Docket: 2010-3834(EI)

BETWEEN:

GREG TOMYK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

Appeal heard on May 3, 2011 at Vancouver, British Columbia

Before: The Honourable Justice Wyman W. Webb

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Jonathan Wittig

JUDGMENT

The appeal from the decision of the Minister of National Revenue dated November 3, 2010 is allowed and this decision is varied to provide that the Appellant had 632 hours in insurable employment for the purposes of the *Employment Insurance Act* during the period from November 2, 2009 to February 19, 2010.

Signed at Halifax, Nova Scotia, this 31st day of May, 2011.

"Wyman W. Webb"

Webb, J.

Citation: 2011TCC283
Date: 20110531
Docket: 2010-3834(EI)

BETWEEN:

GREG TOMYK,

Appellant,

and

THE MINISTER OF NATIONAL REVENUE,

Respondent.

REASONS FOR JUDGMENT

Webb, J.

[1] The issue is this appeal is the number of hours that the Appellant had in insurable employment for the purposes of the *Employment Insurance Act* (the "*EI Act*") during the period from November 2, 2009 to February 19, 2010.

[2] The Appellant was employed by Natureland Products Ltd., a company that is in the business of producing and selling organic beverages. The Appellant started work on November 2, 2009 and was dismissed on February 19, 2010. The employment contract that the Appellant signed stated that:

> [y]our employment hours will be from 9 am to 5 pm.

[3] The employment contract also stated that:

> 3. Your remuneration and benefits shall be as follows, namely:
>
> a) A fixed salary of not less than $35,000 annually, which is subject to annual review. The salary will be payable in semi-monthly instalments.

[4] The Appellant determined his number of hours in insurable employment as follows:

8 hours / day x 5 days / week x 16 weeks = 640 hours

[5] In the Reply it is stated that the employer determined that the Appellant worked 7.5 hours per day, was not paid for the November 11 holiday (as the Appellant had not been employed for 30 days at that time) and that the Appellant was not paid for 3.75 hours on January 10, 2010 (as the Appellant went home sick that day). As a result the number of hours in insurable employment determined by the employer was 588.75[1], which, as a result of the provisions of paragraph 10.2(b) of the *Employment Insurance Regulations*, would mean that the number of insurable hours would be 589 hours.

[6] The number of hours of insurable employment is relevant for the purposes of section 7 of the *EI Act* in determining whether a particular person qualifies for benefits under the *EI Act* and for the purposes of section 12 of the *EI Act* in determining the maximum number of weeks for which benefits may be paid. In each case the number of insurable hours required will depend on the regional rate of unemployment. Neither party identified why the number of insurable hours was relevant or what number of hours was material in this matter.

[7] Section 55 of the *EI Act* provides that:

> 55. (1) 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.

[8] Sections 10 and 10.1 of the *Employment Insurance Regulations* provide that:

> 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.

[1]

7.5 hours / day x 5 days / week x 16 weeks =	600
Minus: 7.5 hours for November 11, 2009	(7.5)
Minus: 3.75 hours for January 10, 2010	(3.75)
Total:	588.75

(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.

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

10.01 (1) If a person is required under their contract of employment to be available for a certain period awaiting a request from their employer to work, the hours during that period are deemed to be hours of insurable employment if the person is paid for those hours at a rate equivalent or superior to the remuneration that would be paid if the person had actually worked during that period.

(2) Despite subsection (1), if a person is required by their employer under their contract of employment to be present at the employer's premises for a certain period in case their services are required, the hours during that period are deemed to be hours of insurable employment if the person is paid for those hours.

> 10.1 (1) Where an insured person is remunerated by the employer for a period of paid leave, the person is deemed to have worked in insurable employment for the number of hours that the person would normally have worked and for which the person would normally have been remunerated during that period.
>
> (2) Where an insured person is remunerated by the employer for a period of leave in the form of a lump sum payment calculated without regard to the length of the period of leave, the person is deemed to have worked in insurable employment for the lesser of
>
> (a) the number of hours that the person would normally have worked and for which the person would normally have been remunerated during the period, and
>
> (b) the number of hours obtained by dividing the lump sum amount by the normal hourly rate of pay.
>
> (3) Where an insured person is remunerated by the employer for a non-working day and
>
> (a) works on that day, the person is deemed to have worked in insurable employment for the greater of the number of hours that the person actually worked and the number of hours that the person would normally have worked on that day; and
>
> (b) does not work on that day, the person is deemed to have worked in insurable employment for the number of hours that the person would normally have worked on that day.

