Docket: 2015-1136(EI)

BETWEEN:

KELLY J. WATERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on October 22, 2015, at Edmonton, Alberta

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jeff Watson

JUDGMENT

The appeal is allowed, without costs, and the decision of the Minister is varied to reflect that the Appellant's insurable hours are increased to 731 in accordance with the application of subsection 10(1) of the *Employment Insurance Regulations*.

All in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 4th day of February 2016.

"Diane Campbell"

Campbell J.

Citation: 2016 TCC 32
Date: 20160204
Docket: 2015-1136(EI)

BETWEEN:

KELLY J. WATERS,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] Mr. Waters was employed as a substitute teacher by the Roman Catholic Separate School District No. 734 (the "Payor") under a contract of service during the period from September 10, 2013 to June 27, 2014 (the "Period"). He has appealed the determination by the Minister of National Revenue (the "Minister") that he had accumulated 674 insurable hours during the Period and was not eligible for employment insurance benefits. He submitted that his total insurable hours were, instead, 763. The Province of Alberta requires an applicant to have a minimum of 700 hours of insurable employment to be eligible for employment insurance benefits.

The Evidence

[2] The Appellant was paid on a *per diem* basis and not according to an hourly rate. His work day was based on a fixed 7 hours, referenced to blocks of instructional time, supervision and preparatory time, to a total daily maximum of 1.0. Pursuant to the collective agreement between the Payor and the Alberta Teachers Association Local 23, total time paid to a teacher for any particular day, therefore, could not exceed 1.0. That total was comprised of instructional and supervision blocks of 6 hours and 40 minutes each, with an additional 20 minutes allocated for preparatory time prior to class commencing. The minimum work day

for which he was paid was 3.5 hours or, by reference to the formula contained in the collective agreement, 0.5. If the Appellant worked three quarters of the day, then compensation was determined using 0.75, again applying the same formula.

[3] The Appellant contended that the Payor's calculation of 674 insurable hours relied on by the Minister is only an approximation, based on a formula established for the purpose of compensation. It did not reflect a calculation of the Appellant's "actual" hours in a work day. The Appellant argued that this calculation excludes the additional hours devoted to pre-day and post-day duties outside the required instructional time, supervision and preparatory time.

[4] The Appellant provided several examples to illustrate the time required for additional responsibilities depending on the class and course he was assigned. If he was the substitute teacher for the food studies class, he would be required to shop for groceries, prep the kitchen and deliver the groceries well before the class commenced which, according to his evidence, would be approximately 1.5 hours prior to school commencing. If he was called in to substitute for the physical education coach, he might be required to oversee after-school extracurricular sports activities. If he was teaching elementary students, he would have additional time spent addressing the safety of those students, ensuring, for example, those children were off and on buses at appropriate times. The Appellant relied on the Substitute Employee Handbook (Exhibit A-1) which references generally starting-day and ending-day duties (page 9) and, more specifically, states, at page 6, that if a teacher is replacing another teacher for a period of 5 consecutive days or more, the substitute "… is expected to take responsibility for planning and assessment, parental contact, monitoring student progress on IPPs, involvement in school activities, etc.". This handbook also refers to the current rate of substitute pay, capped at $221.49 daily, and states that the total time paid for any particular day is not to exceed 1.0.

[5] The Appellant relied on a document copied from the Payor's work website which tracked his days worked, hours and the teacher he was replacing (Exhibit A-2). Since the Appellant could not input his own information into this record, he printed it and, in his own handwriting, tracked the additional time he spent on various activities performed beyond the 7-hour days for which he was compensated. This log totalled the hours spent on the various listed activities. The Appellant kept his own record on the advice of the Teachers Association and submitted that the Payor did not track these additional hours because it was limited under the collective agreement to compensating according to an established

formula to a maximum total time of 1.0. Therefore, it was of no benefit for the Payor to track this additional time.

[6] The Respondent submitted that the Payor provided the Minister with evidence by way of the Record of Employment ("ROE") respecting the Appellant's total insurable hours. The Payor calculated these hours to be 674, based on the assumption that a full work day equaled 7 hours and that the Appellant had worked 96 days during the Period. The Respondent relied on subsection 10(1) of the *Employment Insurance Regulations*, SOR/96-332, (the "*Regulations*") and submitted that pursuant to this provision, the Payor was required to provide the evidence to the Minister of the actual hours worked and for which he was remunerated. Since this is a deeming provision, once the employer supplies this evidence, subsection 10(1) applies and the remaining subsections 10(2) through 10(5) will not need to be considered. In his submissions, Respondent counsel summed up his position in the following manner:

> … Regulation … 10(1) …deems the hours submitted by the employer to be correct. And I submit that you can't even get to the actual hours unless that stage hasn't occurred. But, because it did occur, those are the hours that have to be used.
>
> (Transcript, page 49)

The Legislation and Analysis

[7] The relevant provisions governing this appeal are contained in the *Employment Insurance Act* (the "*Act*") and the *Regulations*. Of particular importance to my analysis will be Regulation 10.

