

**Date: 20071102**

**Docket: A-323-06**

**Citation: 2007 FCA 354**

**CORAM: LÉTOURNEAU J.A.  
NOËL J.A.  
TRUDEL J.A.**

**BETWEEN:**

**THE ATTORNEY GENERAL OF CANADA**

**Plaintiff**

**and**

**MARTINE BÉGIN**

**Defendant**

Hearing held at Québec, Quebec on October 31, 2007.

Judgment rendered at Québec, Quebec on November 2, 2007.

**REASONS FOR JUDGMENT BY:**

**LÉTOURNEAU J.A.**

**CONCURRED IN BY:**

**NOËL J.A.  
TRUDEL J.A.**

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**Defendant**

**REASONS FOR JUDGMENT**

**LÉTOURNEAU J.A.**

**Issue**

[1] In its simplest form and stripped of artifice, the argument comes down to this: was the board of referees (the board) right to apply the exception in section 24 of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations), in calculating the rate of employment insurance benefits applied for by the defendant? The umpire affirmed the board's decision (CUB 66024).

[2] Section 24 reads:

**24.** Where a period of employment for which insurable earnings have been reported on the record of employment falls partially within the claimant's rate calculation period, the Commission shall, unless presented by the claimant or the employer with evidence of the amount of insurable earnings actually earned in the rate calculation period, allocate the amount of insurable earnings, excluding insurable earnings paid or payable on or after January 1, 1997 by reason of lay-off or separation from employment, proportionately over that period of employment, on the basis that the claimant earned the same amount of insurable earnings for each of the seven days of each week.

**24.** Lorsque la période d'emploi à laquelle se rapporte la rémunération assurable déclarée sur le relevé d'emploi coïncide partiellement avec la période de base du prestataire, la Commission répartit, sauf si celui-ci ou son employeur lui présente la preuve du montant de la rémunération assurable effectivement gagnée au cours de la période de base, le montant de la rémunération assurable — compte non tenu de la rémunération assurable payée ou payable le 1er janvier 1997 ou après cette date en raison de son licenciement ou de la cessation de son emploi — proportionnellement sur cette période d'emploi, en partant du principe que le prestataire a gagné la même rémunération assurable pour chacun des sept jours de chaque semaine.

[Emphasis added.]

[3] The underlined portion refers to the exception. Depending on whether the exception applies or not, the amount of weekly benefits to which the defendant is entitled is \$413 or \$381 respectively.

### **Brief summary of facts**

[4] The defendant is a teacher. She exercised her right of preventive retirement pursuant to the “For a Safe Maternity” program. For the period from September 7, 2004 to April 23, 2005, she received benefits from the Commission sur la santé et la sécurité au travail: see plaintiff’s record, page 38. She then had a benefit period established for her beginning on April 24, 2005.

[5] When her application for employment insurance benefits had been made, the Employment Insurance Commission (the Commission), pursuant to section 14 of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), proceeded to determine the rate of weekly benefits payable to the defendant.

[6] In connection with that exercise, the Regulations contained provisions in Part I relating to the allocation of insurable earnings for purposes of calculations under section 14 of the Act.

[7] Section 23 of the Regulations and section 24, cited above, set out the allocation method. To make the matter clearer, I set out section 23:

**23.** (1) For the purposes of section 14 of the Act, insurable earnings shall be allocated in the following manner:

(a) remuneration, including statutory holiday pay, other than the remuneration referred to in paragraph (b), paid in respect of a pay period shall be allocated in the following manner:

(i) if the remuneration is paid in respect of work performed during the pay period, it

**23.** (1) Pour l’application de l’article 14 de la Loi, la rémunération assurable est répartie de la façon suivante :

a) la rétribution, y compris la paie des jours fériés, autre que la rétribution visée à l’alinéa b), qui est versée pour une période de paie est attribuée de la manière suivante :

(i) la rétribution versée pour le travail accompli au cours de la période de paie est

shall be allocated to that pay period in proportion to the hours worked during each day of the period,

(ii) if the remuneration is paid in respect of a period of leave, it shall be allocated to that period at the rate at which the period was compensated,

(iii) if the remuneration is paid in respect of a period of leave in the form of a lump-sum payment calculated on a basis other than the length of the period of leave, it shall be allocated proportionately over the whole period;