[9] The Appellant did not refer to these provisions but instead included excerpts from the Service Canada website. The issue of the number of insurable hours that a person has worked will be determined in accordance with the provisions of the *EI Act* and the *Employment Insurance Regulations*, not the Service Canada website. In particular subsection 10(1) of the *Employment Insurance Regulations* provides that an employee who is not paid on an hourly basis will be deemed to have worked that number of hours that he actually worked and for which he was paid, provided that the employer provides evidence of such number of hours.

[10] By a letter dated April 30, 2010, from the Canada Revenue Agency, the Appellant received a ruling that included the following:

> Under subsection Ss. 10(2) of the Employment Insurance Regulations, we have established your insurable hours to be 589 for the period under review.

[11] Subsection 10(2) of the *Employment Insurance Regulations* provides that:

> (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.
>
> (emphasis added)

[12] It seems clear that there was no agreement between the employer and the Appellant with respect to the number of hours and therefore there does not appear to be any basis for a determination to have been made under subsection 10(2) of these *Regulations*. No explanation was provided for this reference to subsection 10(2) of the *Employment Insurance Regulations.*

[13] The Appellant appealed this ruling under section 91 of the *EI Act*. The decision of the Minister of National Revenue was reflected in a letter dated November 3, 2010 from the Canada Revenue Agency. In this letter it is stated in part that:

> After conducting a complete and impartial review of all of the information relating to the appeal, it has been determined that you had 589 hours of insurable employment for the period under review.
>
> The decision is issued in accordance with subsection 93(3) of the *Employment Insurance Act* and is based on subsection 10(2) of the *Employment Insurance Regulations.*

[14] Since the Appellant was appealing the Ruling in relation to the number of hours that he had in insurable employment, it must have been obvious that there was no agreement between the employer and the Appellant with respect to the number of hours. However, the letter clearly states that the decision is based on subsection 10(2) of the *Employment Insurance Regulations*. There is no basis for a decision to have been made based on subsection 10(2) of these *Regulations*.

[15] In the Reply there is again a reference to subsection 10(2) of the *Employment Insurance Regulations* as one of the two subsections of these *Regulations* on which the Respondent is relying. The only other subsection of these *Regulations* included in

the paragraph that refers to the statutory provisions relied upon is subsection 10(1) of these *Regulations*.

[16] Since clearly there is no agreement between the Appellant and his employer with respect to the number of hours, there is no basis for a determination of the number of hours under subsection 10(2) of the *Employment Insurance Regulations* in this appeal.

[17] The Respondent did also refer to subsection 10(1) of the *Employment Insurance Regulations* in the Reply. This subsection provides that:

> 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.
>
> (emphasis added)

[18] In this case it is clear that the Appellant's earnings were not paid on an hourly basis. The agreement provided that he was to paid an annual salary and Barry Seims, who was the accountant for the employer, stated during his cross-examination that:

> Q So are you satisfied in saying that I was not an hourly employee?
>
> A No, you were an annual, you were paid semi-monthly.
>
> Q So I was a fixed salary employee?
>
> A Yes.

[19] In order to rely on subsection 10(1) of the *Employment Insurance Regulations* to establish the number of insurable hours worked by the Appellant, ***the employer*** must provide ***evidence***. This is a different basis for the determination of the number of hours than was referred to in both the ruling and the decision of the Minister. It seems to me that in this case the evidence that the employer would be required to provide must be evidence presented at the hearing. Since the onus is on the employer to provide evidence it does not seem to me that the Respondent can satisfy this requirement simply by making assumptions of fact in the Reply. The employer will be required to provide evidence at the hearing to establish the actual number of hours worked.

