Docket: 2004-3391(IT)I

BETWEEN:

CHARLES ROBERT ROGERS,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on February 17, 2005 at Calgary, Alberta

Before: The Honourable Justice J.E. Hershfield

Appearances:

For the Appellant: The Appellant himself

Counsel for the Respondent: Mark Heseltine

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the 2002 taxation year is allowed, with costs, for and in accordance with the reasons set out in the attached Reasons for Judgment.

Signed at Ottawa, Canada, this 24th day of May 2005.

"J.E. Hershfield"

Hershfield J.

Citation: 2005TCC336
Date: 20050524
Docket: 2004-3391(IT)I

BETWEEN:

CHARLES ROBERT ROGERS,

Appellant,

And

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR JUDGMENT

Hershfield J.

[1] The Minister of National Revenue (the "Minister") assessed the Appellant's 2002 taxation year and denied $37,590.00 of legal expenses claimed. The assessment was on the basis that such expenses were not incurred for the purpose of earning income from a business or property.

[2] The legal fees were incurred in respect of a lawsuit for wrongful dismissal and wages owed. The Appellant attempted to claim the expenses as they were incurred and paid, namely, in the years 1998 through 2002 but he was told to wait until the lawsuit was disposed of. The case was finally disposed of in 2002. The Appellant lost his suit.

[3] The Reply to the Notice of Appeal includes the following assumptions relied on by the Minister in confirming the assessment denying the expenses claimed:

(a) the Appellant did not establish that his employer or former employer owed the Appellant any amounts;

(b) the legal fees claimed were not incurred to collect or establish a right to salary or wages the Appellant's employer or former employer owed him;

(c) the legal fees were not incurred for the purpose of gaining or producing income from a business or property;

(d) the legal fees were not paid by the Appellant in the year to collect or establish a right to an amount of a benefit under a pension fund or plan in respect of the employment of the Appellant; and

(e) the legal fees were not paid by the Appellant in the year to collect or establish the right to an amount of a retiring allowance of the Appellant.

[4] One or both of the first two of these assumptions were apparently meant to suggest that the burden of proof is on the Appellant to establish that he was in fact an employee of the union. Regardless that these assumptions do not clearly make that point, it is clear from Respondent's counsel's argument that he is of the view that that was the basis for the assessment and that the Respondent can in any event, rely on paragraph 8(1)(*b*) of the *Income Tax Act* (the "*Act*") in denying the Appellant's claim if based on the evidence at the hearing, I find that the Appellant did not perform services in an employment capacity.[1] The Respondent also relies on paragraph 60(o.1) of the *Act* to the extent necessary to deny the deduction of legal expenses incurred in respect of the wrongful dismissal aspect of the action. On this point I note that damages for wrongful dismissal are a "retiring allowance" under the *Act*[2] and legal fees incurred to establish a right to a retiring allowance are only deductible under paragraph 60(o.1) to offset retiring allowance and pension fund receipts. In a failed action for wrongful dismissal then the deductible amount

[1] It is clear from the Reply that it and the assessment and confirmation all rely principally or in part on the assumption that the legal fees claimed were not allowed as they were not incurred for the purpose of earning income from a business or property; e.g. assumption (c). This suggests that the claim was not considered as a claim in respect of employment which in turn suggests that the Respondent did not accept that the Appellant was an employee of the party sued for wages and wrongful dismissal. Such inferences, as logical as they may be, should not have to be relied on by the Respondent. Assumptions need to be straight forward and plainly understandable if appellants are to have the burden of proof to dislodge them. The point is mute however in the case at bar as the Appellant has met the required burden of proof in respect of this issue.

[2] As defined in section 248.

will be reduced to nil where there are no such amounts received. Respondent's position that the Appellant cannot succeed under that paragraph of the *Act* appears correct as there is no assertion of any retirement allowance or pension fund receipts. Accordingly, the appeal hangs on the deduction being allowed under paragraph 8(1)(*b*) of the *Act.*

[5] Paragraph 8(1)(*b*) of the *Act* provides as follows:

> 8. (1) In computing a taxpayer's income for a taxation year from an office or employment, there may be deducted such of the following amounts as are wholly applicable to that source or such part of the following amounts as may reasonably be regarded as applicable thereto:
>
> . . .
>
> (*b*) amounts paid by the taxpayer in the year as or on account of legal expenses incurred by the taxpayer to collect or establish a right to salary or wages owed to the taxpayer by the employer or former employer of the taxpayer.

