Docket: 2017-3441(EI)

BETWEEN:

JOSEPH S. ROOKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 10, 2019, at Ottawa, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Elise Rivest

JUDGMENT

The appeal made under the *Employment Insurance Act* is dismissed, without costs, and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of March 2019.

"Diane Campbell"

Campbell J.

Docket: 2017-3442(CPP)

BETWEEN:

JOSEPH S. ROOKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on January 10, 2019, at Ottawa, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Elise Rivest

JUDGMENT

The appeal made under the *Canada Pension Plan* is dismissed, without costs, and the decision of the Minister of National Revenue is confirmed in accordance with the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 5th day of March 2019.

"Diane Campbell"

Campbell J.

Citation: 2019 TCC 52
Date: 20190305
Dockets: 2017-3441(EI)
2017-3442(CPP)

BETWEEN:

JOSEPH S. ROOKE,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Campbell J.

Introduction

[1] The Appellant has appealed the decision of the Minister of National Revenue (the "Minister") dated June 12, 2017 under the *Employment Insurance Act* ("*EIA*") and the *Canada Pension Plan* ("*CPP*") for the period August 1, 2010 to December 31, 2011.

[2] A Trust Accounts Examination was conducted on the books and records of the University of Waterloo (the "Payer") and an employment ruling was requested to determine if the amounts received by the Appellant from the Payer were insurable and pensionable.

[3] On February 16, 2017, a CPP/EI Rulings officer issued a ruling which found that:

1. the Appellant was engaged in insurable and pensionable employment with the Payer for the period September 1, 2010 to April 25, 2011 in respect to amounts received by the Appellant to provide services as a Graduate Teaching Assistant; and

2. the Appellant was not engaged in insurable and pensionable employment for the period August 1, 2010 to December 31, 2011 in respect to amounts received by the Appellant for a scholarship amount paid by the Payer to the Appellant.

[4] The Appellant appealed the ruling to the Minister and, on June 12, 2017, the Minister upheld the ruling and informed the Appellant that since he was an employee, the employment was insurable and pensionable.

[5] It is this decision that the Appellant is appealing and the issue, therefore, is whether the Appellant was engaged in insurable and pensionable employment.

The Evidence

[6] I heard from two witnesses, the Appellant and the Respondent's witness, Dr. Kieran Bonner.

[7] On July 27, 2010, the Appellant received an offer from the Payer for admission to the Master of Arts Program to study sociology. In this admission offer, the Appellant was offered funding for the first year of the program in the amount of $12,000.00 "…made up of a combination of two teaching/research assistantships and a University of Waterloo Graduate Entrance Scholarship." (part of Exhibit A-1). A follow-up letter from the Payer, dated September 10, 2010 (part of Exhibit A-1), entitled "Offer of Admission", reiterated this information and went on to state that the teaching assistant duties averaged 10 hours per week or 140 hours for the academic term. The Appellant was eligible to receive one assistantship in the fall of 2010 and one in the winter term of 2011, which were conditional on satisfactory performance. The Graduate Scholarship was to be paid in three instalments, with one in each term, beginning in September, 2010. To be eligible in maintaining this scholarship, a minimum 80 percent average in the program had to be maintained.

[8] The Appellant's position is that the entire $12,000.00 amount was a scholarship and that he was not accepting a job offer from the Payer when he accepted this Offer of Admission, nor did he ever consider himself an employee of the Payer. He pointed out that nothing in either the July 27, 2010 or September 10, 2010 letters refers to a 'job' or 'employment' or 'salary'. Instead, he testified that he viewed the teaching assistantships as volunteer positions with the Payer, which would assist his learning opportunities in the program and also as a means of

assisting the university to show his appreciation for the funding. He argued that funding and wages are two very different concepts.

[9] The Appellant testified that he did not receive $1,333.00, being the first of three instalments of the $4,000.00 scholarship amount, in September and that the Payer only paid the amount of $1,333.00 after he filed a small claims action, for this part of the $4,000.00 amount, in June, 2011. The Payer did not file a defence and paid the claim amount.

[10] In the fall of 2010, the Appellant also complained that the Payer had unilaterally changed the terms of the Offer of Admission when it decided to issue the second instalment of his student scholarship in four parts, once per month, although he was busy with his studies and accepted that the monthly payments were according to internal accounting procedures.

[11] In March, 2011, he received his T4 from the Payer showing deductions for CPP and EI. He did not report the T4 earnings when he filed. He testified that he requested that the Payer change his T4 to reflect his interpretation of his funding but the Payer did not comply. He reported the amounts as being non-taxable based on his personal understanding of the nature of the funds he received.

