

[TRANSLATION]

Citation: *D. M. v. Canada Employment Insurance Commission*, 2014 SSTGDEI 130

Appeal Nos.: GE-14-1517
and GE-14-1519

BETWEEN:

D. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Normand Morin

HEARING DATE: August 28, 2014

TYPE OF HEARING: Teleconference

DECISION: Appeal dismissed

PERSONS IN ATTENDANCE

[1] The Appellant, D. M, participated in the telephone hearing (teleconference) held on August 28, 2014.

DECISION

[2] The Social Security Tribunal of Canada (the Tribunal) finds that the appeal from the decision of the Canada Employment Insurance Commission (the Commission) to allocate the Appellant's earnings has no merit under sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations).

INTRODUCTION

[3] On May 25, 2009, the Appellant submitted an initial benefit claim that took effect on May 24, 2009. The Appellant stated that she worked for Bégin & Bégin Inc. from May 23, 2005, to May 22, 2009, inclusive (Exhibits GD3-3 to GD3-13 of file GE-14-1517).

[4] On August 6, 2010, the Appellant submitted an initial benefit claim that took effect on July 18, 2010. The Appellant stated that she worked for Bégin & Bégin Inc. until July 16, 2010, inclusive. The Appellant stated that she was scheduled to return to work for the employer on August 2, 2010 (Exhibits GD3-3 to GD3-13 of file GE-14-1519).

[5] On November 19, 2013, the Commission told the Appellant that it had allocated her earnings from her self-employment in the period from the week starting on May 31, 2009, to the week starting on November 29, 2009 (Exhibits GD3-158 and GD3-159 of file GE-14-1517).

[6] On November 19, 2013, the Commission told the Appellant that it had allocated her earnings from her self-employment in the weeks starting on July 18, 2010, July 25, 2010, June 26, 2011, July 3, 2011, and July 10, 2011 (Exhibits GD3-72 and GD3-73 of file GE-14-1519).

[7] On November 19, 2013, the Commission told the Appellant that it had allocated her earnings from her self-employment in the weeks starting on July 17, 2011, and July 24, 2011. In this case, the Commission specified that the adjustment to the Appellant's income did not affect her benefits (Exhibit GD2-14 of file GE-14-1517 and Exhibits GD2-14 and GD2-15 of file GE-14-1519).

[8] On December 24, 2013 (the date on which Service Canada received the document according to the date stamp), the Appellant submitted a Request for Reconsideration of an Employment Insurance Decision (Exhibits GD3-161 and GD3-162 of file GE-14-1517 and Exhibits GD3-75 and GD3-76 of file GE-14-1519).

[9] On February 25, 2014, the Commission told the Appellant that it was upholding the decision rendered in her case on November 19, 2013, concerning her status as a "self-employed business operator" and the application of her business's net profits to each week in which she claimed benefits under sections 35 and 36 of the Regulations (Exhibits GD3-163 and GD3-164 of file GE-14-1517 and Exhibits GD3-77 and GD3-78 of file GE-14-1519).

[10] On April 3, 2014 (the date on which the Tribunal received the document according to the date stamp), the Appellant submitted an "Application Requesting Leave to Appeal to the Appeal Division" to the Tribunal to contest the Commission's decision rendered on February 25, 2014 (Exhibits GD3-163, GD3-164, GD2-1 to GD2-14 of file GE-14-1517 and Exhibits GD3-77, GD3-78, GD2-1 to GD2-15 of file GE-14-1519). The Tribunal specified that even though the Appellant did not use the form entitled "Notice of Appeal – General Division – Employment Insurance Section" to submit her appeal, the application was processed as a regular appeal to the Tribunal's General Division.

[11] On July 22, 2014, the Tribunal informed the Appellant that appeal nos. GE-14-1517 and GE-14-1519 were being joined under section 13 of the *Social Security Tribunal Regulations* (Exhibits GD5-1 and GD5-2 of files GE-14-1517 and GE-14-1519).

[12] On September 2, 2014 (the date on which the Tribunal received the document according to the date stamp), the Appellant sent the Tribunal a copy of the financial statements of 9200-2690 Québec Inc. for 2009, 2010 and 2011 (Exhibits GD6-1 to GD6-17 of files GE-14-1517 and GE-14-1519).

[13] On September 4, 2014, the Tribunal sent the Commission a copy of the new documents submitted by the Appellant following the hearing held on August 28, 2014 (Exhibits GD7-1 and GD7-2 of files GE-14-1517 and GE-14-1519).

