Citation: *Canada Employment Insurance Commission v. P. W.*, 2014 SSTAD 28

Appeal No. 2012-0611

BETWEEN:

**Canada Employment Insurance Commission**

Appellant

and

**P. W.**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division – Appeal

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| SOCIAL SECURITY TRIBUNAL MEMBER: | Pierre LAFONTAINE |
| DATE OF DECISION: | April 11, 2014 |
| TYPE AND DATE OF HEARING: | In person hearing held on March 17, 2014 at 9h00 am (Mountain Time Zone) |

## DECISION

[1] The appeal is allowed, the decision of the board of referees dated March 15, 2012 is rescinded and the decision of the Appellant is restored.

## INTRODUCTION

[2] On March 15, 2012, a panel of the board of referees determined that:

- The Respondent had an interruption of earnings pursuant to sections 7 and 11 of the *Employment Insurance Act* (the "*Act*") and section 14 of the *Employment Insurance Regulations* (the "*Regulations*").

[3] The Appellant appealed that decision to the Office of the Umpire on April 3, 2012.

## TYPE OF HEARING

[4] The Tribunal held an in person hearing for the reasons mentioned in the notice of hearing dated December 17, 2013. The Appellant, represented by Gegerly Hegedus, was present at the hearing. The Respondent and his representative, Edward H. Molstad, were also present at the hearing.

## THE LAW

[5] The Appeal Division of the Tribunal becomes seized of any appeal filed with, but not heard by, the Office of the Umpire before April 1, 2013, in accordance with section 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act of 2012*. As of April 1, 2013, the Office of the Umpire had not decided whether to grant or dismiss the Appellant's appeal. The appeal was transferred from the Office of the Umpire to the Appeal Division of the Social Security Tribunal (the "Tribunal"). Leave to appeal is deemed to have been granted by the Tribunal on April 1, 2013 in accordance with paragraph 268 of the *Jobs, Growth and Long-term Prosperity Act of 2012*.

[6] To ensure fairness, this matter will be examined based on the Appellant's legitimate expectations at the time of the appeal to the Office of the Umpire. For this reason, the present appeal will be decided in accordance with the legislation in effect immediately prior April 1, 2013.

[7] The only grounds of appeal presentable to the Tribunal mentioned in subsection 115(2) of the *Act*, immediately in effect prior to April 1, 2013, are that:

a. the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

b. the board of referees erred in law in making its decision, whether or not the error appears on the face of the record; or

c. The board of referees based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

**ISSUE**

[8] The Tribunal must decide if the board of referees made an error in fact and in law when it determined that the Respondent had an interruption of earnings pursuant to sections 7 and 11 of the *Act* and section 14 of the *Regulations.*

**ARGUMENTS**

[9] The Appellant submits the following arguments in support of the appeal:

- the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

- the board of referees erred in law in making its decision, whether or not the error appears on the face of the record;

- The board of referees based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

- The Federal Court of Appeal has confirmed that when determining whether or not there is an interruption of earnings when the person ceases to work while under contract with the employer, the wording of the agreement regarding the effective date and the duration of the contract, as well as the period for which the earnings at issue are payable should be examined;

- The contract of the Respondent was signed on May 15, 2008 for the 2010 season and the Club chose to renew the Respondent's standard player contract on November 5, 2010 for the 2011 season. It clearly states that it is an annual contract and salary;

- The board of referees ignored the Respondent's own evidence which repeatedly made reference to the fact that the Club had the option of terminating his contract at any given time;

- These contracts were back to back and there was no cessation of employment even though no paycheque was issued during the off season;

- These contracts never expired even during the off season;
- The ROE relied upon by the board of referees in support of its decision is not consistent with the standard player contract signed by the Respondent;

- The board of referees applied incorrectly the legislation and well established jurisprudence to the case of the Respondent, namely CUB's 76213, 42735 and 16774.

