

Citation: *Canada Employment Insurance Commission v. R. B.*, 2014 SSTAD 226

Appeal No: 2012-1851

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

R. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal decision

SOCIAL SECURITY TRIBUNAL MEMBER: Pierre LAFONTAINE

DECISION DATE: September 10, 2014

DATE AND TYPE OF HEARING: In-person hearing held in Jonquière on June 10, 2014, at 9:00 a.m. (Eastern Time)

DECISION

[1] The appeal is allowed, the Board of Referees' decision of October 31, 2012, is set aside and the Respondent's appeal to the Board of Referees is dismissed.

INTRODUCTION

[2] On October 31, 2012, a Board of Referees concluded that:

- There was reason to proceed with a review of the allocation of earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

[3] The Appellant filed an appeal from the Board of Referees' decision to the Umpire on November 19, 2012. On July 4, 2013, a request by the Appellant to extend the time for filing observations was granted and the parties were required to file their observations by August 1, 2013, at the latest.

TYPE OF HEARING

[4] The Tribunal held an in-person hearing for the reasons indicated in the Notice of Hearing dated March 21, 2014. The Appellant was represented by counsel Toni Abi Nasr. The Respondent was present and represented by Éric Lalancette.

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. The appeal was transferred from the Office of the Umpire to the Tribunal's Appeal Division. 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, which was 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.

ISSUE

[8] Did the Board of Referees err in fact or in law when it found that the Appellant should revise its calculation of the company's net income according to sections 35 and 36 of the Regulations?

SUBMISSIONS

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

- Income from participation in the profits of a company constitutes earnings under subsection 35(10) of the Regulations and, according to the provisions of subsection 36(6), such earnings must be allocated to the weeks in which the services were performed or the weeks in which the transaction took place;
- The Board of Referees' decision is unreasonable in light of the facts in the appeal docket;
- It took into account the monthly fluctuation in the inventory and sales according to the monthly statements of income that were provided by the Respondent for

all the weeks in question and that showed the company's activities performed while the Respondent was receiving benefits;

- The Respondent did not appeal to the Board of Referees the allocation based on the monthly in-house financial statements;
- It did the allocation correctly by taking the daily average from the net monthly income shown on the income statements submitted by the Respondent;
- The Board of Referees could not just accept the explanation given by the Respondent's representative at the hearing and ignore the documentary evidence in the docket.

[10] The Respondent submits the following arguments against the Appellant's appeal:

- The Board of Referees' decision is well-founded in fact and in law;
- The Appellant must take into account the monthly fluctuation in inventory and sales;
- The Appellant should have used the amount of annual net profits that appears in the annual income statements rather than the amount that appears in each monthly income statement since the annual income takes into account the fluctuation in inventory, sales and depreciation;
- The sale of whey generates an income based on the accumulation of whey throughout the year and should be allocated over the entire year.

STANDARDS OF REVIEW

[11] The Appellant submits that the applicable standard of review for questions of mixed fact and law is reasonableness – *Canada (AG) v. Hallée*, 2008 FCA 159.

[12] The Respondent did not make a submission regarding the applicable standard of review.

[13] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a Board of Referees or an Umpire regarding question of law is the standard of correctness - *Martens v. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of mixed fact and law is reasonableness - *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[14] The Appellant appeals from the decision of the Board of Referees, which dismissed the Respondent's appeal with modification [translation] "to the effect that the Commission revise the calculation of the overpayment for the months in question in this case, in accordance with sections 35 and 36 of the Regulations."

[15] Therefore, the Tribunal must determine whether, according to the applicable standard of review, the Board of Referees erred in fact and in law when it concluded that the Respondent's appeal should be dismissed with modification concerning the issue of allocation of earnings pursuant to paragraph 35(10)(c) and subsection 36(6) of the Regulations.

[16] After listening to the parties at the hearing and carefully examining the appeal docket, the Tribunal came to the conclusion that the Board erred in dismissing the Respondent's appeal with modification regarding the issue of allocation of earnings.

[17] It is the calculation of income according to paragraph 35(10)(c) of the Regulations that is the source of this appeal.