[14] On September 8, 2014, the Tribunal sent the Commission questions regarding the new documents submitted by the Appellant following the hearing held on August 28, 2014, in order for the Commission to investigate and prepare a report by September 19, 2014 (Exhibits GD7-1, GD7-2, GD8-1 and GD8-2 of files GE-14-1517 and GE-14-1519).

[15] On September 26, 2014, the Tribunal sent the Appellant a copy of the additional submission made by the Commission on September 12, 2014, and told her that if she wanted to provide new written observations in response to the additional submission, she had to do so no later than October 10, 2014 (Exhibits GD9-1 to GD9-3, GD10-1 and GD10-2 of files GE-14-1517 and GE-14-1519). The Appellant did not provide new observations following this notice.

TYPE OF HEARING

[16] The hearing was held by teleconference for the reasons set out in the notice of hearing dated July 22, 2014 (Exhibits GD1-1 to GD1-3 of files GE-14-1517 and GE-14-1519).

ISSUE

[17] The Tribunal must determine whether the appeal from the Commission's decision on the allocation of the Appellant's earnings has merit under sections 35 and 36 of the Regulations.

APPLICABLE LAW

[18] The provisions for the allocation of earnings are in sections 35 and 36 of the Regulations.

[19] For the “Determination of Earnings for Benefit Purposes,” section 35 of the Regulations defines “income” as “... any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.” This section specifies exactly which income is considered earnings.

[20] Concerning the definition of “employment,” paragraph 35(1)(b) of the Regulations makes the following clarification:

(1) The definitions in this subsection apply in this section. “employment” ... (b) any self-employment, whether on the claimant’s own account or in partnership or co-adventure.

[21] Subsection 35(2) of the Regulations stipulates the following:

Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment ...

[22] Paragraph 35(10)(c) also stipulates the following:

(10) For the purposes of subsection (2), “income” includes ... (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 ...

[23] Once this item has been established, section 36 of the Regulations states to which weeks the earnings must be allocated.

[24] Concerning the “allocation of earnings for benefit purposes,” subsection 36(6) of the Regulations specifically stipulates the following:

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

[25] Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within one of the exceptions in subsection 35(7) of the Regulations or does not arise from employment.

[26] For the purposes of section 35 of the Regulations, subsection 30(5) of the Regulations defines a “self-employed person” as an individual who:

(a) ... is or was engaged in a business; or (b) ... is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act.

EVIDENCE

[27] The evidence in files GE-14-1517 and GE-14-1519 is the following:

- a) A copy of a document issued by Quebec’s Registraire des entreprises entitled [translation] “Quebec – Certificate of Incorporation” and submitted to Quebec’s Registraire des entreprises on August 12, 2008, indicates that the Appellant is the signing officer and shareholder of 9200-2690 Québec Inc. The business was incorporated on August 11, 2008, under Part IA of the *Companies Act* (Quebec) (Exhibits GD3-14 to GD3-23 of files GE-14-1517 and GE-14-1519);
- b) On March 12, 2012, S. D., an accountant for Groupe Mallette (partnership of chartered professional accountants) stated that she was authorized by Ms. D. M. (the Appellant) to obtain information on her Employment Insurance file. She stated that Ms. D. M. would respond to the questionnaire for both businesses and that she would submit the documents requested for March 30, 2012 (Exhibit GD3-24 of files GE-14-1517 and GE-14-1519);