[12] On cross-examination, although he testified that he thought he was performing *pro bono* work for the Payer in appreciation of the $12,000.00 which he felt was all scholarship amount, he did agree that the Payer's Offer of Admission contained a term to the effect that he had to commit to work 140 hours per term as a teaching assistant. He stated that it was primarily Professor McClinchey who gave him directions on his tasks. His duties as a teaching assistant included grading exams and essays, meeting with and providing assistance to first-year students and discussions with the Professor. He was given training and marking guidelines for the students and submitted the students' grading on a designated web-portal where student assignments were located. He did not receive feedback from Professor McClinchey, but he did from the head of teaching assistants when it was pointed out to him that he was too lenient in his grading.

[13] The Respondent's witness, Dr. Bonner, is currently employed at St. Jerome's University, which is federated with the University of Waterloo. During the period under appeal, he was a Professor and the Associate Chair of Graduate Studies in Sociology with the Payer. In 2010, he was overseeing the entire process of graduate admissions and the graduate program. He worked with a

graduate committee in implementing program changes, admission requirements and funding. Although he had limited contact with the Appellant, he testified that he had knowledge of him initially through the committee review of the Appellant's admission application and had a general discussion with the Appellant, in the summer of 2010, about the program. The Appellant was also a student in at least one of Dr. Bonner's courses.

[14] Dr. Bonner testified that there were three streams of the Masters program: a two-year period with thesis and four courses, a sixteen-month period with research paper and six courses and a one-year period with eight courses only. The Appellant was enrolled in the coursework-only stream.

[15] Dr. Bonner stated that the graduate student funding package was composed of a graduate entrance scholarship, which was one-third of the total funding and was also conditional on maintaining a particular academic average, and the balance consisting of the teaching assistantships which were conditional on satisfactory performance with a dedicated workload of 140 hours per term. The funding amount associated with the teaching assistantship was $8,000.00. The entire funding package was divided over three terms. He also confirmed that a receipt of a teaching assistantship funding carried with it certain responsibilities, such as grading papers and availability to students. Part of the graduate students' orientation was comprised of training for the position and, as well, an assistant would receive mentoring throughout the semester by a professor.

[16] Dr. Bonner testified that the level of supervision, as well as the tasks assigned to teaching assistants, could vary depending on the needs of the professor to whom the assistant was assigned. Teaching assistants were assigned to those professors whose workload exceeded their capacity due to the excessively large number of students enrolled in their courses, sometimes in the hundreds. Hiring teaching assistants was a way of balancing the workload with those professors who had fewer students in their courses and also a practical way of delivering courses.

[17] Although it never happened, Dr. Bonner testified that, if a student decided not to act as a teaching assistant, he or she would presumably have to forego this funding portion, but could still accept the scholarship portion in obtaining the degree. He also stated that, if an assigned assistant and professor were having difficulty working together, the assistant would be reassigned by the Sociology Department. Payments to teaching assistants were managed and handled through the payroll division of the Department of the Dean of Arts. The Sociology Department, as such, was not involved in overseeing the pay logistics.

The Appellant's Position

[18] The cross-examination of Dr. Bonner by the Appellant proceeded primarily on the basis that he was not a credible witness due to his religious beliefs. The Appellant's position was grounded in an argument based on Dr. Bonner's oath that he took at the outset of his testimony and the fact that he was a practicing Catholic. The Appellant submitted that this Court should disregard Dr. Bonner's evidence as he was not a credible witness. According to the Appellant, he was ambiguous and visually deceptive in responding to questions concerning his religious beliefs.

[19] The Appellant's position, concerning the primary issue in these appeals, was best summed up in his concluding submission: "I based the entire, my entire argument on the fact of how I read the Offer of Admission." The Appellant argued that the entire funding amount of $12,000.00 referred to in the Offer of Admission was a non-taxable scholarship amount. He believed that the tasks completed for Dr. McClinchey, to whom he had been assigned, were performed on a voluntary and *pro bono* basis or, as he argued, a "*quid pro quo*" in exchange for the receipt of the $12,000.00. The Appellant's interpretation of the Payer's offer was that he would be required to assist as a teaching assistant in return for the Payer's offer of the $12,000.00 scholarship. He further contends that the Payer never advised him that he was being "hired as an employee" and that the usual terminology of 'wages', 'salary', or 'employment' were not used in the Offer of Admission. In addition, he never considered himself an employee of the Payer. Although he acknowledged that the Payer paid him as an employee, he stated that "they shouldn't have done that" as it was a breach of the Offer of Admission. If, in fact, he was working for the Payer, he was "self-funding" in that the Payer was not funding him. To support his view of the Offer, he suggested that employees do not get paid by instalments, as occurred here.

The Respondent's Position

[20] The Respondent submits that there was a contract of service between the Appellant and the Payer during the period, as it was a condition of the contract to provide services as a graduate teaching assistant. The employment relationship, although not explicitly stated in the Offer of Admission, was implied and the subsequent interactions between the parties were indicative of an employee-employer relationship.

