Docket: 2018-4301(EI)

BETWEEN:

SORIN HERTA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

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Appeal heard on May 6, 2019, at Montreal, Quebec.

Before: The Honourable Justice Guy R. Smith

Appearances:

| | |
|---|---|
| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Renaud Fioramore-Beaulieu |

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## **JUDGMENT**

In accordance with the attached reasons for judgment, the appeal made under the *Employment and Insurance Act* is allowed, without costs, on the basis that the Appellant's employment was "insurable employment" during the period from December 14, 2015 to July 31, 2017.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Guy R. Smith"

Smith J.

Citation: 2019 TCC 113
Date: 20190509
Docket: 2018-4301(EI)

BETWEEN:

SORIN HERTA,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

## **REASONS FOR JUDGMENT**

Smith J.

[1] This is an appeal from a decision made by the Minister of National Revenue (the "Minister") on July 18, 2018 which confirmed a ruling made by the Canada Revenue Agency ("CRA") on May 7, 2018 (the "Ruling") at the request of Service Canada with respect to the Appellant's insurability under the *Employment Insurance Act*, S.C. 1996, c. 23 (the "Act") for the period from December 14, 2015 to July 31, 2017.

[2] The Minister confirmed the Ruling, finding that the Appellant's employment was not insurable as the services were rendered outside of Canada and premiums were payable under the employment insurance laws of the USA, and more specifically that the employment was excluded from insurable employment within the meaning of paragraph 5(1)(a) of the Act and sections 5 and 7 of the *Employment Insurance Regulations*, SOR/96-332 (the "Regulations").

[3] During the relevant period, the Appellant worked under a contract of employment with Philips North America LLC (the "Payer"), a subsidiary of a Netherlands corporation, with a business establishment in Massachusetts, USA. The Payer also maintained a business presence in Quebec, Ontario and British Columbia.

[4] The relevant facts are not in dispute and in particular it is not disputed that the Appellant was at all material times a resident of Canada and that he maintained

bank accounts, insurance policies, professional association dues and a residence in Brossard, Quebec. He also filed income tax returns in Canada.

[5] The Minister’s assumptions as set out in the Reply to the Notice of Appeal were all essentially admitted. The Appellant was covered by the Payer’s US pension and benefits plan, paid social security, Medicare and paid state income and US federal taxes. He was issued a US statement of earnings, known as a “W-2 and Earnings Summary”, for each of the 2015, 2016 and 2017 taxation years.

[6] Throughout the employment period, it is not disputed that the Appellant paid “social security taxes” in US dollars withheld from source, as follows:

| | |
|---|---|
| 2015 | $ 512.69 |
| 2016 | $5,343.54 |
| 2017 | $4,951.12 |

[7] The Appellant’s employment was terminated effective July 31, 2017. He received a modest bonus and medical coverage was extended for another three months.

[8] The Appellant was entitled to work under a temporary work visa known as a “TN” issued by the US Department of Homeland and Security to professionals with pre-arranged employment in the USA.

[9] It is the Appellant’s position, and it appears not to be disputed by the Respondent, that TN holders are required to leave the USA as soon as their status expires or their employment is terminated.

[10] Accordingly, the Appellant returned to Canada following his termination and filed a claim for employment insurance (referred to as “unemployment” insurance in the USA). His application was eventually approved and he received total benefits of $16,410 for the period from August 2017 to March 2018.

[11] On May 7, 2018, the Appellant was informed by the CPP/EI Division of the Canada Revenue Agency (“CRA”) that it had been determined that his employment was not insurable and as a result he was required to reimburse the benefits received in the amount of $16,410.

[12] The Appellant then returned to the USA on a temporary basis and filed an application for unemployment benefits on May 27, 2018 with the Department of Unemployment Assistance (“DUA”) for the state of Massachusetts, which request was eventually denied. His appeal of that decision was also denied by the appropriate authority on November 15, 2018. He did not appeal that decision.

[13] The Appellant understood that his request for unemployment benefits was denied because he was no longer residing in the USA and thus not available to work. According to eligibility requirements that were not challenged by the Respondent, he was required to have “legal authorization to work in the U.S.” and had to be “actively looking for work each week”. He could not fulfill those requirements as a result of the terms of his TN visa, as noted above.

[14] The Appellant also argued that there was an agreement between Canada and the USA for the coordination of employment benefits. After the hearing, the Appellant provided the Court with an extract from the Service Canada website which, under the title “How to file a claim for American Unemployment Insurance benefits”, provides as follows:

> You must provide proof that your employment in the United States was authorized by American immigration regulations and that you are available for and actively seeking work in Canada. If you are not a Canadian resident, you will be asked for proof that you are authorized to work in Canada.

[15] The Respondent denied that it had any obligation to coordinate unemployment benefits.