[10] The Respondent submits the following arguments against the appeal:

- The board of referees did not make any error in fact and in law;

- The Federal Court of Appeal has confirmed that when determining whether or not there is an interruption of earnings when the person ceases to work while under contract with the employer, the wording of the agreement regarding the effective date and the duration of the contract, as well as the period for which the earnings at issue are payable should be examined;

- That in virtue of the standard player contract and the collective agreement, the Respondent experienced an interruption of earnings following the end of the football season;

- The Respondent's ROE confirms that he was laid off due to a shortage of work or separated form that employment at the end of November with no guarantee of future employment;

- The Respondent did not provide any services to that employer and was not paid after the season. He was free to work for another employer save and except as a football player;

- Other than injury protection provided by the standard player contract, the football club can terminate a player's contract at any time. A player is only paid if he plays a game;

- The player is only guaranteed an interview or tryout with the football club for the following season;

- That the Respondent's contract is better viewed as a contract for seasonal employment rather than an annual continuous employment;

- Subsection 14(1) of the *Regulations* does not have the requirement that the individual not be under contract. Subsection 14(4) of the *Regulations* does not apply since the player is paid per game;

- The decision of the Tax Court of Canada, *Reid vs. MNR*, November 8 2002, supports the interpretation of the Respondent that the employment relationship in the football context terminates at the end of the football season.

**STANDARD OF REVIEW**

[11] The parties submit that the applicable standard of review for questions of fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

[12] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees or an Umpire regarding questions of law is the standard of correctness - *Martens v. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Canada (AG) v. Hallée*, 2008 FCA 159.

**ANALYSIS**

[13] The Respondent was a football player employed by the Montreal Alouettes. He was employed under what is referred to as the Canadian Football League Standard Player Contract which is found at Exhibits 8-11 to 8-12. A more legible copy of said contract is found at Annex "A" of the Collective Agreement (Exhibits 8-14 to 8-24).

[14] The Respondent signed his contract on May 15, 2008 for the 2010 season. He was bound by this contract until February 15, 2011. He was paid in eighteen (18) equal instalments and paid within forty eight (48) hours of each regular season and no further payments were required under the contract. On November 5, 2010, the Club chose to renew his contract for the 2011 season (Exhibit 8-26).

[15] The contract by which the Respondent was bound to play football for the Montreal Alouettes contains the following clauses:

> "1. The term of this Contract shall be from the date of execution hereof until the 15th day of February following the close of the football season commencing in 20_, subject however to the right of prior termination as specified herein.

2. The Player agrees that during the term of this Contract he will play football and will engage in activities related to football only for the Club and will p-lay for the Club in two Pre-Season games, and eighteen (18) regular season games and Canadian Football League playoff games and any other game approved by the Canadian Football League Players' Association; and the Club, subject to the provisions hereof, agrees during such period to employ the Player as a skilled football Player. The Player agrees during the term of this Contract to report promptly for the Club's training sessions and at the Club's directions to participate in all practice sessions.

3. For the Player's services as a skilled football Player during the term of this contract, and for his agreement not to play football, or engage in activities related to football, for any other person, firm, Club or corporation during the term of this contract and for the option hereinafter set forth giving the Club the right to renew this contract and for the other undertakings of the Player herein, the Club promises to pay the Player the sum of $_____ to be payable as follows:

> 100% percent of said sum to be divided into eighteen (18) equal instalments and paid to the Player within forty-eight (48) hours of each regular season game whenever the Club schedule permits it to be practicable. It is understood between the parties hereto that payment to the Player by the Club for League Playoff Games will be made as hereinafter provided.

15. On or before the date of expiration of this Contract, the Club may upon notice in writing to the Player addressed to his permanent home address as indicated hereunder, renew this Contract for a further term until the 15th day of February following the said expiration, on the same terms as are provided in this Contract except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during the said period of renewal and the rate of compensation shall not be less than one hundred (100%) percent of the amount set forth in Paragraph 3 hereof and one hundred (100%) percent of any bonus payment or payments payable except signing bonus, and (2) after such renewal this Contract shall not include a further option to renew the Contract. The renewal of this contract shall be understood to include all bonus clauses regardless as to the year described therein and bonus payment or payments of any nature whatsoever except that signing bonuses will not be included."

[16] The Respondent stated that after the 2010 season ended, between November 27, 2010 and June 5, 2011, although under contract with the Montreal Alouettes, he was not working for them nor was he receiving money of getting paid by them. He was free to seek other employment during the "off season" but he could not play football for any other team at any time (Exhibit 8-32).