[20] One reason for the discrepancy between the number of hours as determined by the employer and the number of hours determined by the Appellant is that the Appellant used 8 hours per day as the number of hours worked and the employer used 7.5 hours per day, with the one-half hour difference representing a lunch break.

[21] Both parties referred to section 32 of the *Employment Standards Act* (British Columbia) which provides that:

> 32 (1) An employer must ensure
>
> (a) that no employee works more than 5 consecutive hours without a meal break, and
>
> (b) that each meal break lasts at least a 1/2 hour.
>
> (2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee.

[22] It is the Appellant's position that he was required to be available for work during his meal break. During cross-examination, the Appellant stated as follows:

> Q Okay. Now you stated that you worked through your lunch hour.
>
> A I state -- I am stating that we were -- we worked through our lunch hour. We had to be available during our lunch hour and breaks. The 30 minutes was not taken away from work. You were at your desk, you had to answer the phone. If somebody needed something, you had to put your sandwich down.
>
> Q And were you able to take that time later on, if you were -- if you happened to be at your desk and the phone rang, could you take lunch later in the day?
>
> A I don't think so.
>
> Q You don't think so. Did you ever ask about that?
>
> A It was kind of frowned upon from the owner.
>
> Q The owner frowned upon it.
>
> A Yes.

Q And –

A The owner frowned upon us eating in the lunchroom.

[23] The only witness that was called by the Respondent was Barry Seims, a chartered accountant. The Appellant's employer was his client and, in addition to doing accounting work for the employer he was also involved in some human resource issues. In relation to the issue of whether the Appellant was provided with a lunch break, the following exchange took place during his direct examination:

Q On the first page, point 2, the contract reads:

"Your employment hours will be from 9:00 A.M. to 5:00 P.M. In addition, during these hours, you shall devote 100 percent of your working time and personal attention to the discharge of the aforesaid duties,"

et cetera.

Could you please explain for the court what this means?

A Well, what we are trying to achieve by putting that in the contract was to make sure the person wasn't working for someone else, or doing somebody else's -- had a second employment when they were working for the company.

Q What is your interpretation of "employment hours"?

A Well, we had a standard 9 to 5 for this particular employee, and that was his -- he was required to get to work at nine in the morning, and leave at five at the end of the day.

Q The contract does not stipulate a lunch break.

A Mm-hmm.

Q Was Mr. Tomyk provided with a lunch break?

A Yes, everybody in the company took a lunch break. It is at one time or another during the day. We followed the rules of the labour code that you have to give someone a half hour lunch every day.

Q Now you say everyone took a break at one point or another.

A Yes. Yes.

Q Was there -- there was a variance as to when people would take lunch?

A Yeah, the company is not that large, and there is not many people in the company, so there had to be some flexibility there, and people seem to be happy to -- if they had to work from 12 to 1 they would take their lunch later in the day, sometimes as late as 2 o'clock in the day. But they all got a lunch.

Q And was it expressed that this was an unpaid lunch period?

A I don't think I actually expressed it that way, except for the fact that the pay stubs I think show that the number of hours that were being paid. It was quite clear on the pay stub how many hours each employee was being paid.

Q And was this policy of a lunch hour expressed elsewhere in writing, if it is not in writing in this document?

A There were other memos issued during the years explaining what the policy was for the company in terms of lunch breaks and extra time spent at work.

Q And Mr. Tomyk would have received those memos?

A He should have received copies of those memos in his employment manual, yes.

Q Employment manual. When would an employment manual have been issued to him?

A That would have been issued when he first started with the company.

Q Is that issued to each employee?

A Yes.

Q So not all of the terms of employment are contained within this document?

A No, there are quite a lot of other issues that aren't covered in here. When to take vacations, for instance, and other issues such as that. What happens if you have to work on a weekend or an evening, or a special event, as a salesperson especially, and how we take time off in lieu if you have to spend extra time in an event. Those types of issues aren't really covered in here in this contract.

Q But those issues would be covered in the employment manual?

A They should be, yes.

[24] No copy of the employment manual was introduced into evidence. In the *Law of Evidence in Canada*, third edition, by Justice Lederman, Justice Bryant and Justice Fuerst of the Superior Court of Justice for Ontario, it is stated at p. 377 that:

> **§6.449** In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.*
>
> **§6.450** An adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof.*
>
> (* denotes a footnote reference that is in the original text but which has not been included.)