- c) On February 14, 2012, the Appellant signed a power of attorney authorizing S. D., an accountant, to deal with Revenue Canada [Canada Revenue Agency] and Employment Insurance [the Commission] on her behalf (Exhibit GD3-25 of files GE-14-1517 and GD-14-1519);
- d) In a document entitled “Self-Employment Questionnaire,” completed on March 25, 2012, the Appellant explained the work performed for 9200-2690 Québec Inc., the nature of the business and her ties to it (Exhibits GD3-26 to GD3-33 of files GE-14-1517 and GE-14-1519);
- e) A number of copies of tables indicate the net income amounts for 9200-2690 Québec Inc. from June 2009 to November 2009, its balance sheet on May 31, 2009, and its income statement for the period from May 1, 2009, to November 30, 2009, inclusive (Exhibits GD3-34 to GD3-49 of files GE-14-1517 and GE-14-1519);
- f) In an undated document, the Commission stated that claimants who use the telephone reporting service to provide their reports receive written instructions on how to access the system, complete the electronic reports and make corrections as needed (Exhibits GD3-50 to GD3-52 of files GE-14-1517 and GE-14-1519);
- g) On May 5, 2014, the Commission stated that for the period from May 31, 2009, to December 5, 2009, the Appellant’s electronic reports and the certification provided by a Commission officer (copies of the questions and answers provided by the Appellant were reproduced on May 5, 2014) show that the Appellant stated that she was not self-employed and that she did not receive amounts other than those indicated for the weeks concerned during the period in question (Exhibits GD3-53 to GD3-157 of file GE-14-1517);
- h) On May 5, 2014, the Commission stated that for the period from July 18, 2010, to July 16, 2010 [July 16, 2011], the Appellant’s electronic reports and the certification provided by a Commission officer (copies of the questions and answers provided by the Appellant were reproduced on May 5, 2014) show that the Appellant stated that she was not self-employed and that she did not receive amounts other than those

indicated for the weeks concerned during the period in question (Exhibits GD3-53 to GD3-71 of file GE-14-1519);

- i) In a document entitled “Details of the Notice of Debt (DH009)” dated November 23, 2013, and reproduced on May 6, 2014, the Appellant’s total debt is established at \$4,289.00 (Exhibit GD3-160 of file GE-14-1517 and Exhibit GD3-74 of file GE-14-1519);
- j) On February 27, 2014, the Commission stated that it gave the Appellant explanations for the decision rendered in her case. The Commission made the following clarification: [translation] “unemployment status granted but subject to earnings.” The Commission stated that the Appellant was considered the operator of the business even though she spent only a few hours a week on it and that she was [translation] “subject to earnings” from the net profits according to the income statements that she provided (Exhibit GD3-165 of file GE-14-1517 and Exhibit GD3-79 of file GE-14-1519);
- k) In the appeal submitted on April 3, 2014, the Appellant also sent a copy of the following documents:
 - i. Letter from the Commission (reconsideration decision) dated February 25, 2014 (Exhibits GD2-6 and GD2-7 of file GE-14-1517 and Exhibits GD2-8 and GD2-9 of file GE-14-1519);
 - ii. Letter from the Commission dated November 19, 2013, concerning the allocation of earnings to the period from the week starting on May 31, 2009, to the week starting on November 29, 2009 (Exhibits GD2-10 and GD2-11 of files GE-14-1517 and GE-14-1519);
 - iii. Letter from the Commission dated November 19, 2013, concerning the allocation of earnings to the weeks starting on July 18, 2010, July 25, 2010, June 26, 2011, July 3, 2011, and July 10, 2011 (Exhibits GD2-12 and GD2-13 of files GE-14-1517 and GE-14-1519);

iv. Letter from the Commission dated November 19, 2013, concerning the allocation of earnings to the weeks starting on July 17, 2011, and July 24, 2011 (Exhibit GD2-14 of file GE-14-1517 and Exhibits GD2-14 and GD2-15 of file GE-14-1519), (Exhibits GD2-1 to GD2-7 and GD2-10 to GD2-14 of file GE-14-1517, Exhibits GD2-1 to GD2-5 and GD2-8 to GD2-15 of file GE-14-1519);

- 1) On September 2, 2014 (the date on which the Tribunal received the document according to the date stamp), the Appellant sent the Tribunal a copy of 9200-2690 Québec Inc.'s financial statements for 2009, 2010 and 2011, which were prepared by Mallette SENCRL, chartered accountants (Exhibits GD6-1 to GD6-17 of files GE-14-1517 and GE-14-1519).

[28] The evidence submitted at the hearing is the following:

- a) The Appellant reviewed the key elements in the file. She stated that during the benefit periods in question in her file, her business was running on a seasonal basis, doing road work (gravel hauling), and that the business's activities subsequently changed. She explained that her business now transports wood in the forest and runs for nine to eleven months a year;
- b) She specified that when she worked at Bégin & Bégin Inc., a hardwood manufacturing plant, it was a full-time job. She explained that during the periods in which she received benefits, it was [translation] "quieter" at the employer's. She specified that she received benefits but continued to work for the employer for one day a week. She stated that for this job, she carried out administrative tasks (such as paying wood producers and preparing reports);
- c) She stated that she currently has two part-time jobs in which she performs administrative tasks. She stated that for the past year and a half, she has worked for 24 hours a week at Réfrigération Y. P. (Témiscouata-sur-le-Lac), and that for about

the past year, she has worked for approximately nine hours a week at Fabrique de Saint-Benoît-Abbé (Packington);

- d) She informed the Tribunal that she would send new documents concerning her business's income spanning a full year and covering the periods in which she received Employment Insurance benefits (Exhibits GD6-1 to GD6-17 of files GE-14-1517 and GE-14-1519).

