

Docket: 2014-11(EI)

BETWEEN:

BRADLEY D. GOODWIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 1, 2014, at Vancouver, British Columbia

Before: The Honourable Justice John R. Owen

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Holly Popenia

JUDGMENT

The appeal is dismissed, without costs, and the decision of the Minister is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 28th day of November 2014.

“J.R. Owen”

Owen J.

Citation: 2014 TCC 359

Date: 20141128

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BETWEEN:

BRADLEY D. GOODWIN,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Owen J.

I. Introduction

[1] This is an appeal under subsection 103(1) of the *Employment Insurance Act* (the “*EIA*”) of a decision by the Minister of National Revenue under section 91 of the *EIA* issued on September 27, 2013, confirming a ruling under subsection 90(1) of the *EIA* issued on February 21, 2013. The ruling was to the effect that the Appellant, Mr. Bradley D. Goodwin, was in receipt of insurable earnings under the *EIA* during the period from January 1, 2012 to November 15, 2012. The earnings in question were received by Mr. Goodwin in the form of long-term disability payments payable to Mr. Goodwin under the terms of a long-term disability plan.

II. Facts

[2] The Appellant was employed by CP Airlines as a pilot commencing in June 1979. CP Airlines subsequently became Canadian Airlines, which was acquired by Air Canada in 2000.

[3] As a result of two failed treatments for what, at first, appeared to be a benign injury to his jaw in the mid 1980’s, the Appellant had to stop working as a pilot. He initially went on short-term disability but when that ran out he applied for and was accepted for long-term disability commencing in 1987. He has been on long-term disability ever since. Several years later, after a number of unsuccessful

operations, the Appellant was advised that he would never function properly or be integrated back into the workforce again. Some years after that when he realized the prognosis was correct, the Appellant applied for, and was granted, a disability benefit under the Canada Pension Plan.

[4] That the Appellant is unable to work as a result of his condition, which has required 11 separate surgeries to his jaw and one surgery to his brain, is not contested. The Appellant testified that, as a result of his disability, he has never provided services to Air Canada. The Appellant also stated that he has no work record on file with Service Canada.

[5] The Appellant was not clear on the details of the long-term disability plan under which he receives long-term disability payments except to say that he thought the benefit was about 35% of his income as a pilot prior to being injured. The Appellant entered into evidence as Exhibit A-5 a copy of a T4 slip issued by Air Canada to the Appellant for his 2012 taxation year that indicates that the total amount of employment income received in 2012 was \$33,015.90 or \$2,751.33 per month and that the total amount of EI premiums deducted for 2012 was \$604.19. The Appellant confirmed that the employment income identified on the T4 slip is the aggregate of the disability payments received by him in 2012 under the long-term disability plan.

[6] The Appellant did not recall entering into a new long-term disability plan when Air Canada acquired Canadian Airlines in 2000, nor did he recall entering into a written employment contract with Air Canada. However, he did recall that he was issued an employee identification number by Air Canada following the acquisition.

[7] A letter entered into evidence by the Appellant as Exhibit A-3 from Great-West Life Assurance Company (“Great-West Life”) to the Appellant dated May 8, 2014 indicates that the plan under which the Appellant receives payments is identified as Group Plan Number 51648. That same letter indicates that the Appellant’s employee identification number with Air Canada is E91765.

[8] A form entered into evidence by the Appellant as Exhibit A-4, entitled “Claimant’s Explanation of Benefits” and issued by Great-West Life to the Appellant on March 12, 2014, similarly identified the plan number as 51648; however, the employee I.D. Number had some additional zeros and was stated as E000091765. Nothing turns on this slight difference. Exhibit A-4 also includes the following statement: “The Great-West Life Assurance Company provides claim

processing and adjudication services only. Benefits under the plan are funded by the Contractholder and not the Great-West Life Assurance Company”.

[9] The Respondent called as a witness Ms. Kate Friedmann, who is the Director of Disability Management at Air Canada, a position that she has held since September 2012. Ms. Friedmann’s evidence filled in the details regarding the Appellant’s entitlement to disability payments under the long-term disability plan.

[10] Ms. Friedmann testified that her group would be responsible for the Appellant’s file although the Appellant’s medical records would be in the custody of Great-West Life. Ms. Friedmann also testified that, to her knowledge, the terms and conditions of the long-term disability plan under which the Appellant receives disability payments have not changed since the acquisition of Canadian Airlines by Air Canada in 2000.

