Docket: 2012-3793(EI)

BETWEEN:

GINA HEIDEBRECHT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on February 7, 2013, at Edmonton, Alberta

Before: The Honourable N. Weisman, Deputy Judge

Appearances:

Counsel for the Appellant:	Derek A. Cranna
Counsel for the Respondent:	Paige Atkinson

JUDGMENT

The appeal with respect to a decision of the Minister of National Revenue under the *Employment Insurance Act* is allowed and the Minister's decision varied under subparagraph 103(3)(*a*) of the *Act* to provide that the number of insurable hours worked and for which the Appellant was remunerated was 547 hours and 10 minutes.

Signed at Toronto, Ontario, this 12th day of April 2013.

"N. Weisman"

Weisman D.J.

Citation: 2013 TCC 113
Date: 20130412
Docket: 2012-3793(EI)

BETWEEN:

GINA HEIDEBRECHT,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Weisman D.J.

[1] The appellant is a part-time music teacher. The respondent, the Minister of National Revenue (the "Minister") determined her insurable hours while employed by Edmonton School District #7 during the 2010-2011 academic year to be 509. She now appeals against the respondent's calculations.

[2] Specifically, she contends that the Minister has improperly declined to give her credit for 61 hours and 10 minutes of time that she spent setting up her classroom at the beginning of the year, attending meetings assigned by her principal, general preparation and planning of her courses, marking student work and recording student achievements including the preparation of report cards, and extra-curricular activities such as rehearsals, performance preparation and other such non-instructional extra work with her students.

The Legislative Provisions

[3] The relevant legislative scheme is set out in sections 6.(3) and 55.(1) of the *Employment Insurance Act*[1] (the "*Act*") and section 10 of the *Employment Insurance Regulations*[2] (the "*Regulations*"). They are reproduced below.

[1] S.C. 1996, c.23.
[2] SOR/96-332.

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.

Employment Insurance Regulations

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 overtime 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.
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> (6) Subsections (1) to (5) are subject to section 10.1.

[4] The above provisions have been judicially considered in the following reported cases to ascertain which of the above paragraphs are best applied to school teachers and those whose earnings are not paid on an hourly basis.

[5] In *Franke v. M.N.R.*[3] Bonner J. rejected the University's formula-based calculation of hours entered on the record of employment issued to the appellant lecturer as any evidence of hours actually worked by him. He found the appellant credible and accepted his evidence of excess hours worked in non-instructional duties connected to his course as provided for in subsection 10.(5) of the *Regulations*. In view of this determination, the deeming provision in 10.(5) was found to be inapplicable.

[6] *McKenna v. M.N.R.*[4] involved a writing instructor at York University in Toronto. I found her estimate of actual hours worked to be credible, in view of her 12 years of experience teaching the same course, notwithstanding the absence of any detailed docket to support her evidence. I rejected the University's formulaic approach to the determination of actual hours worked. In the result, the excess hours worked provision in Regulation 10.(5) was applied rather than the deeming provisions contained in subsections 10.(4) and (5).

[7] In *Furtado v. M.N.R.*[5] a building superintendent who was responsible for management, rent collection and cleaning the premises claimed that she worked 7 to 10 hours per day, 7 days per week. The Minister resorted to the deeming provisions in Regulation 10.(4), and used the minimum wage applicable in Ontario to calculate her insurable hours. This approach was approved of by Somers J., who dismissed the worker's appeal.

[8] *Redvers Activity Centre Inc. v. M.N.R.*[6] concerned the operator of a group home for residents with high care physical and medical needs. She had a set daily

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[3] [1999] T.C.J. No. 645.
[4] [1999] T.C.J. No. 816.
[5] [1999] T.C.J. No. 164.
[6] [2000] T.C.J. No. 414.

wage and worked three-day shifts of 24 hours per day. Her employer had knowledge of these actual hours worked and agreed with her calculation of 72 insurable hours per shift. Beaubier J. therefore found subsections 10.(1) and (2) applicable, and her appeal was granted.

[9] In *Moses v. M.N.R.*[7] the appellant was a sessional instructor at the University of Windsor. At trial, I found subsection 10.(5) applicable. However, the appellant had no documentation to support his claim, for extra hours worked on non-instructional duties. Any notes he did have were made *ex part facto* in support of his application for benefits under the *Act*, and he was found to be lacking in credibility. I rejected his estimate of excess hours worked. Upon judicial review by the Federal Court of Appeal [8], no issue was taken with respect to my resort to Regulation 10.(5) in this fact situation. The Court, however, sent the matter back to the Tax Court on the grounds that I ought to have determined a figure for the hours spent in preparatory time and other time not relating to face-to-face hours with the applicant's students.

[10] *Chisholm v. M.N.R.*[9] involved the Director of the Grimsby Public Art Gallery who was paid an annual salary. She catalogued some 19 different duties inherent in her position, which Bowman J. described as "onerous and gruelling." The appellant filed her daily appointment book as an exhibit in the proceedings. It documented 98.75 overtime hours, which the court found credible. In applying Regulation 10.(5) the court concluded: "… where there is evidence of the number of hours actually worked there is no need to have recourse to any other method."

