Docket: 2006-139(IT)I

BETWEEN:

CHRISTIAN ALCINDOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

Appeal heard on August 3, 2006, at Montréal, Quebec

Before: The Honourable Justice Paul Bédard

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Anne-Marie Boutin

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is dismissed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 23rd day of October 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 13th day of July 2007.

Brian McCordick, Translator

Citation: 2006TCC455
Date: 20061023
Docket: 2006-139(IT)I

BETWEEN:

CHRISTIAN ALCINDOR,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

[OFFICIAL ENGLISH TRANSLATION]

REASONS FOR JUDGMENT

Bédard J.

Facts

[1] This appeal under the informal procedure was heard in Montréal on August 3, 2006.

[2] The Appellant was an employee of the Canada Customs and Revenue Agency ("the Agency") until his retirement on November 8, 2002. In December 2002, the Agency paid the Appellant the following amounts:

(i) $20,613, which the Agency characterized as a retiring allowance; and

(ii) $1,965, which the Agency characterized as vacation pay.

The Appellant's principal submission is that he did not have to include these two amounts in computing his income for the 2002 taxation year because there was no provision in the *Income Tax Act* ("the Act") requiring such inclusions.

[3] On March 11, 1999, the Appellant filed a grievance (No. 99-1208-0003) concerning his duties and pay. He had been a technical services officer with the Agency since 1981, providing technical interpretations in relation to consumption taxes. The Appellant argued that his peers, officers with the technical interpretations unit in all the other regions, whose university degrees were essentially of the same type as his and whose positions were once classified as PM-03, had been promoted because their positions were reclassified as AU-02. In fact, the Appellant was submitting that he was the victim of discrimination.

[4] At the end of a mediation session held on March 5 and March 6, 2002, the purpose of which was to settle this grievance and other disputes, the Appellant, the union and the Agency signed a Memorandum of Understanding ("the MOU")[1] the principal clauses of which stipulated as follows:

> [1][TRANSLATION]
>
> 1. On April 1, 2002, the employee shall leave his current position as Technical Interpretation Officer – Excise, PM-3. The employment relationship with the employer shall subsist.
>
> 2. From April 1, 2002, to November 8, 2002, the employer shall remunerate the employee as follows:
>
> A. From April 1 to October 4, 2002, the employee shall be on authorized paid leave for a period of six months and five working days.
>
> B. From October 7 to November 8, 2002, the employee shall be on annual leave. This period corresponds to the 13 days (or two and a half weeks) that he will have accumulated during the six-month authorized paid leave, plus the 12 days of annual leave that he has banked until March 31, 2002, which days shall elapse during this period.
>
> 3. On November 8, 2002, the employee shall retire. The employment relationship shall be definitively severed at the end of the complainant's working day on that date.

[1] Exhibit A-1 (P-1)

> 3A. Following his retirement, the employee shall receive his 23-week severance pay under the collective agreement.

[5] The Appellant was an employee of the Agency and the Department of National Revenue for 20 years and 358 days prior to his retirement on November 8, 2002. It should be noted that, apart from the commitment to retire in accordance with the MOU, the Appellant could have retired on the same date with an immediate annuity plus $20,613.63 in severance pay. I note that, under the terms of section 62.14 of the collective agreement[2] between the Agency and the Public Service Alliance of Canada ("the collective agreement"), "[t]he equivalent full-time period in years shall be multiplied by the full-time weekly pay rate for the appropriate group and level to produce the severance pay benefit." In other words, the collective agreement provides that the Appellant is entitled, upon retirement, to severance pay equal to 21 weeks of salary.

[6] Thus, contrary to the stipulation in section 3A of the MOU, the collective agreement provided for 21 weeks worth of severance pay, not 23 weeks. The severance pay to which the Appellant was entitled at November 8, 2002, was $20,613.63 (21 weeks multiplied by the Appellant's weekly salary), not $22,678.63 (23 weeks multiplied by the Appellant's weekly salary.)

[7] Marc Bellavance, the Agency's Assistant Director, Human Resources, for the Quebec region, who signed the MOU on the Agency's behalf, testified that it was only after signing the MOU that the Agency realized that the Appellant was entitled to 21 weeks worth of severance pay, as opposed to 23 weeks. Mr. Bellavance explained that in any event, the Agency had decided to pay the Appellant the sum of $1,965, or the equivalent of two weeks of salary, as vacation pay.

The Appellant's position

[8] The arguments made by the Appellant in the Notice of Appeal and in his oral submissions can essentially be found in his notice of objection.[3] Those arguments are:

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[2] Exhibit A-1 (P-8).

[3] Exhibit A-1 (P-6).