[17] The board of referees allowed the Respondent's appeal and made the following findings:

> "the Board finds that the appellant's standard player's contract is not a contract guaranteeing employment at some future date, such as a teacher's contract, but was a guarantee of an interview or tryout with the Alouettes Football Club.
>
> The Board finds that at the end of the team's football season, the appellant no longer provided services and was no longer paid.
>
> The Board finds that the standard player's contract was an agreement allowing the Alouettes Football Club to contract the appellant's playing rights.
>
> The Board finds that the Record of Employment issued on December 15, 2010 showed there was a shortage of work due to the end of the season.
>
> The Board finds that prior to 2010, the appellant had found post season employment with Ranch Ehrlo in Regina for four consecutive years. In the 2010 post season he became the primary caregiver for his father and later his mother.
>
> The Board finds that following the 2010 football season there was an interruption of earnings.
>
> The Board is guide by CUB 56362 which states:
>
> > "I agree with the finds of the Board of Referees because in this particular case no pattern was established. This was the claimant's first employment with this company and his first layoff. There is no evidence of him being rehired for subsequent trips. The only evidence before the Board was having worked for two trips and then laid off. In these circumstances I am satisfied that there was no evidence before the Board to show a pattern which is required in order to subsection 11(4) to come into play. For these reasons the appeal of the Commission is dismissed."
>
> The Board finds the Alouette Football Club continues to operate for 52 weeks of the year, employing people of which the appellant was not employed due to a shortage of work but also with no guarantee of future employment.
>
> The Board finds that if the appellant's contract of employment is to be considered a contract then Subsection 36(4) and 36(5) of the EI Regulations would apply. The Record of Employment states he was laid off because of a shortage of work."

[18] It is the Appellant's position that the board of referees erred in fact and law when it concluded that the Respondent had an interruption of earnings pursuant to section 14

of the *Regulations*. The Appellant argues that the board of referees relied on the last day paid on the ROE and the end of the 2010 season while ignoring other evidence which confirmed that the Respondent was employed under contract as a professional football player until February 15, 2011, that said contract was renewed for the following year and that he was compensated for his services for the term of his contract. The board's failure to apply the test under section 14 of the *Regulations* to the relevant evidence in the file is an error in law.

[19] The Tribunal finds that the board of referees ignored the evidence before it that clearly shows that the Respondent's contract did not end until February 15, 2011 and erred in fact and law when it concluded that because he was not paid up until the termination date of his contract, he had an interruption of earnings following his last pay on November 26, 2010. This finding by the board of referees is contrary to the provisions of the contract (Exhibits 8-11 to 8-24) which states:

> "1. The term of this Contract shall be from the date of execution hereof until the 15th day of February following the close of the football season commencing in 20__...
>
> 2. The Player agrees that during the term of this Contract he will play football and will engage in activities related to football only for the Club and will p-lay for the Club in two Pre-Season games, and eighteen (18) regular season games and Canadian Football League playoff games and any other game approved by the Canadian Football League Players' Association…
>
> 3. For the Player's services as a skilled football Player during the term of this contract, and for his agreement not to play football, or engage in activities related to football, for any other person, firm, Club or corporation during the term of this contract and for the option hereinafter set forth giving the Club the right to renew this contract and for the other undertakings of the Player herein, the Club promises to pay the Player the sum of $_____ to be payable as follows:

100% percent of said sum to be divided into 18 equal instalments and paid to the Player within forty-eight hours of each regular season game whenever the Club schedule permits it to be practicable. It is understood between the parties hereto that payment to the Player by the Club for League Playoff Games will be made as hereinafter provided.

15. On or before the date of expiration of this Contract, the Club may upon notice in writing to the Player addressed to his permanent home address as indicated hereunder, renew this Contract for a further term until the 15th day of February following the said expiration…"

(Underlined by the undersigned)

[20] An interruption of earnings is defined in section 14 (1) of the *Regulations* as follows:

"Section 14(1)

Subject to subsections (2) to (7) an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36 (13), are payable or allocated."

[21] The Appellant's position is that section 14 (4) of the *Regulations* is applicable which reads:

"Section 14 (4)

Where an insured person is employed under a contract of employment under which the usual remuneration is paid in respect of a period greater than a week, no interruption of earnings occurs during that period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration is paid."

[22] The issue of interruption of earnings raised in the present appeal before the Tribunal is the object of an abundant jurisprudence from the Umpires.

[23] In **CUB 5541**, the Umpire stated:

> "If the player's contract terminated at the end of the season then he would be eligible for benefits upon indicating by sufficient job searches that he was not restricting his searches for employment to the sport constituting his principal occupation, but was willing to accept and was seeking other suitable employment which he was capable of performing. When a claimant is still governed by a contract however he cannot contend that he is unemployed, even though he has no duties to perform under it during the off-season. If at the end of the season the club had decided not to renew his contract for the next season he might perhaps have been able to secure his release from the contract before its expiration and hence be considered on the labour market, but there is no suggestion that this was the situation of the present claimant. While he had no assurance of renewal the contract still remained in effect for its fall term. In the present case the football season for claimant's club terminated on November 15, 1977. He received no remuneration after the final payment, but did not apply for benefit until January 19, 1978. His disentitlement ran from January 15th to April 15th, 1978, when the contract terminated."