> *Employment Insurance Act*:
>
> 6. (3) Hours of Insurable employment – For the purposes of this Part, the number of hours of insurable employment that a claimant has in any period shall be established as provided under section 55, subject to any regulations made under paragraph 54(z.1) allocating the hours to the claimant's qualifying period.
>
> 55. (1) Hours of insurable employment – The Commission may, with the approval of the Governor in Council, make regulations for establishing how many hours of insurable employment a person has, including regulations providing that persons whose earnings are not paid on an hourly basis are deemed to have hours of insurable employment as established in accordance with the regulations.

(2) Alternative methods – If the Commission considers that it is not possible to apply the provisions of the regulations, it may authorize an alternative method of establishing how many hours of insurable employment a person has.

(3) Alteration or rescission of authorization – The Commission may at any time alter the authorized method or rescind the authorizations, subject to any conditions that it considers appropriate.

(4) Agreement to provide alternative methods – The Commission may enter into agreements with employers or employees to provide for alternative methods of establishing how many hours of insurable employment persons have and the Commission may at any time rescind the agreements.

Employment Insurance Regulations, Part 1, Hours of Insurable Employment – Methods of Determination:

9.1 Where a person's earnings are paid on an hourly basis, the person is considered to have worked in insurable employment for the number of hours that the person actually worked and for which the person was remunerated.

9.2 Subject to section 10, where a person's earnings or a portion of a person's earnings for a period of insurable employment remains unpaid for the reasons described in subsection 2(2) of the *Insurable Earnings and Collection of Premiums Regulations*, the person is deemed to have worked in insurable employment for the number of hours that the person actually worked in the period, whether or not the person was remunerated.

10. (1) Where a person's earnings are not paid on an hourly basis but the employer provides evidence of the number of hours that the person actually worked in the period of employment and for which the person was remunerated, the person is deemed to have worked that number of hours in insurable employment.

(2) Except where subsection (1) and section 9.1 apply, if the employer cannot establish with certainty the actual number of hours of work performed by a worker or by a group of workers and for which they were remunerated, the employer and the worker or group of workers may, subject to subsection (3) and as is reasonable in the circumstances, agree on the number of hours of work that would normally be required to gain the earnings referred to in subsection (1), and, where they do so, each worker is deemed to have worked that number of hours in insurable employment.

(3) Where the number of hours agreed to by the employer and the worker or group of workers under subsection (2) is not reasonable or no agreement can be reached, each worker is deemed to have worked the number of hours in insurable employment established by the Minister of National Revenue, based on an

> examination of the terms and conditions of the employment and a comparison with the number of hours normally worked by workers performing similar tasks or functions in similar occupations and industries.
>
> (4) Except where subsection (1) and section 9.1 apply, where a person's actual hours of insurable employment in the period of employment are not known or ascertainable by the employer, the person, subject to subsection (5), is deemed to have worked, during the period of employment, the number of hours in insurable employment obtained by dividing the total earnings for the period of employment by the minimum wage applicable, on January 1 of the year in which the earnings were payable, in the province where the work was performed.
>
> (5) In the absence of evidence indicating that over-time or excess hours were worked, the maximum number of hours of insurable employment which a person is deemed to have worked where the number of hours is calculated in accordance with subsection (4) is seven hours per day up to an overall maximum of 35 hours per week.
>
> (6) Subsections (1) to (5) are subject to section 10.1.

[8] To qualify for benefits, both an individual's insurable earnings and insurable hours are key to entitlement. The issue in this appeal concerns the Appellant's insurable hours. To qualify, he had to have a minimum of 700 insurable hours in respect to the Period. Section 55 of the *Act* authorizes the Commission to enact regulations for determining the required number of insurable hours. Regulation 10 sets out guidelines that can be used to determine actual hours worked and for which remuneration was paid, where a worker is not paid an hourly rate but according to some other method, such as blocks of time as referred to in this appeal. It applies to salaried employees who are required to work additional hours beyond their normal work day to fulfil their responsibilities, even where their nominal work week is described in hours. It also applies to piece workers who are paid a set amount per work unit provided the unit is anything other than actual hours worked (*MacKenzie v MNR*, 2011 TCC 199, [2011] TCJ No. 150, at paragraph 19). While Regulation 9 simply addresses the worker who is paid an hourly wage for each hour worked, Regulation 10, by its very subject matter, is far more complicated. It addresses those unique situations that fall outside Regulation 9. In addition, the wording, particularly of subsection 10(1), is not straightforward.