*(b)* overtime pay, shift premiums, pay adjustments, retroactive pay increases, bonuses, gratuities, accumulated sick leave credits, incentive payments, cost of living allowances, separation payments, and wages in lieu of notice and vacation pay not paid in respect of a pay period shall be allocated proportionately over the pay period in which they are paid;

*(c)* any other remuneration not paid in respect of a pay period and not covered by paragraphs *(a)* and *(b)* shall be allocated proportionally over the pay period in which it is paid; and

*(d)* remuneration that remains unpaid for reasons described in subsection 2(2) of the Insurable Earnings and Collection of Premiums Regulations shall be allocated under paragraphs *(a)* to *(c)* in the same manner as if it had actually been paid in the normal course of business.

répartie sur cette période proportionnellement aux heures travaillées chaque jour de la période,

(ii) la rétribution versée pour une période de congé est attribuée à cette période selon le taux d'indemnisation de rémunération pour cette période,

(iii) la rétribution versée pour une période de congé sous forme d'une somme forfaitaire déterminée en fonction d'un critère autre que la durée de cette période est répartie proportionnellement sur toute la période;

*b)* la paie d'heures supplémentaires, les primes de quart de travail, les rajustements de salaire, les augmentations de salaire rétroactives, les primes, les gratifications, les crédits de congés de maladie non utilisés, les primes de rendement, l'indemnité de vie chère, l'indemnité de fin d'emploi, l'indemnité de préavis et la paie de vacances qui n'est pas versée à l'égard d'une période de paie sont répartis proportionnellement sur la période de paie au cours de laquelle ils sont versés;

*c)* toute autre rétribution qui n'est pas versée à l'égard d'une période de paie et qui n'est pas visée par les alinéas *a)* et *b)* est répartie proportionnellement sur la période de paie au cours de laquelle elle est versée;

*d)* la rétribution qui n'est pas versée pour les raisons visées au paragraphe 2(2) du Règlement sur la rémunération assurable et la perception des cotisations est attribuée ou répartie selon les alinéas *a)* à *c)* de la même manière que si elle avait été effectivement versée dans le cours normal des affaires.

(1.1) Where an insured person is on unpaid leave or has quit their employment or been terminated or laid off, the remuneration referred to in paragraph (1)(b) shall be allocated proportionately over the last pay period for which regular salary, wages or commissions are paid.

(2) Where an insured person is employed in insurable employment on the basis of a contract for a fixed term and their insurable earnings under the contract are not paid on a regular basis, the insurable earnings shall, regardless of the basis on which they are paid, be allocated proportionately over the term of the contract.

(3) Where the remuneration of an insured person consists solely of commissions or of salary and irregularly paid commissions, the person's insurable earnings paid in the period of employment or in the last 52 weeks, whichever is shorter, shall be allocated proportionately over the shorter of the period of employment and the last 52 weeks, as applicable, excluding weeks for which the insured person is on unpaid leave of absence from employment for one of the reasons referred to in subsection 12(3) of the Act.

(4) Where an insured person has insurable earnings to which none of subsections (1) to (3) apply, the insurable earnings paid in the period of employment or in the last 52 weeks, whichever is shorter, shall be allocated proportionately over the shorter of the period of employment and the last 52

(1.1) Lorsque l'assuré est en congé sans solde, a quitté volontairement son emploi ou est licencié, ou dans le cas de la cessation de son emploi, la rétribution mentionnée à l'alinéa (1)b) est répartie proportionnellement sur la dernière période de paie pour laquelle un salaire, un traitement ou des commissions ont été versés sur une base régulière.

(2) Lorsque l'assuré exerce un emploi assurable aux termes d'un contrat à durée fixe et que la rémunération assurable à cet égard n'est pas versée sur une base régulière, la rémunération assurable versée en vertu de ce contrat est répartie, indépendamment des modalités de versement, proportionnellement sur la durée du contrat.

(3) Lorsque la rétribution de l'assuré se compose uniquement de commissions ou d'un salaire assorti de commissions versées à intervalles irréguliers, la rémunération assurable versée au cours de la période d'emploi ou les 52 dernières semaines, selon la période la plus courte, est répartie proportionnellement sur cette période, compte non tenu des semaines pour lesquelles l'assuré est en congé sans solde pour l'une des raisons mentionnées au paragraphe 12(3) de la Loi.

