[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. E. A.*, 2014 SSTAD 96

Appeal No.: 2013-0036

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

E. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal decision

SOCIAL SECURITY TRIBUNAL MEMBER:	Pierre LAFONTAINE
DATE OF DECISION:	May 7, 2014
TYPE AND DATE OF HEARING:	In-person hearing held on May 5, 2014, at 9:00 a.m. (Eastern Time)

DECISION

[1] The appeal is allowed only on the issue of earnings according to the Appellant's new calculations in Exhibits 28-3 and 28-4 of the appeal file.

INTRODUCTION

[2] On February 7, 2013, a Board of Referees found the following:

- The Respondent showed that he was unemployed under sections 9 and 11 of the *Employment Insurance Act* (the Act);

- There was no need to proceed with the allocation of earnings under sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations);

- There was no need to impose a non-monetary penalty under sections 38 and 41.1 of the Act.

[3] The Appellant filed an appeal from the Board of Referees' decision to the Umpire on February 27, 2013.

TYPE OF HEARING

[4] The Tribunal held an in-person hearing for the reasons set out in the notice of hearing dated March 12, 2014. The Appellant did not participate in the hearing. The Respondent participated in the hearing and was represented by Pierre Céré from the Comité Chômage de Montréal.

THE LAW

[5] The Appeal Division of the Social Security Tribunal (the Tribunal) hears appeals that were filed with the Office of the Umpire and not heard before April 1, 2013, in compliance with

sections 266 and 267 of the *Jobs, Growth and Long-term Prosperity Act* of 2012. On April 1, 2013, the Umpire had not yet heard or rendered a decision on the Appellant's appeal. This appeal was transferred from the Office of the Umpire to the Appeal Division of the Tribunal, since leave to appeal from the decision is considered to have been granted by the Tribunal on April 1, 2013, in compliance with section 268 of the *Jobs, Growth and Long-term Prosperity Act* of 2012.

[6] To ensure fairness, this appeal will be reviewed on the basis of the legitimate expectations of the Appellant at the time of filing its appeal to the Umpire. For this reason, the present appeal will be decided in accordance with the applicable provisions of the Act in effect immediately before April 1, 2013.

[7] In compliance with subsection 115(2) of the Act, in effect at the time of the appeal, the only grounds of appeal are the following:

> (*a*) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or
>
> (*c*) the board of referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUES

[8] Did the Board of Referees err in fact or in law with regard to the unemployment status, the allocation of earnings, and lastly, the penalty?

SUBMISSIONS

[9] The Appellant submitted the following arguments in support of its appeal:

- It no longer disputes the Board of Referees' decision on the Respondent's unemployment status and allocation of earnings for the period before August 7, 2007;

- The Respondent's business income constitutes earnings under paragraph 35(10)(*c*) of the Regulations, and under subsection 36(6) of the Regulations, the earnings must be allocated to the period in which the services were performed;

- For the Claimant who is self-employed and who operates a business on his own account as the sole owner, the business's net income is allocated as earnings;

- When it has been established that a Claimant is self-employed, it is not necessary for the Claimant to have actually received an income for it to be allocated because merely having the right to the income is sufficient;

- Contrary to the Board of Referees' decision, the issuance of a payment by the company was not necessary to determine the amounts that needed to be allocated;

- A new allocation needs to be done, taking into account the business's net income for the period from August 1, 2007, to July 31, 2008, rather than the taxable income, and to allocate the earnings in proportion to the monthly sales according to the document provided by the Claimant (Exhibits 22 and 23);

- The Board erred in finding that the Respondent did not act knowingly in this case;

- The Appellant had 72 months to reconsider the claim because the claim was related to a false or misleading statement or representation.

[10] The Respondent submitted the following arguments to refute the Appellant's appeal:

- The Appellant's view that the Claimant made false or misleading statements, giving it the right to extend the time to reconsider from 36 to 72 months, is disputed. The Respondent did not make false statements. He followed the instructions dictated to him;

- The Appellant considered the net income of $22,951 from the company as income attributable to the Respondent, even though he never received the amount, and instead kept it as working capital;

- The Appellant established bogus earnings for a period starting before the creation of the company, even before the first day of the fiscal year;

- The Claimant was unemployed for the period from May 2007 to March 2008 and was actively searching for employment;

- There is no need for the Tribunal to intervene on the issue of the penalty;

- The Board of Referees did not err in fact and in law.

STANDARDS OF REVIEW

[11] The Appellant submitted that the applicable standard of review for a question of law is correctness – *Chaulk v. Canada (AG)*, 2012 FCA 190 and for questions of mixed fact and law is reasonableness – *Martens v. Canada (AG)*, 2008 FCA 240.

[12] The Respondent made no submissions with regard to the applicable standard of review.

[13] The Tribunal noted that the Federal Court of Appeal ruled that the applicable standard of review for a decision of a Board of Referees and an Umpire on questions of law is correctness – *Martens v. Canada (AG)*, 2008 FCA 240, and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[14] The Appellant no longer disputes the Board of Referees' decision on the Respondent's unemployment status and allocation of earnings for the period before August 7, 2007.