[9] Regulation 10 sets out several methods for determining a worker's insurable hours. The objective is to ascertain the total number of hours "actually worked" and for which compensation was paid by the employer in order to determine whether a worker has attained a sufficient number of insurable hours to be eligible for employment insurance benefits during a qualifying period.

[10] The Supreme Court of Canada, in *Abrahams v Canada (Attorney General)*, [1983] 1 SCR 2, affirmed that social legislation should receive a broad and liberal interpretation. Wilson J. stated the following, at paragraph 10:

> … Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation of the re-entitlement provisions. I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant. …

[11] Similarly, Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at paragraph 36, stated:

> Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the *Act*.

[12] The aforementioned statements have been referenced by this Court in several decisions relating to the determination of insurable hours under this *Act* (*MacKenzie*, at paragraphs 43 to 44; *Sutton v MNR*, 2005 TCC 125, [2005] TCJ No. 257, at paragraph 17; *Kuffner v MNR*, [2001] TCJ No. 23, at paragraph 15; and *Bylow v MNR*, [2000] TCJ No. 187, at paragraph 8). Any ambiguity arising in this interpretation of Regulation 10 should therefore be resolved in favour of the worker. In line with this thinking, Bonner J. in *Franke v MNR*, [1999] TCJ No. 645, at paragraph 3, stated:

> … The *Employment Insurance Regulations* ("*Regulations*") are intended for use in determining the number of hours of insurable employment where unconventional arrangements such as those now under consideration are present. The statutory scheme cannot work as intended unless the *Regulations* are construed and applied as attempts to measure in hours the time that the employee "actually worked" and for which the employee was compensated by the employer. The *Regulations* must not be construed in a manner which is likely to produce arbitrary or capricious results.

[13] Bowman A.C.J. (as he was then) in *Chisholm v MNR*, [2001] TCJ No. 238, at paragraphs 15 and 16, made the following comments respecting Regulation 10:

> [15] Finally, I come to section 10 of the Regulations. It is a regulation authorized by section 55 of the *EI Act* to provide some assistance in determining how many hours have been worked by an employee in cases where there is doubt or lack of agreement between the employer and the employee or difficulty in determining the number of hours worked. It clearly is not intended to displace clear evidence of the type that we have here of the number of hours actually worked. To say that the rules set out in section 10 of the Regulations could prevail against the true facts would be to put a strained and artificial construction on this subordinate legislation that would take it far beyond what section 55 of the *EI Act* intended or authorized. Indeed subsections (4) and (5) of section 10 are premised upon the actual number of hours not being known or ascertainable, or upon there being no evidence of excess hours. That is demonstrably not the case here.
>
> [16] I have found the decisions of Bonner J. in *Franke v. Canada*, [1999] T.C.J. 645, and of Weisman D.J. in *McKenna v. Canada*, [1999] T.C.J. 816, and *Bylow v. Canada*, [2000] T.C.J. 187, and of Beabier J. in *Redvers Activity Centre Inc. v. Canada*, [2000] T.C.J. 414, of great assistance. They support the broad, and in my view, common sense conclusion that where there is evidence of the number of hours actually worked there is no need to have recourse to any other method.

[14] In addition to the requirement, that a worker's earnings are not to be paid on an hourly basis, in order for Regulation 10(1) to apply, the employer must (1) provide evidence of the number of hours actually worked in the period of employment and (2) the worker must have been remunerated for those hours.

[15] The focus of Regulation 10 is to make a determination of the hours that a worker "actually worked". If subsection 10(1) is to be successfully relied upon, the employer must provide evidence of the number of insurable hours worked. This subsection places the onus on the employer even though the worker is not paid on an hourly basis. According to Weisman D.J. in *Moses v MNR*, [2001] TCJ No. 361, when Parliament used the word "evidence", it meant evidence that was credible. Although he was referencing subsection 10(5), that observation is equally applicable to all of the subsections contained in Regulation 10. I also agree with the comments of Webb J. in his reasons in *Tomyk v MNR*, 2011 TCC 283, [2011] TCJ No. 212, at paragraph 19, that the Respondent cannot simply satisfy that requirement "… by making assumptions of fact in the Reply. The employer will be required to provide evidence at the hearing to establish the actual number of hours worked." (Emphasis added). There is no general rule that necessitates an employer to physically provide such evidence at a hearing. However, this may be required when the evidence did not form the basis of the Minister's decision or if it appears to the Court that the employer's evidence was arbitrary or incomplete. It is commonplace for an employer to provide the evidence outside of court by