[6] Respondent's counsel argues that to get the benefit of the foregoing provision an employment relationship must be established. While at first glance that does appear to be the requirement in the section, in fact, in the context of the case at bar and a common sense reading of the provision, such construction is unwarranted in my view. In the case at bar the Appellant has brought suit claiming wages *qua* employee. His claim was dismissed but failure to establish that wage amounts were owed under the asserted terms of even an alleged contract of employment cannot be determinative of the deductibility of the legal expenses incurred. The provision clearly allows for the deduction of legal expenses incurred to establish a right to amounts owed to the taxpayer by an employer which must, where the right is dependent on there being an employment relationship, include legal expenses incurred to establish that relationship where it is in issue. The question as to a right to an amount owed as wages by an "employer" is inextricably tied to the question as to whether there is a contract of employment where that is the basis for the non-payment of the amount being pursued as wages. Further, and in any event, the Appellant actually was an employee of the asserted debtor and the civil suit was brought to recognize that the *terms* of employment were that the worker be paid as a full-time employee for a 40-hour week at an agreed rate per hour. He lost that action but is nonetheless entitled to deduct the expenses claimed as an employee incurring legal fees seeking to establish his right to the wages claimed.

[7] Counsel for the Respondent has argued against these findings respecting the application of paragraph 8(1)(*a*), but before dealing with his arguments, the following brief description of the facts leading to the civil dispute will be helpful in terms of providing the context in which paragraph 8(1)(*b*) is being considered.

[8] The Appellant testified that he had acted in a volunteer capacity as the union organizer for a union identified at the hearing. At some point during the course of volunteering, the Appellant was paid as an employee for his services on rather loose terms but he asserts that he was told that he would be paid, on a full-time 40-hour per week basis, a union rate per hour for the work he was performing if the union received funding. The Appellant believed that the required funds had been received by the union and that his work was then performed under a contract of full-time employment for the wage promised. However the union denied that a contract for full-time employment at the union rate relied on by the Appellant ever became operative and it never paid the Appellant the wages due under that contract. The Appellant sued for the unpaid wages for work performed on the basis of a contract he believed had become operative. Further, as his services were terminated, he claimed wrongful dismissal on the basis of wrongful termination of his asserted full-time contract of employment.

[9] Respondent's counsel argued that the Appellant was never an employee. The basis of the argument was that the civil suit dismissed the claim for wrongful dismissal which it is argued should be taken to confirm there was no employment to be terminated. That is not the suggestion to be drawn from the civil suit. The civil suit found that there was no full-time employment in respect of which a claim for wrongful dismissal could be based. Also in the civil suit the judge clearly acknowledged wage payments had been made by the union for services performed as an employee even though he sharply criticized same as having been paid as part of an Employment Insurance scheme. Still, there was an employment relationship recognized. If that is not sufficient, I have in evidence a copy of a T4 issued by the union for wages paid by it to, and declared by, the Appellant. The uncontradicted evidence is that these amounts were paid to the Appellant for employment services. By issuing a T4 the union acknowledged the Appellant as an employee. It denied only that such employment was on the terms claimed by the Appellant. Had the civil action upheld the full-time nature of the employment at the union rate, the union would have had a substantial unpaid wage debt owing to the Appellant employee. Legal fees were incurred to establish his right to such unpaid wages. The failure of the Appellant to succeed in his action does not adversely affect his

right to deduct such fees. This is clearly established in *Loo v. Canada*[3] and in *Fortin v. Canada*.[4]

[10] Before commenting on those cases, it may be helpful, in deference to Respondent's counsel's arguments, to consider briefly the Statement of Claim filed (the Claim) and Reasons for Judgment given by Justice Brooker of the Alberta Court of Queen's Bench (Justice Brooker's Reasons) in respect of the Appellant's civil suit.[5] The Claim asserts that the Appellant performed his duties as a full-time employee and was not paid the salary owed to him. It asserts as well that the Appellant was terminated from the employment. The Appellant, based on these assertions, claimed wages/salary owing in the amount of $52,400.00 and damages for wrongful dismissal in the amount of $4,366.00. Although the action failed, Justice Brooker's Reasons do not, as argued by Respondent's counsel, support a finding that the Judgment was that the Appellant was not an employee.

[11] Respondent's counsel referred me to several portions of Justice Brooker's Reasons. For example, Respondent's counsel referred me to the following sentence in the first paragraph of those Reasons: "This is an action for damages for wrongful dismissal". If Respondent's counsel wants me to take this statement and the dismissal of the Claim as definitive of there being no claim for lost wages so as to require me to consider this case only as involving a retiring allowance, then I am at a loss as it is abundantly clear from Justice Brooker's Reasons that he made a finding, as he was required to do in light of the express language in the Claim, that the union was not liable for unpaid wages as per the asserted terms of the Appellant's employment. To dismiss that claim (as well as the wrongful dismissal claim), the judgment made a finding that there was not sufficient proof of a full-time engagement on the terms asserted so as to warrant allowing the Claim as pleaded. At page 7 of Justice Brooker's Reasons he states:

> However, the issue before me is relatively simple – did Jones, on behalf of the union local hire Rogers as its full-time organizer effective May 1st, 1995 at a rate of journeymen industrial or commercial pay for 40 hours a week? Reluctantly, I cannot conclude that it did. The plaintiff has the burden of proving

[3] [2004] F.C.J. No. 1132 (FCA).

