.R. 2008 TCC 538.

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COURT FILE NO.:	2010-3092(EI)
STYLE OF CAUSE:	COREEN GEDDES v. THEMINISTER OF NATIONAL REVENUE
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 31, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Johanne D'Auray
DATE OF JUDGMENT:	August 8, 2011

APPEARANCES:

Counsel for the Appellant:	Gwendoline Allison
Counsel for the Respondent:	Shankar Kamath

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