[11] Ms. Friedmann confirmed the authenticity of two documents entered into evidence by the Respondent as Exhibits R-1 and R-2. Great-West Life and Canadian Airlines are the parties to both documents. Ms. Friedmann indicated that following the 2000 acquisition, Air Canada stepped into the shoes of Canadian Airlines with respect to these documents. I take this to mean that any explicit or implicit reference to Canadian Airlines in the documents must be read as a reference to Air Canada. For the sake of clarity, the descriptions that follow make this adjustment where necessary.

[12] The first document, Exhibit R-1, is entitled “Plan Document” on the front page and “Group Disability Income Plan – Pilots” at the top of each page commencing on page 3 (pages 1 and 2 being the table of contents). The cover page indicates that the Plan Document Holder is Canadian Airlines International Ltd. (subsequently replaced by Air Canada according to Ms. Friedmann), that the Plan Document Number is 51648 and that the effective date of the Plan is July 1, 2000. The coverage provided is identified as “Group Disability Income”. Ms. Friedmann testified that, to her knowledge, that is the plan under which the Appellant receives his disability payments, which accords with Exhibits A-3 and A-4. The Appellant did not contest this fact.

[13] The Group Disability Income Plan – Pilots (the “Plan”) includes a number of terms and conditions relevant to the issue at hand:

1. Section 1(1) states that the purpose of the Plan is to provide a reasonable level of income protection during periods that a pilot is, for medical reasons, unable to perform his regular duties, subject to the limitations stated in the Plan.
2. Section 2(1) states that participation in the Plan is a condition of employment (including pilots in training).
3. Section 2(3) states that the Plan covers a pilot who is “Disabled” or “Totally Disabled,” as defined in sections 2(3)(a) and (b) of the Plan.
4. A pilot is considered Disabled if either Air Canada’s medical department or Transport Canada determines that, for medical reasons, the pilot is unfit to fly.
5. Under the definition of Totally Disabled, a totally disabled employee is one whose condition is judged by Great-West Life to be such that he is unable to work at any job for which he is reasonably fitted by education, training or experience. The parties agree that Mr. Goodwin was totally disabled under this definition.
6. Section 2(6) describes the circumstances in which coverage may be suspended or reinstated. Sections 2(6)(a) to (d) consistently refer to an employee.
7. Section 2(7) provides that coverage under the Plan terminates on the earliest of:
 - a. The date the employee leaves Air Canada.
 - b. The date the employee ceases to be a pilot.
 - c. The date the employee retires.
 - d. The last day of the month in which the employee attains his 60th birthday.
 - e. The date that the employee dies.

A Note to section 2(7) emphasizes that coverage may not be terminated at the option of the individual member.

8. Section 3(1) provides that the total monthly premium for the Plan is paid by Air Canada.
9. Section 3(4) provides that for claimants who are assessed as Totally Disabled, benefits in the second and subsequent years will be paid at 60% of salary to the earlier of death, recovery or attainment of age 60.
10. Section 3(7) provides indexation for eligible claimants as of July 1, 2000 being employees who are classified by the Company as “disabled or totally disabled”.
11. Section 3(8) provides that all benefits will cease for all employees on the last day of the month in which his or her 60th birthday is attained.
12. Section 3(9) provides that while an employee is in receipt of benefits under the Plan, contributions are waived and allowable service is continued in the Air Canada Pension Plan; and the employee is entitled to full coverage under the Group Life, Dental and Supplementary Health Insurance Plans, and the Basic Accidental Death, Dismemberment and Loss of Use Insurance Plan without cost.
13. Section 4(2)(b) provides that the assessment of disability will be based on the reports of the employee, the employer and the attending physician.
14. Section 4(2)(c) provides that prior to the end of the first year of disability, Great-West Life will assess the degree of the employee’s disablement to determine whether the employee is Disabled or Totally Disabled. The results of such assessment will be forwarded to the Corporate & Human Resources Branch, the Advisory Committee and to Payrolls.
15. Section 4(3)(b) provides that Air Canada may require an investigation be made of a particular case.
16. Section 4(4) provides that should an employee be dissatisfied with the assessment, he may lodge an appeal through his representatives on

the Advisory Committee for consideration. In addition, where an assessment is in dispute, a three man medical board will be established and the findings of the board are final.

17. Section 5 provides that the Advisory Committee shall consist of three representatives of Air Canada and three representatives of the pilots' association.
18. Section 6 provides that a medical board will consist of one medical examiner appointed by Air Canada, one appointed by the claimant and a third neutral party appointed by the first two appointees.