[15] The Respondent disputed before the Board of Referees and disputes before the Tribunal the possibility for the Appellant of extending the time to reconsider the claim from 36 to 72 months under subsection 52(5) of the Act because he did not make false or misleading statements.

EXTENSION OF THE TIME TO RECONSIDER

[16] Regarding the extended time to reconsider the Respondent's benefit claim, subsection 52(5) of the Act states the following:

> 52(5) If, in the opinion of the Commission, a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months within which to reconsider the claim.
>
> (Emphasis added by the undersigned)

[17] The Federal Court of Appeal determined in *Langelier* (A-140-01), *Lemay* (A-172-01) and *Dussault* (A-646-02) that, to be granted the extended time to reconsider set out in subsection 52(5) of the Act, the Commission does not have to establish that the Claimant in question made false or misleading statements but must instead simply show that it could reasonably find that a false or misleading statement was made in connection with a benefit claim.

[18] In the circumstances of this case, could the Appellant reasonably find that the Respondent made a false or misleading statement or representation?

[19] In this case, the Appellant found that the Respondent provided false information by failing to report during his benefit period that he was working for his business even though he had been the sole owner and administrator of his company since August 2007 and by failing to report his business income.

[20] The Respondent stated that the business was launched in August 2007 and that it was registered with the proper tax authorities at that time. The Respondent admitted that he helped launch the business and that he was personally involved in the operations of the business. He personally invested in the business and he had a goal of building the business for the future. The

business's total revenue was $96,205 for the period from August 1, 2007, to July 31, 2008 (Exhibits 6-1 to 6-7).

[21] The Tribunal considers, on the basis of the evidence, that the Appellant could reasonably find that the Respondent made a false or misleading statement or representation and therefore could be granted a period of 72 months to reconsider the Respondent's benefit claim.

EARNINGS

[22] When it allowed the Respondent's appeal on the issue of earnings, the Board of Referees stated the following:

> [Translation]
> Regarding the earnings, the Board of Referees notes that the amounts indicated by the Commission represent the net income of the BUSINESS that he founded (Exhibit 19-1) and not wages paid. However, the business is a corporation and its net income cannot be considered as belonging to its main shareholder, unless the shareholder pays himself wages or dividends, which is not the case according to the information in the business's tax return and financial statements.
>
> The Board of Referees finds that the Commission failed to establish that the claimant paid himself wages, and that the claimant clearly showed that the amounts indicated were not paid to him. Additional evidence can be found in the claimant's personal tax return (Exhibit 9).

[23] The Board of Referees clearly set aside the Appellant's determination on the grounds that the Respondent did not receive his business income while receiving his benefits. In the Tribunal's view, this was the wrong decision.

[24] The Federal Court of Appeal, in *Canada (AG) v. Drouin*, A-348-96, stated the following on the issue:

> In my reasons for judgment in file No. A-136-96, after observing how obscure the self-employment provisions of the Act and the Regulations are, especially in respect of any income claimants earn from a business or operation while unemployed and entitled to benefits, I noted that three constants had nevertheless emerged from the decisions of umpires concerning the application of the provisions in question. First, the legal status of the operation or business in which the self-employed person works is irrelevant. Second, the relative amount of time spent on the operation or business is irrelevant. Third, actually receiving income from the operation or business is unnecessary, as the mere right to receive such income is sufficient. I pointed out that

> these constants had seemed necessary in order to give effect to Parliament's intention to include all income directly or indirectly related to work, as opposed to pure investment income.
>
> (Emphasis added by the undersigned)

[25] The Respondent may not have received income from the operation of his business, but he clearly had the right to receive it. The interpretation of sections 35 and 36 of the Regulations is a question of law, and the Respondent's business income constitutes earnings under paragraph 35(10)(*c*) of the Regulations. In addition, under subsection 36(6) of the Regulations, the earnings that arise from the performance of services must be allocated to the weeks in which those services are performed.

[26] The amended allocation of earnings submitted by the Appellant (Exhibits 28-3 and 28-4) was not really disputed by the Respondent. The Tribunal is satisfied that the new calculations comply with the requirements of the Regulations.

PENALTY

[27] The evidence about knowledge must be evaluated by the Board of Referees, which must make findings on the facts and on the Claimant's credibility – *Canada (AG) v. Gates*, A-600-94.

[28] In this case, the Board of Referees had the opportunity to hear the Respondent's testimony and found that he provided a reasonable explanation to show that he did not knowingly make false or misleading statements.

[29] For quite some time the case law has consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the Board of Referees, which is better able to make a decision on it. The Tribunal will intervene only if it becomes clear that the Board's ruling on the issue is unreasonable, on the basis of the evidence of the facts before the Board of Referees to help the Board make a decision.

[30] The Tribunal does not find any reason to intervene in this case regarding the findings of fact made and the issue of credibility as evaluated by the Board of Referees.

CONCLUSION

[31] The appeal is allowed only on the issue of earnings according to the Appellant's new calculations in Exhibits 28-3 and 28-4 of the appeal file.

Pierre Lafontaine
Member, Appeal Division