[25] It seems to me that this can also apply to a failure to produce a document that is within the control of a witness called by a party. As noted pursuant to subsection 10(1) of the *Employment Insurance Regulations,* the question is what number of hours are established based on evidence provided by the employer. It seems to me that an adverse inference can be drawn from the failure of the employer to provide a copy of the employment manual when the particular subsection of the *Employment Insurance Regulations* upon which the Respondent is relying, requires the employer to provide evidence. The negative inference that I draw is that the employment manual would require the workers (including the Appellant) to remain on the premises during their lunch break and to be available during such breaks for work.

[26] Subsection 10.01(2) of the *Employment Insurance Regulations* provides that:

> (2) Despite subsection (1), if a person is required by their employer under their contract of employment to be present at the employer's premises for a certain period in case their services are required, the hours during that period are deemed to be hours of insurable employment if the person is paid for those hours.

[27] The Appellant was paid a salary of $35,000 per year and therefore he was paid for all of the time that he was required to be at the employer's premises. It seems to

me that he was required to be at the employer's premises from 9:00 am to 5:00 pm each day. As stated by Mr. Seims:

> he was required to get to work at nine in the morning, and leave at five at the end of the day.

[28] Therefore he was paid for the lunch breaks and, as a result of the negative inference that I have drawn, he was required to remain on the premises during these breaks in case his services were required.

[29] It should also be noted Mr. Seims was not asked whether the Appellant was required to remain on the premises during his lunch breaks in case his services were required during such times. Also during cross examination Barry Seims stated that:

> Q And you mentioned that people took lunch breaks at work?
>
> A Yes.
>
> Q Where did you see them take their lunch breaks?
>
> A I would often come into the office into the office later in the afternoons. I didn't usually get there until the afternoon, but when I got in there often other employees would not be available in the office and I'd ask where they where, and they'd say they were on the lunch breaks.
>
> Q Did you ever see employees eating at their desk?
>
> A I think I have seen a couple, yes.

[30] Since he saw people eating at their desk, this would suggest that the employees were required to be present at the employer's premises in case their services were required during their lunch breaks. As well, Barry Seims was the external accountant and would not, as he had stated, usually arrive at the employer's premises until the afternoon. The employer has not established that the Appellant would not have been required to remain on the employer's premises in case his services were required during the lunch breaks. The times for the lunch breaks (one-half hour per day) should have been included as insurable hours.

[31] The other two matters in dispute, based on the Reply, relate to the November 11 holiday and a time when, as stated in the Reply, the Appellant went home sick. The only evidence that was presented with respect to these matters was a copy of what appears to be the pay stubs. One pay stub indicates that the pay period is from

October 31, 2009 to November 13, 2009 and states that the hours were 67.50. Another one is for the period from December 12, 2009 to some illegible date in 2010. This indicates the number of hours as 71.25. The other stubs show the hours as 75.

[32] The explanation provided by Barry Seims for the number of hours was as follows:

> Q Can you explain to the court the hours recorded and the hourly rate?
>
> A Well, what would have happened is Mary-anna would have taken the contract that I prepared, which shows the annual salary and would divide the number of hours into that annual salary to come up with an hourly rate, and then she would have recorded it that way for the payroll, Ceridian Payroll, which is an external payroll preparer.

[33] The only explanation for the change in the hours for these two pay stubs is contained in the Reply. In paragraph 6 of the Reply it is stated that:

> 6. In determining that the Appellant had 589 insurable hours of employment with the Payor during the Period, the Minister relied on the following assumptions of facts:
>
> …
>
> t) the Appellant was not paid for November 11, 2009 because he had worked for the Payor for less than 30 days;
>
> u) the Appellant was not paid for 3.75 hours for the pay period ending on January 10, 2010 as he went home sick on one day in this pay period.