[14] Ms. Friedmann testified that the question of whether an individual is Disabled (as defined in the Plan) is determined by medical specialists at Air Canada who are certified in aviation medicine. In order for an individual to be considered Disabled, the Air Canada medical specialists must determine that the individual is unfit to fly for medical reasons. Once this determination is made and is communicated to Great-West Life, Great-West Life is responsible for determining whether the individual is eligible for benefits under the Plan. Great-West Life is also responsible for determining whether an individual is Totally Disabled (as defined in the Plan). This determination must be made before the end of the first year of disability. If an employee wishes to challenge the medical assessment, he or she may lodge an appeal through his or her representative on the Advisory Committee and a three-person medical board will determine the issue.

[15] The second document, Exhibit R-2, is entitled "Services Agreement". The cover page indicated that the contract holder is Canadian Airlines International Ltd. (subsequently replaced by Air Canada according to Ms. Friedmann), that the effective date is July 1, 2000 and that the contract type is Services Agreement. The relevant terms and conditions of the Services Agreement are as follows:

1. The preamble states that Great-West Life has agreed to act as the servicing agent on behalf of Air Canada for the purposes of executing the terms of the Plan.
2. Article II(4) provides that Great-West Life in performing its obligations under the Services Agreement is acting only as servicing agent of Air Canada and the rights and responsibilities of Great-West Life and Air Canada shall be determined in accordance with the law of agency except as otherwise provided.

3. Under Article III, Great-West Life agrees to perform the services described in the Schedule of Services described in Appendix II and Air Canada agrees to pay to Great-West Life, for such services, the fees described in the Schedule of Fees in Appendix I. Appendix II includes the following services:
 - a. The preparation and printing of claims forms, claim cheques, administrator's guides and other administrative forms.
 - b. The provision of monthly statistical reports including bank reconciliation.
 - c. The provision of monthly benefit payment reports.
 - d. Adjudication of claims.
 - e. The preparation and issue of cheques.
4. Article V provides that Air Canada shall indemnify and hold Great-West Life harmless from any loss, liability, claim or expense arising out of any act or omission of Air Canada in connection with the Plan.

[16] Ms. Friedmann testified that Great-West Life was working for Air Canada in an administrative services capacity pursuant to which it would execute the Plan and carry out the administration of the Plan. In terms of funding, Air Canada would pay into a trust account on a monthly basis an amount sufficient to cover the payments to be made by Great-West Life to beneficiaries under the Plan and the fees payable to Great-West Life. Great-West Life would draw on these funds to make payments to the beneficiaries and to pay its fees and would submit bimonthly invoices to Air Canada that itemized the payments it had made to the beneficiaries together with the fees it was entitled to under the Services Agreement.

[17] Ms. Friedmann testified that, under the terms of the Services Agreement, Great-West Life was responsible for drafting the documents that would support the benefits provided and for the administration of the benefits. To this end, Great-West Life would provide Air Canada with claim forms, cheques, guidelines, tax slips and regular reporting including bank reconciliations that described the deposits to and withdrawals from the trust account. Great-West Life would also provide reports on benefits paid, undertake an annual review with Air Canada and

address any required revisions or reconciliations. Finally, Great-West Life was responsible for adjudicating the entitlement to benefits under the Plan.

[18] Ms. Friedmann testified that the financial obligations and risks under the Plan were solely those of Air Canada. To the extent that Great-West Life incurred a loss in the administration of the Plan, Air Canada would reimburse Great-West Life.

[19] In cross-examination, Ms. Friedmann confirmed that Air Canada's system identified the Appellant as an employee of Air Canada who is on leave and consequently is not providing services to Air Canada. Ms. Friedmann also testified that the Plan applied to individuals who were pilots at Canadian Airlines prior to its acquisition by Air Canada and that Exhibit A-3 confirmed that the Plan applied to the Appellant.

A. Appellant's Position

[20] The Appellant submitted that the terms of the Plan had not changed after 2011 and that it is arbitrary for the Canada Revenue Agency to amend its interpretation of the Plan and collect EI premiums in 2012 when it had not done so in the past. He submitted that he should not be required to pay EI premiums when the terms of the Plan did not originally attract such premiums. He also submitted that he was not able to provide services and, in fact, had not provided services to anyone since he became permanently disabled and that paying EI premiums in such circumstances is a hardship and is unfair to him and to others receiving long-term disability payments as they cannot benefit from the employment insurance scheme. The Appellant also referred to a Department of Justice document on the retroactive effect of conditional obligations in tax law, which explored the retroactive effect of civil law conditional obligations and the impact they have in a tax context.

B. Respondent's Position

[21] The Respondent submitted that the issue is whether the long-term disability payments received by the Appellant are "insurable earnings" under the *EIA*. The Respondent submitted that there was no issue that the Appellant was first an employee of CP Air, then Canadian Airlines and now Air Canada and that the Appellant received long-term disability benefits for the period from January 1, 2012 to November 15, 2012.