[4] [2001] T.C.J. No. 420.

[5] *Charles Rogers v. United Association of Journeymen et al.;* Action No. 9801-1314, April 29, 2002.

> the existence of this contract and its terms. The standard of proof is on a balance of probabilities. The plaintiff has not so satisfied me.

[12] The closing paragraph of Justice Brooker's Reasons repeats this finding in very similar terms and concludes "and accordingly I must dismiss the Plaintiff's action with costs". I am satisfied that this dismissal is not inconsistent with a finding that the Appellant was an employee who incurred legal costs in a *bona fide* action for wages owed.

[13] While the *bona fideness* of the claim may not be relevant I also note here that there is no question in my mind based on his testimony at the hearing and the pursuit of his claim at some considerable cost, that the Appellant honestly believed he was employed by the union on terms that would allow his claim for unpaid wages to succeed.[6] However what is clear from Justice Brooker's Reasons is that there were contradictions in the Appellant's case as well as some inappropriate dealings relating to collecting EI benefits promoted by the union and seemingly enjoyed by the Appellant that did not assist the Appellant in his cause. Aside from these factors, Justice Brooker accepted the union's version of events which was (as set out at pages 5 and 6 of his Reasons) that the union recognized the Appellant's services performed initially as a volunteer and later on the understanding that the union would pay him as much as it could afford from time-to-time. This is an acknowledgement of an employment relationship and work performed in an employment capacity. As to what the union could afford to pay, the union, as suggested in Justice Brooker's Reasons, seems to have admitted that a *recommendation* to pay the Appellant on the asserted terms *was* promised on the condition of there being a grant renewal but there was no admission or evidence that such a renewal occurred. All this is to confirm that there was a claim being

[6] The Appellant filed an affidavit of his lawyer as an exhibit at the hearing which also confirms the *bona fideness* of the suit for wages. I did not exclude this affidavit as evidence however I note that it does little more than confirm my findings quite independent of it. The pleadings and Justice Brooker's Reasons and the testimony of the Appellant speak for themselves. Still, regardless that the lawyer’s opinion evidence was uncalled for and is in a less reliable form than generally accepted given that the lawyer was not available for cross-examination, there is reason in self-represented informal cases not to simply disallow such evidence being admitted even if ultimately it may not be relied on or given weight or relevance. Appellant's should be able to rely on the informal procedure rules which do not require strict adherence to rules of evidence. In some instances such permissiveness will afford a consideration of the likely reliability of certain evidence versus the cost of bringing better evidence to the court.

made to establish the Appellant's entitlement, as an employee having worked for the union in that capacity, to a particular wage amount owing pursuant to the asserted terms of a contract. Legal costs to pursue such claim are deductible under paragraph 8(1)(*b*) of the *Act* even if the claim fails as confirmed in *Loo v. Canada*.[7]

[14] The Appellant can also rely on *Fortin* in this regard. In that case Justice Dussault of this Court briefly notes the legislative history of the subject provision at paragraph 16. I need not repeat the reference except to say the pre-1990 version of the provision made winning the claim for wages an issue. This was the basis for the department's administrative position that the legal expenses could not be expensed until the results of the suit for wages were known. If the suit was successful the taxpayer would be allowed to go back to previous years to claim the legal expenses paid in those years. Since the expense is only deductible in the year paid, the subject provision would, but for this administrative practice, inevitably deny the very expense it sought to allow unless payment of legal fees were held off until the wage claim was disposed of – an option likely not made available by many lawyers (who would have to consider their own overhead and bad debt issues).[8]

[15] Justice Dussault confirms in his analysis at paragraphs 20 through 22 that, post-1989, the amended provision does not require a successful action for wages – only a claim to establish a right to wages need be brought to permit a deduction under the subject provision. While he does envision a limitation based on this Court being satisfied that work was done in an employment capacity in respect of which a wage claim could be based, that reservation does not create a bar in the present case as I am satisfied on the evidence that work was done in an employment capacity as per the findings of Justice Brooker. Further, I suggest that the limitation suggested by Justice Dussault was not meant to be taken as applicable to all situations. It is a limitation suggested in this Court's decision in *Turner-Lienaux v. Canada*[9]. However, that case itself does not stand for such a broad sweeping principle even as affirmed by the Federal Court of Appeal. In that case no

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[7] F.C.A. at paragraph 8.