[21] The Respondent submits that the sole issue is whether the Appellant was employed in insurable and pensionable employment pursuant to paragraph 5(1)(a) of the *EIA* and subsection 6(1) of the *CPP*.

[22] The Respondent further submits that the usual 4-factor test, generally employed to ascertain whether a taxpayer is an employee or an independent contractor, is not applicable to these appeals. Instead, the Respondent argues that the proper test is the test set out by Woods J. (as she then was) in *Caropreso v MNR*, 2012 TCC 212, 2012 DTC 1190, and subsequently applied in a number of similar fact-based decisions before this Court (see *Rizak v MNR*, 2013 TCC 273, and *Russell v MNR*, 2016 TCC 143). It is further argued that the facts in these appeals are similar to those in *Rizak*, although the Appellant's testimony that it was never his intent to be an employee was diametrically opposed to Dr. Bonner's testimony in respect to the Appellant's employment relationship, the actual facts surrounding the contract terms reflect an employment relationship (see *1392644 Ontario Inc. o/a Connor Homes v MNR*, 2013 CAF 85, [2013] FCJ No. 327).

Analysis

[23] Before I deal with what I consider to be the primary issue before me, which is whether the Appellant was engaged in insurable and pensionable employment, it is essential that I address one of the Appellant's arguments, which was the use of religious beliefs to attack the credibility of a witness. His argument was basically to the effect that, since Dr. Bonner testified to being Catholic and professed a belief in God, it was more plausible than not that he could refuse to tell the truth, even though he took his oath on the Bible, because he could later ask for and be forgiven. Consequently, Dr. Bonner's oath tainted his credibility.

[24] Respondent counsel provided no comment on this issue, although invited to do so.

[25] The cross-examination of Dr. Bonner bordered on a foray into his belief in a higher being as opposed to a non-belief. At one point, Dr. Bonner himself expressed his feelings of awkwardness with the line of questioning. There was no objection by Respondent counsel that these questions were irrelevant or vexatious.

[26] In *The Queen v Santhosh*, 2016 ONCA 731, 2016 CarswellOnt 15158, the Appellant submitted that the trial judge improperly relied on the complainant's religious beliefs as a relevant factor in assessing the complainant's credibility. The Court of Appeal for Ontario, at paragraph 40, agreed and concluded that

"…evidence of a witness's religious beliefs is not admissible for the purposes of enhancing or impeaching his or her credibility, nor can it be relied upon for those purposes." …

[27] The Court of Appeal for Ontario continued, at paragraphs 49 to 50 of *Santhosh*, with the following comments on the use of religious beliefs, or the absence thereof, to impeach credibility of a witness:

> [49] Third, public policy concerns militate against using evidence of a witness' religious belief for credibility purposes. In s. 14 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, Parliament has made clear that an oath and affirmation are equivalent. This legislative policy reflects the *Charter* values of freedom of conscience and religion and of equality. This policy would be undermined by permitting or encouraging inquiry into the religious beliefs of witnesses in our courts for the purposes of assessing credibility. While there are some very limited circumstances in which inquiry into the degree to which an oath or affirmation binds a witness' conscience is permissible, these are restricted to where there is reason to believe that the witness' oath or affirmation is not genuine. Such an inquiry is primarily a question of testimonial competence as opposed to credibility. See for example: *R. v. J. (T.R.)*, 2013 BCCA 449, 6 C.R. (7th) 207 (B.C.C.A.), at para. 4; *R. v. K. (A.H.)*, 2011 ONSC 5510, 97 W.C.B. (2d) 413 (Ont. S.C.J.), at paras. 27-28; *R. v. Bell*, 2011 ONSC 1218, [2011] O.J. No. 803 (Ont. S.C.J.), at para. 57.
>
> [50] It would be inappropriate to permit any more invasive inquiry. If religious beliefs (or the absence thereof), were to be considered relevant to bolstering a witness' credibility, then surely they would also be relevant to impeaching credibility. Under this approach, witness testimony could easily devolve into a roving inquiry into collateral facts relating to the religious beliefs of witnesses. The efficient and fair functioning of our courts would not be well served by such a development.

[28] The Court in *Santhosh* also recognized the explicit bar contained in Rule 610 of the *United States Federal Rules of Evidence* on using evidence of religious beliefs or opinions for credibility purposes.

[29] I do not consider evidence of a witness' religious beliefs to be a relevant or reliable indicator of whether that witness is likely or not to be credible or likely or not to tell the court the truth. I agree with the conclusion reached in the decision in *Santhosh* that it would constitute a reviewable error in law if this Court were to consider the evidence of the religious beliefs of a witness in assessing his or her credibility.