[22] The Respondent referred to the definitions of “insurable earnings” and “insurable employment” in subsection 2(1) of the *EIA*. “Insurable earnings” is defined to mean the total amount of the earnings, as determined in accordance with Part IV, that an insured person has from insurable employment. “Insurable employment” in turn has the meaning provided for by section 5 of the *EIA*. Paragraph 5(1)(a) reads as follows:

5(1) Subject to subsection (2), insurable employment is

(a) employment in Canada by one or more employers, under any express or implied contract of service or apprenticeship, written or oral, whether the earnings of the employed person are received from the employer or some other person and whether the earnings are calculated by time or by the piece, or partly by time and partly by the piece, or otherwise;

[23] Counsel also referred to subsection 1(2) and paragraphs 2(1)(a) and 2(3)(d) of the *Insurable Earnings and Collection of Premiums Regulations* (the “*IECPR*”), which provide as follows:

1(2) For the purposes of Part IV of the Act and for the purposes of these Regulations, “employer” includes a person who pays or has paid earnings of an insured person for services performed in insurable employment.

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 . . .

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

. . .

(d) a supplement paid to a person by the person's employer to increase a wage loss indemnity payment made to the person by a party other than the employer under a wage loss indemnity plan;

III. The Law

[24] The relevant statutory provisions are those cited by the Respondent and described above. The scope of these statutory and regulatory provisions is discussed in two cases decided by the Federal Court of Appeal: *Université Laval v*

Canada (Minister of National Revenue), 2002 FCA 171 and *Attorney General of Canada v National Bank of Canada*, 2003 FCA 242. In each of these cases, the Court held that payments under a wage loss replacement plan funded by the employer were insurable earnings for purposes of the *EIA*. In *National Bank*, the Court summarized the principles propounded in *Université Laval* in paragraph 3 of the judgment as follows:

3 In our view, the decision of this Court in *Université Laval v. Canada (Minister of Revenue)*, 2002 FCA 171, dated May 3, 2002, is applicable in this case, and accordingly the application for judicial review must be allowed. In that case, this Court enunciated the following principles:

- (1) The expression “in respect of” such employment, which qualifies earnings paid by the employer and which is found in subsection 2(1) of the Regulations is particularly broad;
- (2) There can be insurable earnings within the meaning of the Regulations *even where the employee has not performed any services*;
- (3) Benefits paid by an employer under a wage loss indemnity plan constitute insurable earnings within the meaning of the Act and the Regulations, while benefits paid by a third party insurer are excluded from the definition;

. . . and

- (5) Wage loss benefits are paid by an employer under a contract of employment where the following indicia exist, which are not necessarily exhaustive: the wage loss insurance plan is entirely paid for by the employer, the employment relationship continues to exist during the disability, the benefits payable are increased if there is a salary increase during the disability period, the benefits are paid by the employer during normal pay periods for the first 52 weeks of disability and thereafter by the insurer and lastly, the employer determines eligibility for the benefits and signs the cheques.

(Emphasis added)

[25] The Court went on to state in paragraph 4 that:

4 It seems clear to us from our review of that judgment that it is not necessary for all these indicia to exist in order to conclude that the benefits are paid by the employer under a contract of employment.

[26] The Federal Court of Appeal determined that there can be insurable earnings even where the employee has not performed any services. The issue is not whether services are performed by the recipient of the payments but whether, in view of the circumstances, the employee is paid the disability payments by the employer in respect of insurable employment.

[27] According to the Federal Court of Appeal, the determination of whether the payments are paid by, and received from, the employer is dependent upon whether or not the employer is funding the disability payments. The fact that a person other than the employer may issue the cheques does not determine the identity of the person making the payment.

[28] Finally, the Federal Court of Appeal observed in paragraph 18 of *Université Laval* that paragraph 2(3)(d) of the *IECPR* expressly excludes from insurable earnings a supplemental payment made by an employer where the base payment is made under a wage loss replacement plan by a person other than the employer. It follows from this exclusion that wage loss replacement type payments made by an employer are otherwise considered insurable earnings within the meaning of subsection 2(1) of the *IECPR*.