[16] In any event, the Court attaches little weight to the printout provided since the information is general in nature and cannot be accepted for the truth of its content, though it appears to be accepted that information from official websites of well-known organizations can be a source of reliable information as noted in *Alexander College Corp. v. The Queen*, 2015 TCC 238:

> [24] Printouts (of bond rates) from the Bank of Canada’s official website were admitted for the truth of their contents in *Awan v Cumberland Health Authority*, 2009 NSSC 295, 283 NSR (2d) 107, as evidence to assist with calculating pre-judgment interest. In *Krawczyk v Canada (Minister of National Revenue – MNR)*, 2011 TCC 506, [2011] TCJ No. 414 (QL), Webb J. (as he then was) admitted a printout from the website for Human Resources and Skills Development Canada, which indicated wages for different jobs during a specific period.

[17] The Minister relies on a number of provisions of the Act including subsection 5(1)(a) and (d) as well as subsection 5(4) and 5(6) as follows:

> Types of insurable employment
>
> 5(1) Subject to subsection (2), insurable employment is
>
> (a) employment in Canada by one or more employers, (…)
>
> (…)
>
> (d) employment included by regulations made under subsection (4) or (5);
>
> (…)
>
> Excluded employment
>
> 5(2) Insurable employment does not include
>
> (…)
>
> (h) employment excluded by regulations made under subsection (6); and
>
> (…)
>
> Regulations to include employment
>
> 5(4) The Commission may, with the approval of the Governor in Council, make regulations for including in insurable employment:
>
> (a) employment outside of Canada or partly outside of Canada that would be insurable employment if it were in Canada;
>
> (…)
>
> Regulations to exclude employment
>
> (6) The Commission may, with the approval of the Governor in Council, make regulations for excluding from insurable employment:
>
> (a) any employment if it appears to the Commission that because of the laws of a country other than Canada a duplication of contributions or benefits will result.

(…)

[18] The Respondent also relies on sections 5 and 7 of the Regulations as follows:

> (5) Employment outside Canada, other than employment on a ship described in section 4, is included in insurable employment if
>
> (a) the person so employed ordinarily resides in Canada;
>
> (b) that employment is outside Canada or partly outside Canada by an employer who is resident or has a place of business in Canada;
>
> (c) the employment would be insurable employment if it were in Canada; and
>
> (d) the employment is not insurable employment under the laws of the country in which it takes place.
>
> (…)
>
> (7) The following employments are excluded from insurable employment:
>
> (…)
>
> (c) employment in respect of which premiums are payable under
>
> (i) the unemployment insurance law of any state of the United States, the District of Columbia, Puerto Rico or the Virgin Islands, by reason of the *Agreement between Canada and the United States Respecting Unemployment Insurance*, signed on March 6 and 12, 1942, or
>
> (…)
>
> (My emphasis.)

[19] The Respondent claims that the Appellant's employment is not insurable because paragraph 5(1)(a) of the Act refers to "employment in Canada" and it is not disputed that the Appellant was employed in the USA during the relevant period.

[20] The Respondent then argues that while the Appellant satisfies paragraphs 5(a), (b) and (c) of the Regulations, he does not satisfy paragraph (d)

that requires that the employment outside of Canada “not” be “insurable employment under the laws of the country in which it takes place”.

[21] Further and in the alternative, the Respondent argues that is it not disputed that the Appellant paid social security benefits as deducted and paid to the state of Massachusetts during the relevant period, in the amounts noted above. Therefore his employment is excluded from insurable employment by virtue of subparagraph 7(c)(i) of the Regulations in that premiums were paid to the subject state “by reason of the Agreement between Canada and the United States Respecting Unemployment Insurance, signed on March 6 and 12, 1942.”

[22] The Respondent argues that there are two issues:

i) Is the Appellant’s employment insurable by virtue of section 5 of the Regulations? If not, then that ends the matter;

ii) But if the Court concludes that the employment is insurable pursuant to section 5, then the issue is whether such employment is nonetheless specifically excluded by virtue of subparagraph 7(c)(i).

[23] The Appellant argues that the employment was insurable in Canada and that subparagraph 7(c)(i) of the Regulations was merely intended to ensure that there was no duplication of “contribution or benefits”. Since he was employed in the state of Massachusetts, he was required by state laws to pay social security premiums and while he did so, there was no duplication in Canada. Additionally, since he did not receive any benefits from DUA, there was also no duplication in benefits when he was originally approved for employment benefits in Canada.

[24] The Respondent relies on *Hinkly v. Canada (Minister of National Revenue — M.N.R.)*, [1992] T.C.J. No. 266 (QL) (TCC) (“Hinkly”) where the appellant had been admitted to Canada on a work permit which allowed him entry only for the purposes of employment with his present employer with whom he worked as an engineer. He argued that he “ought not be obliged to pay into a scheme from which he is unable to derive benefits”.

[25] The Court declined to specifically address that concern and simply found that his employment was not “excepted insurance” and that, despite the fact that he was not, by the terms of his work permit, allowed to stay in Canada to claim unemployment benefits if he was terminated, he was nonetheless required to pay unemployment insurance premiums.

[26] I am not convinced that this decision is entirely on point, since the Appellant in this instance is not claiming that he was not required to make social security payments in the USA. He has acknowledged that he was required by law to do so.