[30] In assessing credibility, the following passage from the decision in *R v. Pressley*, 1948 CarswellBC 123, and adopted in the reasoning of *Fiorillo v. Krispy Kreme Doughnuts Inc.*, 2009 CarswellOnt 3344, best sums up the appropriate approach:

> 6 …
>
> > The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack or harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[31] The issue in these appeals is not whether the Appellant was an employee or independent contractor, which is generally what this Court is considering when deciding if employment is insurable and pensionable or whether it is not. Rather, I must determine whether the Appellant was an employee as opposed to a student receiving financial assistance.

[32] At the outset of the hearing, the Respondent advised the Court that $4,000.00 of the total $12,000.00 amount at issue was a non-taxable scholarship amount, received in his capacity as a student. It is the balance of $8,000.00 that is at issue in these appeals.

[33] In *Rizak*, Justice Graham reviewed the jurisprudence of this Court in respect to student funding and whether a student can be an employee providing services for compensation or simply receiving student assistance. He pointed out that prior to the decision in *Caropreso*, the case law was divided on the issue. Justice Woods, at paragraph 20 in that case, set out the test to be applied as follows:

> [20] 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.

This was a clear departure from the 4-factor test typically employed in EI and CPP issues.

[34] Subsequent case law has adopted this as the appropriate test, even though the taxpayer may not have been a postdoctoral student, as in *Caropreso*. As Justice Graham pointed out in *Rizak*, at paragraph 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).

[35] In *Rizak*, the Court concluded that the student, a doctoral student working as a graduate research assistant, was engaged in insurable employment while the Court in *Russell* concluded that a student, performing work on his thesis while in receipt of an award partly funded by the university and partly by a third party organization, was not engaged in insurable employment.

[36] The facts in the present appeals are similar to those in *Rizak*. The Appellants in both cases had to complete specific tasks for the professor and were compensated for those. They were not conducting the work on their own for their own benefit. Mr. Rooke followed specific parameters when grading students and admitted that he had received feedback on his work, particularly at one point when he was told he was being too lenient in marking. The facts in the present appeals can be distinguished from those in *Russell* where there was a dual element to the work undertaken by the student. The financial assistance in *Russell* furthered the student's thesis work, but also coincided with the research of the professor he was working for. Since the financial assistance in *Russell* was specifically in respect to the student's thesis research, while any benefit to the university or professor was secondary, the Court concluded that, since the dominant characteristic of the payments was assistance to the student while working on his thesis, he was not engaged in insurable employment. In addition, unlike the facts in *Russell*, where the payments were administered through its accounts payable department and not its payroll department, Mr. Rooke's payments were paid by the Payer's payroll department, suggesting that the Payer considered Mr. Rooke to be an employee and not a student in receipt of financial assistance.

[37] Dr. Bonner acknowledged the potential dual aspect of the funding that the Appellant received for his position as teaching assistant. Although the assistantship would be a learning experience for the student, the dominant purpose of the $8,000.00 funding amount was remuneration for services performed and not for student assistance. He was hired as a teaching assistant to assist one of the professors that taught much larger undergraduate classes of hundreds of students. Dr. Bonner confirmed that the work performed by the Appellant, like other teaching assistants, was essential to the Payer in balancing workloads among the professors.

[38] While the scholarship portion of the funding package was conditional upon a student maintaining an 80 percent average, the conditions and goals associated with the balance of the funding amount were very different. As such, the funding amount paid for the work performed as a teaching assistant cannot be considered funds received primarily for the self-directed furthering of the Appellant's educational studies.

[39] In these appeals, the $8,000.00 funding amount was intimately connected to the Appellant's work as a teaching assistant. There is a clear nexus between that payment and the work completed by the Appellant. In fact, Dr. Bonner, in his direct testimony, confirmed that if a student did not perform the duties of a teaching assistant, they would forego the funding. The facts support my conclusion that the dominant characteristic of the $8,000.00 funding amount received by the Appellant was to assist in facilitating instruction of the large number of students in Dr. McClinchey's first-year sociology class and not to further the Appellant's own education, although he may have received some secondary personal benefits from the work.

[40] Finally, the Appellant argued that his subjective intent was that he was not an employee of the Payer and it was his view that, since the Offer of Admission did not specifically reference 'wages', 'salary' and the like, that he did not enter into an employment contract. In *1392644 Ontario Inc.*, it was held that while intention is a relevant factor, the subjective views of the parties to a contract must be supported independently by the objective independent facts and circumstances surrounding their relationship. Although the Appellant's stated perception was that he was performing the work as a *quid pro quo* in respect of the funding, the evidence adduced before me did not support that impression.

[41] For these reasons, the appeals are dismissed because the Appellant was engaged in pensionable and insurable employment.

Signed at Ottawa, Canada, this 5th day of March 2019.

"Diane Campbell"

Campbell J.

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APPEARANCES:

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