producing its ROE to the Minister. However, the evidence that employers provide must be of the kind contemplated by subsection 10(1). That is, it must be evidence of the "… **time in fact spent** in the performance of duties imposed on the employee by the contract of employment." Bonner J. made this statement in his reasons in *Franke*, at paragraph 12, and it is as pertinent today, in the application of Regulation 10, as it was then. Again I agree with the comment of Webb J. in *Tomyk*, at paragraph 19, when he is referring to the evidence that an employer must provide if subsection 10(1) is to be relied on: "This is a different basis for the determination of the number of hours than was referred to in both the ruling and the decision of the Minister."

[16] The key components in this respect are accuracy and completeness. This Court has consistently rejected employer evidence that is primarily the result of a formulaic approach based only on assumptions and general rules of thumb (*MacKenzie*, at paragraphs 35 to 36; *Judge v MNR*, 2010 TCC 329, [2010] TCJ No. 259, at paragraphs 4 to 5, 10 to 13; *McKenna v Canada*, [1999] T.C.J. 816, at paragraph 18; and *Franke*, at paragraph 12). This Court has also consistently accepted that where it is necessary or generally expected that an employee will work additional hours in order to complete assigned work activities, then those extra hours will be hours of insurable employment provided that the employee was remunerated for them (*Judge*, *Sutton*, *Chisholm*, *McKenna*, *Franke*, *Redvers Activity Centre Inc. v MNR*, [2000] TCJ No. 414, and *Heidebrecht v MNR*, 2013 TCC 113, [2013] TCJ No. 90). To determine whether it was necessary for an employee to work those extra hours, consideration should be given to whether the employee could have accomplished what was expected in order to complete the work tasks within the relevant standard working hours. A worker's claim for additional hours, that would be considered insurable, will more likely be accepted by a court as credible if it is supported by documented information including times and dates tracked contemporaneously with the recorded information.

[17] With respect to the second requirement in subsection 10(1), several cases have addressed the remuneration aspect. Woods J., in her reasons in *Judge*, rejected the Minister's argument that a teacher was remunerated only for the total "set" hours assumed by the employer in the ROE, which assumed that a full day of work equalled a "set" number of hours. However, the collective agreement did not provide for a set number of hours for which teachers were to be remunerated and Woods J., at paragraph 21, concluded that "In the circumstances where the collective agreement is silent as to the number of hours that are to be worked, it is not reasonable to conclude that the appellant was only remunerated for 516 [the set] hours."

[18] Even where a salaried employee's terms of employment specifically state the expected number of hours that an employee is to work, the remuneration may not necessarily be limited to those expected hours. This was the result reached by Bowman A.C.J. (as he was then) in *Chisholm*, where, at paragraphs 9, 10 and 13, he stated:

> [9] The question is whether these hours are hours of insurable employment. The respondent refers to the Terms of Employment approved on December 16, 1998 by the Grimsby Public Library Board. Section 4.1 of that document reads
>
> > A normal work-week for staff consists of thirty-five (35) hours on a five day basis.
>
> [10] A statement of this sort in a document approved by the Library Board proves very little about how many hours the appellant worked. It sets a minimum. The appellant was a professional with wide-ranging responsibilities and it was implicit in her terms of employment that she would devote as much time to the performance of her duties as was necessary to get the job done.
>
> […]
>
> [13] The fact is she was not paid by the hour. She was paid an annual salary and was expected to put in whatever time was required.
>
> (Emphasis added)

[19] Prior to this decision in *Chisholm*, Beaubier J., in *Redvers*, concluded that the remuneration paid was attributable to all of the hours that the employee had actually worked each day as there was no understanding by the employee, who was paid on a *per diem* basis, that she was only required to work a set maximum number of hours per day.

[20] These cases establish that where an employee is not paid an hourly rate and there is no understanding that the employee is only required to work a set maximum number of hours, but there exists an expectation that the employee, when necessary, will work the additional hours when needed to complete the task, then the employee's remuneration is attributable to all of the hours "actually worked".