[34] As noted above, in order to establish the number of hours under subsection 10(1) of the *Employment Insurance Regulations*, the employer must provide evidence. These statements in paragraph 6 of the Reply are not evidence. The only questions that were asked of either witness in relation to these two matters were the following questions that were posed during the cross-examination of the Appellant:

> Q Okay. His Honour pointed out a difference in the calculation earlier, that there was still a gap between the number of hours, 600 versus 589. If you look at the reply, it sets out that you were not paid for statutory holidays, because you were in the probationary period. Is that accurate?

A Where are you looking?

Q I'm looking at the point (o) in the reply. I'll double-check here. My apologies. It's (t) on page 4.

A An hourly employee would not be paid for a statutory holiday.

Q Okay, so that's your response, just that an hourly employee –

A I'm a salaried employee.

Q There is no dispute that you were a salaried employee.

A Okay.

[35] The *Employment Standards Act* (British Columbia) provides, in part, that

1 (1) In this Act:

"statutory holiday" means New Year's Day, Good Friday, Victoria Day, Canada Day, British Columbia Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day and any other holiday prescribed by regulation;

…

44 An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer for at least 30 calendar days before the statutory holiday and has

(a) worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or

(b) worked under an averaging agreement under section 37 at any time within that 30 calendar day period.

45 (1) An employee who is given a day off on a statutory holiday, or is given a day off instead of the statutory holiday under section 48, must be paid an amount equal to at least an average day's pay determined by the formula

amount paid ÷ days worked

where

amount paid is the amount paid or payable to the employee for work that is done during and wages that are earned within the 30 calendar day period

> preceding the statutory holiday, including vacation pay that is paid or payable for any days of vacation taken within that period, less any amounts paid or payable for overtime, and
>
> days worked is the number of days the employee worked or earned wages within that 30 calendar day period.
>
> (2) The average day's pay provided under subsection (1) applies whether or not the statutory holiday falls on the employee's regularly scheduled day off.

46 An employee who works on a statutory holiday must be paid for that day

> (a) 1 1/2 times the employee's regular wage for the time worked up to 12 hours,
>
> (b) double the employee's regular wage for any time worked over 12 hours, and
>
> (c) an average day's pay, as determined using the formula in section 45 (1).

[36] Since the Appellant commenced work on November 2, 2009, he had not been working for 30 days by Remembrance Day and therefore there was no requirement to pay the Appellant under the *Labour Standards Act*. It seems to me that, on a balance of probabilities, the Appellant did not work on November 11 and since his paycheque for the period that includes November 11, was less than his paycheques for the other pay periods, it is more likely than not that he was not paid for this holiday. Therefore, the hours for this holiday should not be included in insurable hours.

[37] The final matter is related to a reduction of 3.75 hours that, as stated in the Reply, was for January 10, 2010 and was made because the Appellant went home sick. However, the only evidence related to this matter was the paycheque for the illegible period that shows 71.25 hours. This is not evidence that he did not work each day during this period from 9 to 5. It is evidence that he was paid less for this period but it is not evidence that he *worked* fewer hours. He was not paid on an hourly basis and therefore some explanation should have been provided by the employer for this reduced paycheque. Evidence is not provided by simply making an assumption of fact in the Reply. No explanation was provided in evidence for this reduced pay for this period, and therefore the employer has not provided evidence to support this reduction in the number of insurable hours.

[38] As a result, the 8 hours for November 11, 2009 will be deducted from the number of hours as determined by the Appellant and the appeal from the decision of the Respondent dated November 3, 2010 is allowed and this decision is varied to provide that the Appellant had 632 hours in insurable employment for the purposes of the *EI Act* during the period from November 2, 2009 to February 19, 2010.

Signed at Halifax, Nova Scotia, this 31st day of May, 2011.

"Wyman W. Webb"

Webb, J.

CITATION:	2011TCC283
COURT FILE NO.:	2010-3834(EI)
STYLE OF CAUSE:	GREG TOMYK AND THE MINISTER OF NATIONAL REVENUE
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DATE OF HEARING:	May 3, 2011
REASONS FOR JUDGMENT BY:	The Honourable Justice Wyman W. Webb
DATE OF JUDGMENT:	May 31, 2011

APPEARANCES:

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Counsel for the Respondent:	Jonathan Wittig

COUNSEL OF RECORD:

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Name:

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