[TRANSLATION]

In support of my objection, I submit, first of all:

(1) that the amount of $3,787.82 includes two amounts: $1,822.82, which is indeed vacation pay (a fact that I do not contest); and the difference of $1,965, which I contest. I submit that the second amount is not vacation pay and is not a taxable benefit or taxable income. The $1,965 must not be included in my income as vacation pay or on any other basis. It is not an amount from an office or employment, not is it a taxable retiring allowance under subparagraph 56(1)(*a*)(ii) of the *Income Tax Act* (ITA); and

(2) that the $1,965 must meet with the same fate as the $20,613.63, since both amounts are attributable to clause 3A of a contract of adhesion between the CCRA and myself, dated March 6, 2002. The amounts do not result from my collective agreement, to which I am not a party but merely a beneficiary. The employer cannot rewrite clause 3A of the contract of March 6, 2002 at it pleases by characterizing these inextricable amounts under clause 3A of the said contract alternately as vacation pay (see box 17A of the record of termination of employment) and as a retiring allowance (See box C of the record of termination of employment).

Neither of these two amounts is a taxable benefit or taxable income, and neither of them is covered by any provision of the ITA. Both of them are gifts, donations or payments by reason of harm caused to me.

Analysis and conclusion

[9] The term "retiring allowance" is defined as follows in subsection 248(1) of the Act:

"retiring allowance" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)(*a*)(iv)) received

(a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or

(b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,

by the taxpayer or, after the taxpayer's death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer;

[10] Subparagraph 56(1)(*a*)(ii) of the Act reads:

56. [Amounts to be included in income for year]

(1) Without restricting the generality of section 3, there shall be included in computing the income of a taxpayer for a taxation year

(a) **Pension benefits, unemployment insurance benefits, etc.** any amount received by the taxpayer in the year as, on account or in lieu of payment of, or in satisfaction of,

. . .

(ii) a retiring allowance, other than an amount received out of or under an employee benefit plan, a retirement compensation arrangement or a salary deferral arrangement,

. . .

[11] I find that the payment of $20,613.83 in the case at bar was a retiring allowance. It corresponds to the definition of "retiring allowance" in section 248 of the Act. This amount of $20,613.63 was paid to the Appellant upon, or following, his retirement in recognition of his long service.

[12] I cannot subscribe to the Appellant's claim that the amount of $20,613.63 did not result from the collective agreement. Section 3A of the MOU merely confirmed that, in any event, upon retiring on November 8, 2002, the Appellant was entitled to the severance benefit contemplated in the collective agreement. The fact that the parties made a good-faith mistake about the number of weeks of salary to which the Appellant was entitled as a severance benefit under the collective agreement does not change the characterization of the amount of $20,613.63 received by the Appellant. I cannot see how the amount of $20,613.63 received by the Appellant was anything other than a retiring allowance. That is the only conclusion that I can reasonably reach.

[13] What about the amount of $1,965 that the Agency paid the Appellant as vacation pay? Regardless of how the Agency defined the payment, it is up to the

Court to characterize it. I find that the payment of $1,965 should be considered a retiring allowance as defined by section 248 of the Act. Thus, it must be added to the Appellant's income for the 2002 taxation year in accordance with subparagraph 56(1)(*a*)(ii) of the Act.

[14] In the case at bar, the Agency paid the amount of $1,965 to the Appellant, either in consideration of his agreement to leave his employment and retire, or in recognition of his long service. Thus, the payment in question comes within the definition of "retiring allowance" in section 248 of the Act.

[15] Even if the amount of $1,965 was not paid by the Agency under the collective agreement, this does not prevent it from being a retiring allowance. A retiring allowance does not necessarily have to be paid by the employer pursuant to a contractual obligation or a provision of the collective agreement that governs the employer. Whether the Agency was required to pay the $1,965 or not, and whether it paid the amount in recognition of the Appellant's long service or to ensure that he would leave his employment and retire, the amount is, in my opinion, a retiring allowance within the meaning of section 248 of the Act.

[16] As for the Appellant's argument that the amounts of $20,613.63 and $1,965 constituted damages for harm that he was caused, I should emphasize that the Appellant adduced no evidence in support of this argument. Quite the contrary, it was proven that the grievance was related to a job classification problem and was therefore a contractual dispute, not a dispute of a delictual or quasi-delictual nature.

[17] For these reasons, the appeal is dismissed.

Signed at Ottawa, Canada, this 23rd day of October 2006.

"Paul Bédard"

Bédard J.

Translation certified true
on this 13th day of July 2007.

Brian McCordick, Translator

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STYLE OF CAUSE:	Christian Alcindor and Her Majesty the Queen
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REASONS FOR JUDGMENT BY:	The Honourable Justice Paul Bédard
DATE OF JUDGMENT:	October 23, 2006

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for Respondent:	Anne-Marie Boutin

COUNSEL OF RECORD:

For the Appellant:

Name:

Firm:

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada