

Citation: 2013 TCC 273

Date: 20130923

Docket: 2011-3695(EI)

BETWEEN:

JOSHUA D. RIZAK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

AMENDED REASONS FOR JUDGMENT

Graham J.

[1] In 2008, Mr. Rizak decided that he wanted to pursue a doctoral degree in neuroscience at the University of British Columbia (“UBC”). Mr. Rizak is appealing a determination by the Minister of National Revenue that the work he did at UBC as part of his graduate studies from September 1, 2008 to May 10, 2010 was not insurable employment at UBC within the meaning of subsection 5(1) of the *Employment Insurance Act*.

Witnesses:

[2] Mr. Rizak testified on his own behalf. He has strongly held views on many aspects of academic life both at UBC and in Canada in general. Those views appear to have arisen during or after his time at UBC. I believe that, to an extent, those views have coloured Mr. Rizak’s perception of events at UBC. As a result, while I generally found Mr. Rizak to be a credible witness, I have taken his description of his interaction with others at UBC with a grain of salt.

[3] Dr. Jennifer Phelps testified for the Respondent. Ms. Phelps is the assistant dean of graduate studies at UBC. I found Dr. Phelps to be a credible witness. Although UBC has a clear stake in the outcome of this appeal, Dr. Phelps did not appear to be slanting her testimony with the goal of achieving a particular result. She

provided general evidence about graduate studies at UBC rather than specific evidence about Mr. Rizak's relationship with UBC.

Graduate Students:

[4] The following general description of graduate programs is based on the testimony of Mr. Rizak and Dr. Phelps and appears to be generally applicable to students at UBC pursuing doctoral degrees in the sciences.

[5] The application process for doctoral students is as follows. First the potential student submits an application to the university. Then the student finds a professor who is willing to accept the student as his or her mentor. The professor advises the university that he or she is willing to take responsibility for the student and the university then informs the student that he or she has been accepted into the program. It is not possible to get admitted to UBC as a doctoral student without the support of a professor.

[6] In order to graduate, students must produce and defend a doctoral dissertation or series of manuscripts which are considered an original piece of scholarly work that contributes significant new knowledge in their field. Graduate students must also attend classes. Mr. Rizak testified that he personally spent approximately 7 hours a week in class or in laboratory based classwork.

[7] Much of what occurs at the graduate level in sciences at universities is driven by grants from third party funding agencies. Typically a professor will write a grant proposal to a funding agency in which he or she will propose a general approach to pursue a certain research problem. If the funding agency approves the grant it will give money to the professor subject to certain conditions. The most important condition is typically that the money be used for the specific research purposes set out in the grant.

[8] Dr. Phelps testified that there are 3 types of funding available from UBC for graduate students. The first is being a graduate research assistant. Graduate research assistants generally design and conduct research for professors. This is the most common source of funding for graduate students in the sciences. Mr. Rizak was a graduate research assistant. The second form of funding is being a teaching assistant. Teaching assistants teach courses to undergraduate students. This occurs in the sciences but is more common in the humanities. The third form of funding is scholarships. There are no specific responsibilities associated with scholarships. I

should note that Dr. Phelps' description of the monies for being a graduate research assistant or a teaching assistant as funding is in keeping with her and UBC's view that the monies provided are a form of fellowship. Mr. Rizak would describe these monies as payment for work performed. Dr. Phelps testified that most graduate students in the biological sciences received funding from more than one of these types of funding.

[9] While it is not necessary for a graduate student in the sciences to work as a graduate research assistant, it is certainly the norm. This is because most students use the intellectual work or data from their graduate research activities as the basis of their doctoral dissertation or manuscripts. A student who does not work as a graduate research assistant would have to obtain their intellectual work or data in another manner. This would be difficult as the professors and their labs are focused on conducting the research that is required by their grants.

[10] Graduate research assistants in the biological sciences typically receive an annual stipend from UBC of between \$16,000 and \$25,000. The money for the stipend for a given graduate research assistant comes from the grant given to the professor whose work the student is doing. Some departments have a set amount that is paid to all graduate research assistants in their department. Sometimes the funding agency funding a given grant sets a specific limit on the amount paid to graduate research assistants working on that grant.

[11] The term graduate research assistant only applies to students pursuing doctoral degrees. Postdoctoral students are not considered graduate research assistants.

Appellant's History At UBC

[12] Mr. Rizak submitted his application to UBC in accordance with the usual process for applying to be a graduate student. Sometime later he, along with a number of other potential graduate students, was contacted by an associate professor named Dr. Jun-Feng Wang. Dr. Wang was seeking a graduate student who was interested in assisting him with his research. Mr. Rizak met with Dr. Wang. They discussed Dr. Wang's research and what a graduate student's role would be. Dr. Wang had Mr. Rizak meet with another professor in his department who was working on the same research grant as Dr. Wang. Dr. Wang also encouraged Mr. Rizak to meet with other professors at UBC in order to ensure that Mr. Rizak found an area of research that most suited his interests. A few days after meeting with Mr. Rizak, Dr. Wang advised Mr. Rizak that he would be pleased if Mr. Rizak

pursued his graduate studies in Dr. Wang's lab. A week later, Mr. Rizak sent Dr. Wang an email accepting Dr. Wang's offer.

[13] Graduate students typically begin their work with professors when they begin their graduate studies in September. Mr. Rizak needed money so he asked Dr. Wang whether he could be hired to work as a research assistant in the lab over the summer. A research assistant differs from a graduate research assistant because he or she has not been accepted to the graduate studies program. Dr. Wang agreed to Mr. Rizak's request. Mr. Rizak worked in Dr. Wang's lab from July 1 to August 31, 2008. Mr. Rizak was paid \$12 per hour and worked a 7.5 hour day. He signed an employment contract with UBC. The parties agree that Mr. Rizak was engaged in insurable employment during this period.

[14] Mr. Rizak's graduate studies commenced on September 1, 2008. Mr. Rizak testified that very little changed in the lab when he became a student. He continued to perform the same tasks that he had performed as a research assistant during the summer. The main difference was that he was no longer paid an hourly wage. Instead, he received an annual stipend of \$21,000. Mr. Rizak cannot recall whether the stipend was paid monthly or semi-monthly. Also, UBC no longer considered him to be an employee.

[15] Mr. Rizak described his work for Dr. Wang as follows. Dr. Wang supplied the lab equipment and the necessary chemicals. He told Mr. Rizak what experiments he wanted conducted. The lab manager would then show Mr. Rizak how to do the experiments. When a given experiment was completed, Mr. Rizak would discuss the results with Dr. Wang. If there were problems with the experiment, Mr. Rizak would make suggestions to Dr. Wang on how to improve the experiment and Dr. Wang would either agree or suggest an alternative. All of Mr. Rizak's work for Dr. Wang was governed by the guidelines of Dr. Wang's grant.

[16] At the time that he accepted Dr. Wang's offer, Mr. Rizak's understanding from UBC's website was that tuition fees would be waived for Ph.D students in neuroscience. In August 2008, Mr. Rizak learned that UBC would, in fact, no longer be waiving tuition fees. Mr. Rizak was not in a financial position to cover his tuition. Mr. Rizak approached Dr. Wang for help. Mr. Rizak eventually received funding from the university in the form of a scholarship that covered his first term's tuition and, later, a second scholarship that covered part of his second term's tuition. Mr. Rizak also applied for a line of credit at his bank. Dr. Wang provided Mr. Rizak with a letter confirming that as a graduate research assistant he would be receiving \$21,000 per year. I note that Dr. Wang's letter refers to the \$21,000 as "an annual

payment ... which is paid through the University from [his] grant". He does not describe it as salary.

[17] When Mr. Rizak's scholarships stopped, Dr. Wang increased Mr. Rizak's stipend from \$21,000 to \$25,000.

[18] Mr. Rizak testified that when he had been in the graduate program for about a year, he had a novel insight about the drug that he and Dr. Wang were researching. Mr. Rizak felt that there was real merit to his insight and wanted to conduct research to support his view. He was met with resistance both by Dr. Wang and others on the faculty but was given an opportunity to spend 3 months trying to support his position so long as he continued to do his regular research work at the same time. When the 3 month period was over, Mr. Rizak presented his work to a graduate committee but their decision was that he not be permitted to continue this personal line of research further. While Mr. Rizak suggested a number of possible explanations for the resistance, based on his description of events, I suspect that it had a lot to do both with the fact that his insight fell outside of the parameters of Dr. Wang's grant and with the fact that the manner in which Mr. Rizak pushed his idea lacked a certain sensitivity to the politics of his department.

[19] Eventually Mr. Rizak became disillusioned with the entire doctoral degree process. His disillusionment, combined with the fact that he had reached the end of his line of credit, caused him to withdraw from the graduate studies program on May 10, 2010.

[20] Although Mr. Rizak was no longer a graduate student and thus no longer had to pay tuition, he still needed money to live on and to pay his debts. He knew that Dr. Wang would not get a new graduate research assistant until September so he offered to work for Dr. Wang as a research assistant until that time. Dr. Wang accepted his offer. Mr. Rizak continued to perform the same research that he had performed for Dr. Wang while he was a student. He was still not permitted to perform research on his own idea. For one reason or another, Mr. Rizak continued to be paid in the same manner as if he were still a graduate research assistant rather than an employee. However, the parties are in agreement that Mr. Rizak was an employee of UBC during the period from May 11 to August 31, 2010 albeit for different reasons: Mr. Rizak because he believes he was always an employee and the Respondent because Mr. Rizak was no longer a student.

Law

[21] There have been many cases before the Court regarding funds received by students from universities in relation to research activities.

[22] Justice Lamarre Proulx considered whether a postdoctoral fellow was an employee in her decision in *Bekhor v. MNR*, 2005 TCC 443. The postdoctoral fellow in question was expected to work on a specific research project. He received stipends for that work. However, he also learned in the process. Justice Lamarre Proulx concluded that the appellant was not an employee. At paragraph 39 she stated:

For all these reasons, I conclude that the relationship of the Appellant with the University of Alberta was one of advanced student and professor, not one of employee and employer. The stipend received was in the nature of financial assistance provided to a learning postdoctoral fellow, not remuneration for services rendered by an employee to an employer.

[23] In *Chabaud v. The Queen*, 2011 TCC 438, Justice Archambault also considered whether a postdoctoral fellow in a similar situation to the one in *Bekhor* was an employee. He came to the opposite conclusion of Justice Lamarre Proulx. At paragraph 71 he stated:

According to Professor Moulin, the relationship between her and Mr. Chabaud was one of student and professor. I do not share this opinion. A professor does not pay a student when the student “studies”. In fact, the opposite is true: it is the student who pays tuition fees! Mr. Chabaud paid none. When a professor hires a student for summer work, this student is in the same situation as all the other students who must earn money to pay for their studies or to support themselves, although the work may be more relevant for his or her future career. If the student receives a salary, it must be included in his or her income tax return (which must be filed if tax is payable). As a result, Mr. Chabaud would not be treated any differently than the summer student mentioned in the operating budget whom Professor Moulin was to hire for her research project at a salary of \$5,252, or than the master's student, who was to receive remuneration of \$17,850 (Exhibit I-11). Therefore, a student can provide services under a contract of employment. In such a situation, the student is an employee.

[24] I am unable to find any factual or legal basis upon which I can distinguish the decisions in *Bekhor* and *Chabaud* from each other. With respect, I prefer Justice Archambault’s reasoning over that of Justice Lamarre Proulx.

[25] In *Caropreso v. The Queen*, 2012 TCC 212, Justice Woods was also asked to consider whether a postdoctoral fellow was an employee. She acknowledged that the case law on the issue was divided. She then set out what she believed was the

appropriate test that should be applied in determining whether a taxpayer has received funding as a student or been compensated as an employee. At paragraph 20 she stated:

The root of the difficulty is that payments to postdoctoral research fellows often have dual elements. The payments further the education of research fellows and they also provide compensation for work performed. If the payments are received by virtue of employment, this takes precedence. However, in making this determination, it is relevant to consider the dominant characteristic of the payments, whether it is compensation for work or student assistance.

[emphasis added]

[26] I agree with Justice Woods' conclusions. In my view, the test that she uses is equally applicable to doctoral students and I adopt it for the purposes of this Appeal.

[27] However, because *Bekhor*, *Chabaud* and *Caropreso* all deal with postdoctoral fellows they are not very helpful in analyzing the dominant characteristic of payments made to graduate students. My understanding from the caselaw is that postdoctoral fellows are individuals who already have a Ph.D who are participating in research work at a university in part to obtain more specialized expertise. They are not working towards a further degree. At paragraph 82 of *Chabaud*, Justice Archambault compared postdoctoral fellows to individuals beginning work in other professions:

In my opinion, there is no relevant difference between the work Mr. Chabaud did as a postdoctoral research fellow and that of an articling law student, a medical resident, an accounting trainee or an apprentice. All must acquire more experience before moving on to the next stage of their careers. Judicial notice is taken of the fact that medical residents and articling law students must work for a number of months under the supervision of an "attending staff physician" or "articling principal" before being eligible for admission to their respective professional bodies. During this period, they receive remuneration for their work while acquiring more experience in their field.

[28] Graduate students are in a very different situation than postdoctoral fellows. Graduate students have not yet obtained their degrees. Their primary reason for being at a university is to obtain their degrees. For those graduate students who choose to work as graduate research assistants, their work is geared, at least in part, towards that end. Therefore, it is important to review how the Court has dealt with cases involving graduate students.

[29] In *Hammell v. MNR*, [1994] TCJ No. 921, a masters student was interested in researching fish epidemiology. The university did not have a professor who specialized in fish epidemiology but it did have a professor who specialized in fish pathology and one who specialized in epidemiology (though not of fish). Those professors agreed to jointly supervise the student's research. The research was not connected to any research that the professors were doing. The student applied to the university for an annual stipend of \$20,000. He was granted the stipend based on the fact that what he was hoping to achieve in his studies in general meshed with the university's goals. Not all masters students received stipends. While the student did a lot of work in the department's laboratories to assist with other people's studies, that work was done on a voluntary basis. He was not required to do the work. He did it purely to gain experience in his field and to advance his prospects of ultimately being asked to join the faculty at the university. The Court held that the student was not engaged in insurable employment.

[30] A similar result occurred in *Hospital for Sick Children v. MNR*, [1993] TCJ No. 388, a case involving a masters student. At paragraph 65 of that decision, Justice Christie stated:

The evidence shows that it was accepted by Dr. Riordan and the [student] that the former was not vested with any real authority to specify the work to be done by her. This was decided by arriving at a consensus. He said that there was no instruction or direction involved. It is an academic process whereby some agreement is reached on the subject of the research. The [student] specifically stated that Dr. Riordan could not obligate her with reference to areas in which to do research. Changes that occurred in the focus of the [student]'s research came about at her instigation. Nor did Dr. Riordan have control over the manner in which the [student] conducted her research. When asked if he could tell her what techniques to use, she replied, no he could only make suggestions in that regard. His evidence is to the same effect. In contrast he said with reference to the technicians that he designed the experiments and he analyzed the results . . .

[31] That decision was followed in *Nabet v. MNR*, [1999] TCJ No 79, a case involving a doctoral student, where Justice Lamarre Proulx found the student not to be an employee. She stated at paragraph 13:

The case at bar is similar to *The Hospital for Sick Children* case, *supra*, and it is my view that that decision properly sets out the law regarding the legal status of a student paid out of research funds: there is no insurable employment if the student is paid for research done as part of a work program the student has drawn up himself or herself; although a professor may have helped the student establish the work program, that program remains the student's program and serves the student's

purposes; the student controls the use of his or her time; the professor is there to give advice; the work is done for the student's benefit; no services are provided to an employer.

[32] A different conclusion was reached in *Charron v. MNR*, [1994] T.C.J. No. 47. In that case Justice Archambault found that a masters student was an employee. Like Mr. Rizak, the appellant in *Charron* began work before her period of studies began. At paragraph 10, Justice Archambault stated:

... The evidence established that the appellant provided her services to the payer and that, in providing her services, she received instructions on the work to be done and the way in which it was to be done. She was not free to choose which experiments to do: it was Dr. Moss who decided on the procedure to be followed. ...

[33] I note that both the Minister at the appeals level and Mr. Rizak at trial focused attention on the 4 factor test that is normally used to distinguish between employees and independent contractors: control, tools, chance of profit and risk of loss. This test has also been applied in some of the above cases. I do not find this test helpful. As Justice **Lamarre** Proulx stated at paragraph 26 of *Bekhor*:

The question at issue is not whether the agreement between the parties is a contract of employment or a contract for services (employee versus independent contractor status), but whether it is a contract of employment or an agreement of financial assistance regarding continuing studies (employee versus student or postgraduate student status).

[34] I am not required to determine whether Mr. Rizak was an employee or an independent contractor as neither party took the position that Mr. Rizak was an independent contractor. I simply have to determine whether the dominant characteristic of the payments that Mr. Rizak received was compensation for the work he did or student assistance. I do not find these 4 factors to be useful in reaching that determination.

Analysis

[35] It is clear to me from the evidence that the dominant characteristic of the stipend paid to Mr. Rizak was compensation for the work that he did for Dr. Wang and thus that he was an employee.