[24] In **CUB 16774**, the Umpire stated:

> "The claimant in this case was not remunerated on a weekly or other periodic basis. The contract was for a year. The salary paid was expressed to be an annual salary. Whether during the football season or outside of it there would be weeks during which the claimant would not receive any money because the times at which his salary instalments were paid to him depended upon the football schedule and not on other timing considerations. Thus "his usual remuneration" was paid by reference to a system under which there would be weeks during which he received no salary instalment because no games were played that week. The payment schedule contemplated this type of irregularity. Therefore, I do not think the claimant has proven that he suffered an interruption of earnings. The weeks during which he received no salary instalment were part of the planned procedure pursuant to which he received "his usual remuneration"."

[25] In **CUB 22887**, the Umpire stated:

> "It is a well-established principle that when there is an employment contract between an employer and an employee, any week included in this contract that is remunerated does not become a week of unemployment just because the employee does not have any duties to perform during it."

[26] In **CUB 42735**, the Umpire stated:

> "The Board of Referees, having found that the claimant's contract did not end until February 15, 1998, erred in fact and law when it concluded that because he was not paid up until the termination date of his contract, February 15, 1998, he had an interruption of earnings following his last pay on November 1, 1997. This finding by the Board of Referees is contrary to the provisions of the contract which state:
>
> "The term of this Contract shall be from the date of execution hereof until the 15th day of February following the close of the football season commencing in 19_..." (Exhibit 5-2)"

[27] In **CUB 47852**, the Umpire stated:

> "The fact that the claimant had no obligation to "play football" for his employer from November 30 to February 15, the time the claimant states the contract gave his employer "a window of opportunity", does not mean he was not "under contract" so as to enable one to conclude that there existed an interruption of earnings in accordance with the Act and Regulations.
>
> I clearly understand the frustration of the claimant. Nevertheless, when he filed for benefits, he was under contract to his employer. The fact that the claimant was not obligated, as the claimant states, to perform any services for his employer is not sufficient for me to conclude that there existed an interruption of earnings."

[28] In **CUB 76213**, the Umpire stated:

> "The issue raised in this appeal has been dealt with on more than one occasion by Umpires. The decisions deal with professional football players who are hired pursuant to a contract similar to the one in this case (exhibit 7), whereby the players are paid in full at the end of the season but the term of their contract extends over the remaining weeks in the 52 week period. The decisions have held, contrary to the decision of the Board of Referees in this case, that despite the fact that the record of employment indicates a last day of payment prior to the expiration of the contract, the salary is an annual salary and extends throughout the term of the contract."

[29] In the present case, the evidence is clear that the Respondent's contract terminated on February 15, 2011 although his salary was paid during the football season. His "usual remuneration" was paid by reference to a system under which there would be weeks during which he received no salary instalment because no games were played that week. No interruption of earnings occurred during that contract period, regardless of the amount of work performed in the period and regardless of the time at which or the manner in which the remuneration was paid to the Respondent as per section 14(4) of the *Regulations*.

[30] The Tribunal finds that when a player is still governed by a contract, he cannot contend that he is unemployed, even though he has no duties to perform under it during the "off-season".

[31] The Respondent relied on the decision of the Tax Court of Canada, *Reid vs. MNR*, November 8, 2002, to support his interpretation that the employment relationship in the football context terminates at the end of the football season. However, said decision is not binding on the board of referees or on the Tribunal and involves a different issue of "insurable hours". It does not alter in any way the above mentioned legal precedents established by the Umpires on the issue of interruption of earnings.

[32] With great respect, and unfortunately for the Respondent, the board of referees erred in fact and law pursuant to paragraphs 2 (b) and (c) of section 115 of the *Act* when it held that the Respondent had an interruption of earnings in accordance with section 11 of the *Act* and section 14 of the *Regulations*.

**CONCLUSION**

[33] The appeal is allowed, the decision of the board of referees rendered on March 15, 2012 is rescinded and the decision of the Appellant is restored.

*Pierre Lafontaine*
Member, Appeal Division