Analysis

[27] It appears the Minister has focused almost exclusively on the fact that the Appellant was working "outside of Canada" and making social security contributions in the USA and thus insurable, and on the *Agreement between Canada and the United States Respecting Unemployment Insurance* which seeks to avoid a duplication of contributions or benefits.

[28] A review of the basic legislative framework is in order.

[29] Subsection 5(1) of the Act refers to "insurable employment" as being "employment in Canada" but paragraph (d) provides that the meaning is extended to "employment included by regulations" under subsections 5(4) and 5(5).

[30] Subsection 5(4) provides that "[t]he Commission may (…) make regulations <u>for including</u> in insurable employment" (my emphasis) and paragraph (a) in particular, refers to "employment outside of Canada (...) that would be insurable employment if it were in Canada". It is the Court's position that this provision is remedial in nature as it seeks to extend the meaning of "insurable employment" typically limited to "employment in Canada" to "employment outside of Canada".

[31] As such, the provision should be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its object" in accordance with section 12 of the *Interpretation Act*, R.S.C., 1985, c. I-21.

[32] The other relevant provision of the Act is subsection 5(6) since it provides that "[t]he Commission may (…) make regulations <u>for excluding</u> from insurable employment" (my emphasis), as set out in paragraph (a), "any employment if it appears (…) that because of the laws of a country other than Canada a duplication of contribution or benefits will result".

[33] The Court agrees with the Appellant that there was no duplication in this instance, since the Appellant was not required to make employment insurance contributions in Canada, despite the fact that he was a resident Canadian. Further, there would be no duplication of benefits if he received them in Canada, because he was not entitled to such benefits in the US, despite having made social security

contributions. He was denied those benefits and, given his temporary work status, it is hard to imagine any circumstances where he might be entitled to claim them, except possibly if he became a US citizen, in which case he would obviously not be making this claim in Canada.

[34] This interpretation appears to be supported by the careful wording of section 5 of the Regulations that appears under the title “Employment included in Insurable Employment”. It provides that “employment outside Canada (…) is included in insurable employment” if four conditions are satisfied.

[35] Subsection 5(a) requires that the person “so employed ordinarily resides in Canada”. It is accepted, and the Respondent admits, that the appellant resided in Canada, although he was employed in the US during the relevant period.

[36] Subsection 5(b) requires that the “employer” have a place of business in Canada. As noted above, the Respondent admits that the Payer has a business presence in three provinces including the Appellant’s province of residence.

[37] Subsection 5(c) requires that “the employment would be insurable employment if it were in Canada”. It is agreed that this criterion is satisfied.

[38] Subsection 5(d) requires that “the employment is not insurable employment under the laws of the country in which it takes place”. The Respondent argues that this last criterion is not satisfied and focuses on the word “insurable”, suggesting that even if the Appellant is not entitled to benefits in the US, he is nonetheless engaged in “insurable” employment and that is all that is required. Since this effectively means that the Appellant is not entitled to any unemployment benefits whatsoever, the Respondent acknowledges that this gives rise to a harsh result.

[39] The Court cannot accept such a narrow interpretation, particularly in light of section 12 of the *Interpretation Act*, referenced above. As argued by the Appellant, the social security contributions were mandatory. They were referred to as a “social security tax withheld” in the statement of earnings and, given this description, it appears the amounts withheld were as much a tax as a contribution to unemployment insurance in the state of Massachusetts.

[40] The Court finds that the Appellant’s employment with the Payer, dependent as it was on his temporary work visa, was not in fact “insurable employment”. The fact that he was later denied those benefits by the DUA simply confirms this.

[41] The Court therefore concludes that subsection 5(d) of the Regulations is satisfied.

[42] It follows from the above that the Court attaches little weight to paragraph 7(c)(i) of the Regulations and the reference to the *Agreement between Canada and the United States Respecting Unemployment Insurance*. It seeks "to avoid a duplication of contributions or benefits" but for reasons aforesaid, there is and was no duplication of contributions or benefits in this instance.

[43] To conclude, the Court finds that the Appellant's employment was "insurable employment" during the relevant period and that, while the Appellant was required to make social security contributions and did so as required by state laws, as a resident Canadian and holder of a temporary visa, he was not and would never be entitled to any unemployment benefits from the state of Massachusetts.

[44] On that basis, the appeal is allowed, without costs.

Signed at Ottawa, Canada, this 9th day of May 2019.

"Guy R. Smith"

Smith J.

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|---|---|
| CITATION: | 2019 TCC 113 |
| COURT FILE NO.: | 2018-4301(EI) |
| STYLE OF CAUSE: | SORIN HERTA v. M.N.R. |
| PLACE OF HEARING: | Montreal, Quebec |
| DATE OF HEARING: | May 6, 2019 |
| REASONS FOR JUDGMENT BY: | The Honourable Justice Guy R. Smith |
| DATE OF JUDGMENT: | May 9, 2019 |

APPEARANCES:

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| For the Appellant: | The Appellant himself |
| Counsel for the Respondent: | Renaud Fioramore-Beaulieu |

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

| | |
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| For the Respondent: | Nathalie G. Drouin<br>Deputy Attorney General of Canada<br>Ottawa, Canada |