[18] The relevant provisions of the Regulations are as follows:

35.(10) For the purposes of subsection (2), "income" includes:

(a) in the case of a claimant who is not self-employed, that amount of the claimant's income remaining after deducting

- (i) expenses incurred by the claimant for the direct purpose of earning that income, and
- (ii) the value of any consideration supplied by the claimant; and

(b) in the case of a claimant who is self-employed in farming, 15 percent of the claimant's gross income from

- (i) farming transactions;
- (ii) any farming subsidies the claimant receives under any federal or provincial program.

(c) in the case of a claimant who is self-employed in employment other than farming, the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

36.(6) The earnings of a claimant who is self-employed in employment other than farming, or the earnings of a claimant that are from participation in profits or commissions, shall be allocated to the week in which the services that gave rise to those earnings are performed and, where the earnings arise from a transaction, they shall be allocated to the week in which the transaction occurred.

[19] When dismissing the Respondent's appeal with modification, the Board of Referees concluded as follows:

[Translation]

The claimant in this case did not dispute the way the profits were allocated since he owns 27% of the shares. He argued that the allocation was calculated using the company's financial statements, and these statements did not take into account the monthly fluctuation in inventory or the breakdown of the sale of whey on a monthly basis.

The company's files show that its net profits less depreciation were \$7,288 in November 2008; \$13,114 in December 2008; \$2,492 in March 2009 and \$467 in May 2009.

In the opinion of the Board of Referees and according to the information provided at the hearing by the tax specialist from the UPA, the interpretation of the amounts used by the Commission to calculate the amounts to be allocated does not reflect reality since it is based on in-house financial statements, which do not take into account monthly fluctuations in inventory or the monthly breakdown of whey sales. These figures are included in the annual income statements done by the accounting firm of Samson Bélair.

Given the credible testimony provided by the claimant and his representative, as well as the documents filed as Exhibit 28 (as a bundle), the Board of Referees respectfully requests that the Commission review the allocation of income on the basis of the new information filed.

[20] According to paragraph 35(10)(c), the amount of income from self-employment is not determined from the company's net profits, but from the amount remaining after deducting the operating expenses, other than capital expenditures, incurred therein - *Lafave v. Canada (AG)*, 2003 FCA 66.

[21] Under subsection 36(6), even if the claimant suffered a net loss during the period he operated the company, the earnings must be allocated on the basis of the net income generated each week during the benefit period (CUB 69474 and CUB 63911).

[22] The Appellant's representative argues that, since the net weekly income is not available in this case, it was reasonable for the Appellant to use the net monthly income, which is closer to the Respondent's weekly reality than using the annual income.

[23] The Respondent's representative stated at the beginning of the hearing that he was not arguing against the allocation that was based on in-house financial statements. However, he argued that the fluctuation in inventory that was established annually and the sale of whey that was counted only once in December but that was based on an accumulation of the whey throughout the year needed to be taken into account.

[24] The Tribunal notes that there was no evidence before the Board of Referees regarding the fluctuation in the monthly inventory which, according to the Respondent's representative, would be very difficult for the company to establish and therefore difficult for the Appellant to establish. Moreover, according to the wording of paragraph 35(10)(c), the expenses that the Respondent is authorized to deduct from the income derived from his employment are the expenses "incurred therein." The Tribunal is not convinced that "fluctuations in inventory" can be an expense "incurred therein" according to the Regulations.

[25] As far as the sale of whey is concerned, the Regulations do not provide for the proceeds of the sale to be spread out over the whole year in order to minimize the income for the month included in the allocation done by the Appellant. The income contemplated in paragraph 35(10)(c) is not annual income, which is a concept foreign to the Act - *Canada (AG) v. Talbot*, 2013 FCA 53.

[26] The Tribunal is convinced that the Appellant's weekly breakdown provides the most accurate information for calculating the Respondent's net income during the period in question, a breakdown that is based on the monthly amounts provided by the Respondent himself.

[27] Consequently, the Board of Referees' decision is set aside and the Appellant's appeal is allowed.

CONCLUSION

[28] The appeal is allowed, the Board of Referees' decision of October 31, 2012, is set aside and the Respondent's appeal to the Board of Referees is dismissed.

Pierre Lafontaine

Member, Appeal Division