IV. Conclusion

[29] The first question to answer is whether the Appellant is in insurable employment during the period in issue? Insurable employment would include employment by Air Canada under an express or implied contract of service whether written or oral. The Appellant testified that he became an employee of CP Air in June 1979 at which time he commenced to provide services as a commercial pilot. There is no evidence that his employment with CP Air terminated when he became disabled in the mid-1980s and was no longer able to perform his duties as a pilot. CP Air subsequently became Canadian Airlines and Canadian Airlines was acquired by Air Canada in 2000. Again, there is no evidence that his employment terminated as a result of these events. In fact, the Appellant has had an employee number with Air Canada since its acquisition of Canadian Airlines and Air Canada's records show the Appellant as an employee of Air Canada who is on leave. The Appellant argued that he did not provide services to Air Canada but he did not argue that he was not an employee of Air Canada. In view of these facts, I find that the Appellant was an employee of Air Canada during the period in issue, which, incidentally, is one of the conditions for eligibility under the Plan (see sections 2(1) and 2(7)(a) of the Plan). The fact that the Appellant did not provide

services to Air Canada because of his disability does not in and of itself alter his status as an employee of Air Canada.

[30] The second question to answer is whether or not Air Canada is paying the disability payments to the Appellant? The disability payments received by the Appellant are funded entirely by Air Canada through its monthly deposits in the trust account maintained for that purpose. Great-West Life issues cheques to the Appellant as servicing agent for Air Canada and draws upon the trust account to cover those cheques. Air Canada pays Great-West Life for its services and indemnifies and holds Great-West Life harmless from any loss or liability arising out of any act or omission of Air Canada in connection with the Plan. In view of these facts, I find that Air Canada pays the disability payments to the Appellant and that the Appellant, therefore, receives the disability payments from Air Canada. The fact that a person other than Air Canada may issue the cheques does not determine the identity of the person making the payment. Air Canada is making the payments through its servicing agent, Great-West Life.

[31] The third question to answer is whether the disability benefits are paid to the Appellant in respect of his insurable employment by Air Canada. In answering this question, the broad nature of the words “in respect of” must be taken into account. In *Nowegijick v Her Majesty The Queen*, [1983] 1 SCR 29, the Supreme Court of Canada observed at paragraph 30:

The words “in respect of” are, in my opinion, words of the widest possible scope. They import such meanings as “in relation to”, “with reference to” or “in connection with”. The phrase “in respect of” is probably the widest of any expression intended to convey some connection between two related subject matters.

[32] There are a number of important indicia that suggest that the disability benefits are paid to the Appellant in respect of his employment by Air Canada:

1. Air Canada funds the Plan and takes all financial risk associated with the Plan.
2. Eligibility under the Plan is a condition of employment by Air Canada.
3. The stated purpose of the Plan is to provide a level of income protection during periods that a pilot cannot perform his regular duties.

4. The Appellant is categorized by Air Canada as an employee notwithstanding his total disability and his consequential inability to perform services. The Appellant is simply considered to be on leave.
5. Benefits under the Plan cease as soon as the Appellant is no longer an employee of Air Canada.
6. Air Canada determines initial eligibility under the Plan by determining whether an employee is Disabled as defined in the Plan.
7. Through its representation on the Advisory Committee and the medical board, Air Canada retains input on decisions related to eligibility that are not expressly determined by the terms of the Plan itself.
8. The Appellant is entitled to full coverage without cost under Air Canada's group life and accident insurance plans and its group health and dental plans. As well, allowable service is continued in the Air Canada Pension Plan.
9. The amount of the disability payments is fixed at 60% of the Appellant's salary.

[33] Although not all of the indicia identified in *National Bank* are found in this case, the Federal Court of Appeal stated that the list of indicia provided in that case was not exhaustive and that not all of the indicia identified in that case need be present to find that a payment is in respect of employment. In light of the indicia that I have identified, I conclude that the disability payments received by the Appellant under the Plan are paid to the Appellant by Air Canada in respect of his insurable employment by Air Canada and that, consequently, the payments are "insurable earnings" for purposes of the *EIA*. The fact that employment insurance premiums were not deducted from the Appellant's disability payments in years prior to 2012 does not alter this conclusion.

[34] For the foregoing reasons, the appeal is dismissed without costs.

Signed at Ottawa, Canada, this 28th day of November 2014.

“J.R. Owen”

Owen J.

CITATION: 2014 TCC 359

COURT FILE NO.: 2014-11(EI)

STYLE OF CAUSE: BRADLEY D. GOODWIN AND THE
MINISTER OF NATIONAL REVENUE

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: October 1, 2014

REASONS FOR JUDGMENT BY: The Honourable Justice John R. Owen

DATE OF JUDGMENT: November 28, 2014

APPEARANCES:

For the Appellant: The Appellant himself
Counsel for the Respondent: Holly Popenia

COUNSEL OF RECORD:

For the Appellant:

Name: N/A

Firm:

For the Respondent: William F. Pentney
Deputy Attorney General of Canada
Ottawa, Canada