[21] Applying the legislative provisions and jurisprudence to the facts in the present appeal, the Respondent submitted that subsection 10(1) requires the employer to submit the evidence to the Minister and that the evidence, of the

Appellant's actual hours worked and for which he was remunerated, is contained in the form of an ROE (which is the Exhibit A-2 without the Appellant's handwritten notations). According to the Respondent, despite some contrary caselaw, subsection 10(1) deems those hours in the ROE that was submitted to the Minister to be the correct number of insurable hours. However, I am of the view that the Respondent's position does not reflect the correct interpretation of subsection 10(1). First, if the Respondent is to place reliance on subsection 10(1) at this stage, the evidence that must be provided is to the Court, not the Minister, and it must be of "actual hours" as referenced in the subsection. As such, assumptions of fact alone will not suffice. If the Court concludes that sufficient and credible information is contained in the evidence, such as an ROE document, that may end the matter. However, in the facts before me, the ROE, which is the only evidence produced by the Respondent, is the result of a formulaic approach based on an administrative assumption that a full work day was equal to 7 hours. This is not the type of evidence contemplated by subsection 10(1).

[22] The Appellant provided not only credible testimony respecting the actual excess hours that he was required to work but he also provided me with his log of handwritten notes that he maintained during the Period, detailing those actual excess hours. The examples ranged from several hours spent prior to the 7 hour day when he was assigned to substitute food studies class to time spent after the 7 hour day ended when he substituted for a physical education coach and was required to oversee extracurricular sporting activities. The Appellant has been able to establish what the Payor did not, and that is, the actual time spent on the performance of his duties required of a substitute teacher to complete his work tasks pursuant to his contract of employment. Consequently, because the ROE reflects a formulaic approach, it does not reflect the actual hours that the Appellant worked. If the Payor's work website, that produced the ROE, had permitted the Appellant to input these additional hours to the website, which the evidence suggests it did not, the Payor could have easily produced an ROE that reflected the Appellant's actual work hours. In the circumstances, the Respondent submitted no other evidence to refute the Appellant's testimony and his documentation.

[23] The Appellant's record supports his oral testimony respecting the "actual hours" he worked, subject to a slight adjustment. The Respondent submitted that the Appellant had accumulated 674 insurable hours as opposed to the Appellant's total of 763. It appears from the evidence that the total of 763 includes, as the Respondent submitted, 32 additional hours for the 20 minutes allotted by the Payor each day as pre-class preparation time and included in the 7 hour day. Therefore,

those 32 hours will be deleted from the Appellant's total of 763 hours, leaving a total of 731 insurable hours.

[24] Although subsection 10(1) is ambiguous as to whether the evidence referenced in the regulation must be provided to the Minister or to the Court, I conclude that such evidence must be adduced to the Court in order for the Court to make a determination of the number of insurable hours, apart from the determination by the Minister. I make this conclusion, in part, by applying a liberal interpretation favourable to the Appellant as set out in the reasoning of the Supreme Court of Canada in both *Abraham* and *Rizzo*.

[25] Although subsections 10(2) to 10(6) were neither pleaded nor relied on, and do not come into play, in any event, given my conclusions respecting subsection 10(1), I agree with the comments and summary of the mechanics of those subsections provided by Boyle J. in his decision in *Chahal v MNR*, 2008 TCC 347, [2008] TCJ No. 268, and in particular, paragraphs 26 to 31. Essentially, where subsection 10(1) does not apply, which was not the case in this appeal, then either subsection 10(2), modified by subsection 10(3), or subsection 10(4), modified by subsection 10(5), should be applied, as noted by Boyle J. in *MacKenzie*. In situations where a worker's actual insurable hours are not known or ascertainable and the employer and worker cannot agree on the number of the hours, there appears to be ambiguity as to whether subsection 10(3) or 10(4) takes precedence. Recognizing that the application of subsection 10(4) would yield a greater number of insurable hours than either an employer or an employee might suggest, Boyle J. was guided by the Supreme Court of Canada statements in *Abraham* and also in *Rizzo*. This ambiguity was also recognized in the decision in *Virani v MNR*, 2012 TCC 97, [2012] TCJ No. 74, which concluded there would be no good reason to prefer a result that would be less favourable to an appellant.

[26] In summary, Mr. Water's appeal is allowed, without costs, to reflect that his insurable hours are increased to 731 in accordance with the application of subsection 10(1) of the *Regulations*.

Signed at Ottawa, Canada, this 4th day of February 2016.

"Diane Campbell"

Campbell J.

CITATION:	2016 TCC 32
COURT FILE NO.:	2015-1136(EI)
STYLE OF CAUSE:	KELLY J. WATERS and THE MINISTER OF NATIONAL REVENUE
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APPEARANCES:

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