[36] This dominant characteristic of the payment was evident throughout the entire relationship between Mr. Rizak and UBC. Dr. Wang had a grant that funded him to do particular research. He needed a graduate research assistant to help him with that research. Therefore he approached a number of potential candidates. Dr. Wang ultimately selected Mr. Rizak to be his research assistant. He told Mr. Rizak that he would receive a stipend of \$21,000 per year. There was a clear correlation between the stipend and the work. Mr. Rizak did not receive the money by virtue of being accepted as a doctoral student. He did not receive the money as some form of no-strings-attached bursary or scholarship. He received the money because he agreed to work in Dr. Wang's lab. If he stopped working in the lab, he would stop receiving the money. Not only did Mr. Rizak have to work for Dr. Wang in order to receive the stipend, he also had to do the specific work that Dr. Wang required of him. When he wanted to research a related topic of interest to him he was permitted to do so for a short period, on his own time but only so long as he continued to do the research for which he was being paid.

[37] Mr. Rizak's situation can be distinguished from the graduate students in *Hammell*, *Hospital for Sick Children* and *Nabet*. The students in those cases developed their own research ideas and pursued them under the mentorship and supervision of their respective professors. By contrast, Mr. Rizak was simply paid to work for Dr. Wang doing the work that Dr. Wang needed him to do. His situation was far closer to that of the masters student in *Charron*.

[38] I find the fact that Mr. Rizak did the same work for Dr. Wang both before and after the period in question and was considered to be an employee while doing so to be particularly telling. Nothing about the nature of the work he was doing changed for Mr. Rizak. Both while he was a student and while he was not he was simply paid for the work he did.

[39] I acknowledge that Mr. Rizak learned invaluable laboratory and research skills and gained in-depth knowledge about Dr. Wang's area of research as a result of his work but this is no different than the skills and knowledge that any employee would acquire in a challenging new job. Had Mr. Rizak obtained part-time work with a pharmaceutical company while he was studying at UBC he would have been in essentially the same position. He would have received payment for doing the work that the company needed him to do and he would have gained experience and knowledge in the course of doing so.

[40] There was insufficient evidence at trial to allow me to determine whether Mr. Rizak's relationship with Dr. Wang was typical of doctoral students in the sciences at

UBC or not. I accept that if Mr. Rizak's situation was common to all doctoral students in the sciences at UBC, it may be difficult for such students to obtain the research and data necessary to prepare their doctoral dissertations without working as graduate research assistants. However, even if UBC has structured its doctoral programs in such a way as to essentially require students to be employed by the university, that would not, in my view, change the fact that they are employees.

[41] As set out above, I do not consider it necessary to consider whether Mr. Rizak was an employee or an independent contractor as neither party took the position that he was an independent contractor. That said, there is no question in my mind that if I had to decide whether Mr. Rizak was an employee or an independent contractor I would find him to be an employee. Simply put, the tools, chance of profit and risk of loss factors all point clearly in that direction as does, to a slightly lesser extent, the control factor.

Income Tax

[42] Mr. Rizak's appeal involves employment insurance, not income tax. However, I nonetheless feel I should discuss the income tax impact of my decision.

[43] Both UBC and Mr. Rizak considered the stipend that he received to be a non-taxable payment. Generally speaking, scholarship and fellowship payments received by graduate students are not taxable under the *Income Tax Act* ("Act"). However, the Act is careful to exclude amounts received in respect of, in the course of or by virtue of employment from scholarship and fellowship payments. I have concluded that the stipend Mr. Rizak received was employment income. This means that he should have included this employment income in his income for income tax purposes.

[44] At trial, I asked Mr. Rizak why he believed he could "have his cake and eat it too" by claiming not to be an employee for income tax purposes while at the same time claiming to be an employee for employment insurance purposes. Mr. Rizak was not able to provide me with a satisfactory answer to this question. I do not think he fully understood the potential consequences of succeeding in his appeal. It appeared that Mr. Rizak had brought his appeal in large part because he believed that graduate students were being treated unfairly and that his appeal would benefit not only himself but also graduate students as a whole. Unfortunately, it is possible that Mr. Rizak's plan may actually have achieved the opposite result for at least some students.

Decision

[45] Based on all of the foregoing, the appeal is allowed on the basis that Mr. Rizak was engaged in insurable employment from September 1, 2008 to May 10, 2010.

This Amended Reasons for Judgment is issued in substitution of the Reasons for Judgment dated September 3, 2013.

Signed at Ottawa, Canada, this 23rd day of September 2013.

“David E. Graham”

Graham J.

CITATION: 2013 TCC 273

COURT FILE NO.: 2011-3695(EI)

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