(4) Dans les cas non visés aux paragraphes (1) à (3), la rémunération assurable de l'assuré versée au cours de la période d'emploi ou des 52 dernières semaines, selon la période la plus courte, est répartie proportionnellement sur cette période.

weeks, as applicable.

(5) Where the insurable earnings of an insured person for a pay period that is running at the time the insured person is laid off or separated from employment cannot be ascertained with accuracy, the employer may estimate the person's insurable earnings for that period.

(5) L'employeur peut faire une estimation de la rémunération assurable de l'assuré pour la période de paie en cours au moment du licenciement ou de la cessation d'emploi, si cette rémunération ne peut être déterminée avec exactitude.

[8] As already noted, the defendant is a teacher. She was paid on a weekly basis, but received her pay every two weeks. She received relatively similar amounts (between \$1,545 and \$1,669). However, for the pay period of June 13 to 30, 2004 she received a pay adjustment for the entire year, a substantial amount corresponding to pay of 35 units instead of the usual pay based on 10 units. Accordingly, as a result of this she received \$5,584.65 and various adjustments, for a total gross amount of \$7,541.83. These adjustments consisted of supplements or premiums for days of work performed.

[9] Relying on subsection 23(2) and section 24 of the Regulations, the Commission allocated the amount of \$7,541.83 proportionately over the length of the contract.

[10] Based on the exception in section 24 and the record of employment provided by the employer, on which the amount of \$7,541.83 appeared in the final weeks of the rate calculation period, the defendant submitted that she met the terms of the exception: "unless presented by the . . . employer with evidence of the amount of insurable earnings actually earned in the rate calculation

period” (emphasis added). It is this evidence which she said she presented at the hearing before the board of referees.

**Analysis of decisions by board of referees and umpire**

[11] The plaintiff argued that section 24 only applied sequentially after applying subsection 23(2) of the Regulations and that, if the allocation is made under that subsection as it should be, the section 24 exception clearly cannot be applied.

[12] Counsel for the defendant argued that it was actually subsection 23(1) that applied here for the allocation of insurable earnings. In any event, he said, whether subsection 23(1) or subsection 23(2) is applied, section 24 contains an exception and the defendant meets the letter and spirit of that exception. The board of referees made no error in approving this.

[13] I feel that the solution to the question of whether the section 24 exception applies lies in the very wording of the section, which moreover is consistent with that of subsection 23(2) and the legislative purpose sought by the two provisions.

[14] In fact, section 24 refers to insurable earnings actually earned in the rate calculation period.

[15] The amounts of 20 additional units and of various adjustments, which were made and which constitute insurable earnings, were paid in the rate calculation period but were not all actually



earned during that period. The earnings were earned during the life of the contract for each day of work performed.

[16] Consequently, the section 24 exception cannot be applied to, as the board and the umpire did, record exclusively in the rate calculation period amounts of insurable earnings earned outside that period.

[17] Section 24 of the Regulations applies when, as in the case at bar, there is no coincidence between the claimant's period of employment and rate calculation period. The period of employment to which the insurable earnings related was 27 weeks, the rate calculation period 14 weeks. However, its purpose is not to include in the rate calculation period insurable earnings earned outside that period. Its purpose is rather to make the two periods coincide by providing for proportional allocation of earnings over the period of employment.

### **Conclusion**

[18] For these reasons, I would allow the application for judicial review and I would quash the umpire's decision. I would refer the matter back to the chief umpire, or an umpire designated by him, to be again decided on the basis that

- (a) the rate of weekly benefits was correctly determined by the Commission pursuant to section 14 of the Act and the Regulations;

(b) the Commission's appeal from the board of referees' decision must be allowed.

“Gilles Létourneau”

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J.A.

I concur.

Marc Noël J.A.

I concur.

Johanne Trudel J.A.

Certified true translation

Brian McCordick, Translator

**FEDERAL COURT OF APPEAL**

**SOLICITORS OF RECORD**

**DOCKET:** A-323-06

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v. MARTINE BÉGIN

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**CONCURRED IN BY:** NOËL J.A.  
TRUDEL J.A.

**DATED:** November 2, 2007

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