[8] I note here that departmental practice under the amended provision does not appear to have changed. Counsel for the Respondent acknowledged the Minister's continuing practice of waiting for judgment in actions of this kind in order to be satisfied that the requirements of the provision have been met. He also confirmed the practice of reopening years to ensure that allowable expenses are permitted deduction in the year paid as prescribed under that provision.

[9] [1996] T.C.J. No. 943 (T.C.C.); [1997] F.C.J. No. 562 (F.C.A.).

work was asserted to have been performed. The denial of the deduction of legal expenses was grounded in the fact that there was no claim that work was done so there was no claim for wages – the claim was for something else: for breach of contract to give a promotion or for breach of duty to apply proper standards in giving promotions but there was no action for wages as required by the section. What principles might be drawn from that case where there has been an assertion that work was done in an employment capacity? What principles can be drawn where there has been an assertion that the terms of employment were to be paid for a worker's availability as opposed to work done or where the issue was whether work was done *qua* volunteer or *qua* employee? One might assert work was done but fail to bring proper proof so as to lose the case but still there may well have been an action brought to establish a right to wages. One might assert wages are owed based on availability even if work is not done but fail to bring proper proof of the nature and terms of the engagement so as to lose the case but still there may well have been an action brought to establish a right to wages. Or, one might assert an employment relationship carried-out for wages as opposed to a volunteer relationship but fail to bring proper proof of the nature and terms of the engagement so as to lose the case but still there may well have been an action brought to establish a right to wages. In the latter case the action brought may fail on the basis that there was no employment *per se* but it is hard to imagine that the action was not brought to establish a right to wages owing. That would be the case in the present appeal if Justice Brooker had found the Appellant not to be an employee at all but rather just a volunteer. Indeed this is what Respondent's counsel seems to want me to take from Justice Brooker's Reasons but even if I accepted that as Justice Brooker's finding (which I do not), I do not see Justice Dussault's reservation (that would limit the legal expense deduction to situations where work has been performed in an employment capacity) as applicable to anything other than the situation he was contemplating when he prescribed that limitation. He cited with approval paragraph 38 in *Turner-Lienaux* (T.C.C.) where Justice Margeson envisioned a broader view which is simply that there may be an action for wages that fails because of improper evidence or insufficient proof in respect of which legal expenses were incurred to establish a right to a salary. Similarly, in *Loo* the Federal Court of Appeal recognizes at paragraph 8 that one branch of paragraph 8(1)(*b*) (the second branch) contemplates a situation in which the matter in controversy is the legal entitlement to the salary claimed. Examples of this branch given in that paragraph are clearly not intended to be exhaustive. This second branch as described by the Court of Appeal is open to consideration of any number of examples including those I have cited. As well, I note that one example sited by the Court of Appeal is a dispute as to the *terms* of employment which is exactly the case at bar on the facts as I have found them.

[16] Before concluding, two further points need to be addressed. There may be an issue in this appeal as to an allocation of fees paid for the collection of wages versus the fees paid for damages for wrongful dismissal although same was not raised by the Respondent. While that is reason enough not to deal with it, I note that the amounts sought in the claim reveal that the damages for wrongful dismissal were nominal relative to the amount claimed for wages so that an apportionment of legal fees would hardly seem appropriate. The fees for the action for wages would not have been less had the action for wrongful dismissal not been added. It was an incidental part of the legal fees and accounting for it separately is not required in my view in these circumstances.

[17] Lastly, I note that the deduction afforded in paragraph 8(1)(*a*) is for a particular year and is limited to fees paid in that year. The year under appeal is 2002. Amounts paid in earlier years cannot be allowed by me as they are not years before me. Accordingly, the appeal can only be and is only allowed for fees paid in 2002. However, counsel for the Respondent, confirmed the Canada Revenue Agency (CRA) practice of re-opening previous years to allow the expenses in the years paid. I trust the CRA will do all that is required to do just that. It would be unconscionable to think that a taxpayer, told as per acknowledged administrative practices not to claim an expense in a particular year on the basis that that year would be re-opened as required, would be denied the expense because the CRA did not do whatever had to be done to permit the deduction in the appropriate year.

[18] For and in accordance with these Reasons, the appeal is allowed with costs.

Signed at Ottawa, Canada, this 24th day of May 2005.

"J.E. Hershfield"

Hershfield J.

CITATION:	2005TCC336
COURT FILE NO.:	2004-3391(IT)I
STYLE OF CAUSE:	Charles Robert Rogers and Her Majesty the Queen
PLACE OF HEARING:	Calgary, Alberta
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REASONS FOR JUDGMENT BY:	The Honourable Justice J.E. Hershfield
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APPEARANCES:

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