[11] In *Carson v. M.N.R.*[10] Porter J. dealt with a school teacher who claimed credit for extra time. She produced her daily class work notes in which she recorded the time she left school each afternoon. She usually departed after the students did and was occupied doing preparation work till then. This evidence was accepted, as was her testimony that she almost always returned to school to work for 7 hours each weekend.

[12] She also produced a calendar on which she had typed the number of hours worked at home on weekends. This evidence, however, was rejected since there was no indication where the numbers came from and no working sheets or notes made at the time to substantiate them. The numbers were apparently put together after the fact when the appellant applied for benefits under the *Act*. Also rejected as not credible

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[7] [2001] T.C.J. No. 361.
[8] 2002 FCA 132, [2002] F.C.J. No. 513.
[9] [2001] T.C.J. No. 238.
[10] 2003 TCC 474, [2003] T.C.J. No. 415.

were amounts for duties such as professional development, report card preparation and marking tests. These lacked specific evidence in support and were found to be double-counted.

[13] In the result, the appellant was found to lack the excess insurable hours necessary to qualify for benefits. An appeal to the Federal Court of Appeal was dismissed. No issue was taken with the trial judge's apparent application of Regulation 10.(5) to resolve the matter.

[14] *Sutton v. M.N.R.*[11] concerned an adult education teacher's appeal involving insurable hours. The appellant had 17 years of experience in the field. Teskey J. adopted the reasoning in *Franke* and *Chisholm* and credited the appellant with insurable hours for extra time spent in preparation for his classes.

[15] In *Société en commandite Le Dauphin v. M.N.R.*[12] Savoie J. found that a residential building superintendent who was remunerated on a weekly basis and who was on-call 24 hours per day, 7 days per week failed to discharge the onus of disproving the respondent Minister's assumptions, and dismissed the appeal. The Minister was found to have properly resorted to the minimum wage deeming provision found in subsection 10.(4) of the *Regulations*.

[16] *Judge v. M. N.R.*[13] dealt with a secondary school teacher who claimed insurable hours for extra time spent in preparing for his classes. The employer school board adduced evidence as to the number of insurable hours its payroll department historically entered on teachers' records of employment, but did not know where the figure came from. This evidence was accordingly rejected by Woods J. as being any proof of the actual hours worked by the appellant and for which she was remunerated. The excess hours worked provision in Regulation 10.(5) was applied and the appeal was allowed. In doing so, the court found the appellant's estimate of time spent in preparation and extra duties much more accurate than that of the Minister.

[17] *MacKenzie v. M.N.R.*[14] involved a part-time college instructor with over two decades of teaching experience. His evidence of preparation and other non-classroom teaching time, however, was only unsupported after the fact estimates which Boyle J.

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[11] 2005 TCC 125, [2005] T.C.J. No. 257.
[12] 2006 TCC 653, [2006] T.C.J. No. 536.
[13] 2010 TCC 329, [2010] T.C.J. No. 259.
[14] 2011 TCC 199, [2011] T.C.J. No. 150.

found to be "somewhat high". The Ontario College of Regents' formulaic approach was also rejected as proof of actual hours worked by the appellant.

[18] The court decided the issue by applying the minimum wage deeming provisions found in subsection 10.(4) of the *Regulations*. The result was many more insurable hours than even the appellant estimated. The court concludes: "This deemed result is certainly an odd result which clearly bears no resemblance to the number I would have determined to be Mr. MacKenzie's actual hours worked…".

[19] This survey of the relevant reported cases to date reveals the following:

1. The courts reject formulae as providing proof of actual hours worked.[15]

2. The excess hours worked provision in Regulation 10.(5) is commonly resorted to by courts as the most fair and accurate method of resolving these issues if there is credible evidence of these hours.[16]

3. Some courts have resorted to the minimum wage in the province where the work was performed pursuant to the deeming provisions in Regulations 10.(4) and (5).[17]

4. The worker's claim for excess hours worked is more likely to be accepted as credible if it is supported by documented times and dates made contemporaneously with the events recorded.[18]

The Facts:

[20] The appellant was paid an annual salary. Pursuant to the Collective Agreement between her teachers' association and the district board of trustees, for this salary, either her principal or the board could assign duties to her, which included instruction, supervision of students and professional activities such as staff meetings and parent/teacher conferences. She also spent unassigned time both at school and at home on professional duties such as preparing for her music classes and completing report cards. Her employer was therefore unable to provide evidence of the hours she actually worked and for which she was remunerated.

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[15] *Franke, McKenna, MacKenzie*.
[16] *Franke, McKenna, Moses, Chisholm, Carson, Sutton, Judge*.
[17] *Le Dauphin, Furtado, MacKenzie*.
[18] *Moses, Carson, MacKenzie.*

[21] The appellant's extra hours were contemporaneously documented by her on 65 pages of daily notes which detail the times she spent on professional duties, both in school and out, before, during and after the school year. She also produced a summary of these docket entries which breaks down her 61 hour and 10 minute claim as follows:

Classroom set up:	11.5 hours (19%)
Meetings:	5.0 hours (8%)
General preparation and planning:	22.0 hours (36%)
Rehearsals, performance preparation, other extra work with students:	6.5 hours (11%)
Report cards/Achievement (marking, comment writing and report cards themselves):	16.0 hours (26%)

[22] She testified that she made these records because she had just returned from a maternity leave, her next child would be born only 19 months after the first, and she knew she would have to keep track of her hours.

[23] The Minister calculated her total insurable hours to be 509. The question is how many more insurable hours she is entitled to for extra time spent in carrying out her responsibilities under Alberta's *School Act*[19] and the Collective Agreement.

Analysis:

[24] I note that the appellant's dockets contain a significant error. The Minister points out that the 11.5 hours she claims for classroom set up on the weekend of April 6 had already been allowed by the Minister who, in fact, included a full 12 hours for this activity in the 509 hours total. The appellant acknowledged this error on her part on cross-examination by counsel for the Minister.

[25] A further concern with the appellant's dockets is that some of the activities and meetings for which she claims extra time were done wholly on assigned time prior to 3:30 p.m. and some partly on assigned time and partly thereafter.

[26] While the appellant acknowledges this concern, she nevertheless claims extra time for all these activities and meetings on the dubious ground that they all resulted in her having to stay after 3:30 p.m. to do tasks that could have been done earlier. There are several problems with this position.

[19] RSA 2000, c. S-3.

[27] Firstly, if such were indeed the case, in each instance there should be docket entries after assignable school hours matching the time spent on activities that purportedly usurped her preparation time. There are none.

[28] Secondly, staff meetings are expressly included in assignable time for which she was remunerated under section 13.21 of the Collective Agreement. In my view, this applies even if these meetings continued past 3:30 p.m. Otherwise, there would be no need to specifically designate staff meetings as assignable time in the Collective Agreement.

[29] Next, it seems inequitable to allow her excess insurable hours for non-instructional activities done during paid assignable time.

[30] Finally, extra-curricular activities are expected to be done on a voluntary basis, if at all, pursuant to page 27 of the Collective Agreement.

[31] Adverting to the appellant's specific docket entries, she has claimed that her preparation and report card time was usurped by staff meetings on Thursday, April 7 from 2:10 - 4:15 p.m. (2 hours, 5 minutes) and on Thursday, June 2 from 2:30 - 4:15 p.m. (1 hour, 45 minutes). These are disallowed because they took place on paid assignable time as defined in the Collective Agreement.

[32] She similarly claimed credit for writing report card comments on Friday, June 3 from 2:30 - 4:30 p.m. (2 hours). Since half of this took place on paid assignable time, 1 hour only will be allowed.

[33] She also claimed credit on April 25 for "planning performance" from 7:30 - 9:15 p.m. (1 hour, 45 minutes); on Thursday, May 12 for "teacher practice" from 2:30 - 3:15 p.m. (45 minutes); on Monday, May 16 for "boys song practice" from 2:30 - 3:15 p.m. (45 minutes); Tuesday, May 17 for "boys rehearsal" from 2:30 to 3:15 p.m. (45 minutes); and on Wednesday, May 18 for 45 minutes for "last boys practice" with no time designations in support.

[34] The April 25 time is not allocated between planning and performance. The former is justifiable, the latter is not since it is extra-curricular. I will give the appellant the benefit of the doubt and disallow 45 minutes only. I must disallow the May 12, 16, 17 and 18 claims since I am satisfied that they all occurred during paid assignable time.

[35] She claimed credit on Thursday, June 9 from 3:00 – 3:45 p.m. (45 minutes) and on Friday, June 10 from 2:15 – 5:35 p.m. (3 hours, 20 minutes) where, in neither case, is there any indication of what task was undertaken. They could be all extra-curricular activities, all preparation, or some combination of the two. I am again prepared to give the appellant the benefit of the doubt and allow the part of these claims that took place after 3:30 p.m. as excess hours for preparation. Finally, she claimed credit on Tuesday, June 28 from 9:00 to 10:10 a.m. (1 hour, 10 minutes) for attending a movie with her students. This must be disallowed since it occurred on assignable time.

[36] The above deductions total 11 hours and 30 minutes. When added to the 11.5 hour mistaken claim for the April 4 weekend, a total of 23 hours must be deducted, leaving a balance of 38 hours and 10 minutes of excess time which can be added to the Minister's conceded 509 hour figure. I conclude that the appellant worked and was remunerated for 547 hours and 10 minutes while employed by Edmonton School District #7 during the period under review.

[37] The appeal will be allowed and the Minister's decision varied under subparagraph 103(3)(*a*) of the *Act* to provide that the number of insurable hours worked and for which the appellant was remunerated was 547 hours and 10 minutes.

Signed at Toronto, Ontario, this 12th day of April 2013.

"N. Weisman"

Weisman D.J.

CITATION:	2013 TCC 113
COURT FILE NO.:	2012-3793(EI)
STYLE OF CAUSE:	GINA HEIDEBRECHT AND M.N.R.
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APPEARANCES:

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