SUBMISSIONS OF THE PARTIES

[29] The Appellant provided the following observations and submissions:

- a) She stated that she was not denying that she was unemployed and that she had a business that was running and generating income;
- b) She explained that for the benefit periods in question, her business generated income on a seasonal basis, from June (end of May) to about mid-December. She stated that the business did not generate any income for about four to six months a year, depending on the year. She stated that her business's income should be allocated to a full year, given the operating expenses;
- c) She explained that she gave the Commission the specific information that it requested regarding her business's income for each month in which she was eligible to receive benefits. She noted that the Commission did not ask her for documents covering a full year of the business's income and expenses (Exhibits GD3-161 and GD3-162 of file GE-14-1517 and Exhibits GD3-75 and GD3-76 of file GE-14-1519);
- d) She stated that she did not contest the amounts that she provided in the documents sent to the Commission (table for the application of earnings and statements of income of 9200-2690 Québec Inc.) (Exhibits GD3-34 to GD3-49 of files GE-14-1517 and GE-14-1519). She stated that the amounts taken into consideration by the Commission and the amounts that she provided were accurate, but that the Commission focused

only on the months related to her benefit periods without looking at the rest of the year;

- e) She stated that she did not ask the Commission to allocate the income from her business to a full year. She stated that she did not consider this possibility and that she subsequently reviewed the matter with her accountant. She noted that this was the first time that she was dealing with a file of this nature and that she did not want to [translation] “do something wrong” or “get trapped” and “make a mistake.” She stated that she did not look at whether her business’s income could be allocated to a full year. She stated that she did not think that her business’s reported income would affect her own income in the calculation of her benefits;
- f) She stated that her business needed funds to be self-supporting. She stated that she found it disappointing that her business’s income was attributed to her personally for the periods in question, because she did not truly benefit from the income since she invested more in her business than she was able to subsequently recover (value of the equipment). She stated that her business’s income and expenses over a full year had to be taken into account. She stated that in the audit, only her business’s income was taken into consideration and not the expenses. She stated that she did not receive any money from her business because she needed any amounts earned to cover her costs and that she also had to reinvest in the business (Exhibits GD2-1 to GD2-7 and GD2-10 to GD2-14 of file GE-14-1517, Exhibits GD2-1 to GD2-5 and GD2-8 to GD2-15 of file GE-14-1519);
- g) She stated that she did not know why her income was corrected for the periods in question and why she owed amounts as repayment of Employment Insurance benefits (Exhibits GD3-161 and GD3-162 of file GE-14-1517 and Exhibits GD3-75 and GD3-76 of file GE-14-1519);
- h) She stated that she spent only four or five hours a week (30 minutes a day) on her business’s activities during the periods in which she received Employment Insurance benefits (Exhibits GD3-26 to GD3-33 of files GE-14-1517 and GE-14-1519);

- i) She specified that she spent about \$35,000.00 or \$40,000.00 on a truck (Inter [International] 1989), for which she obtained \$4,500.00 in financing (Exhibit GD3-28 of files GE-14-1517 and GE-14-1519). She estimated that the value of her business was about \$200,000.00;
- j) She stated that her business was still running, but that its activities for the past two-and-a-half years had been changed to transporting wood. She explained that this change required new trucks to be purchased. She specified that she bought a truck to transport wood around July 2012, and another one later. She stated that her business is a success because it is self-supporting (Exhibit GD3-31 of files GE-14-1517 and GE-14-1519);
- k) She specified that her business now runs for nine to eleven months a year and employs two people on a seasonal basis (Exhibit GD3-30 of files GE-14-1517 and GE-14-1519);
- l) She stated that her principal means of livelihood in her benefit periods was her regular employment at Bégin & Bégin Inc. (Exhibit GD3-31 of files GE-14-1517 and GE-14-1519);
- m) The Appellant stated that she submitted a benefit claim because she was laid off and that her employment at Bégin & Bégin Inc. was insurable (Exhibits GD3-161 and GD3-162 of file GE-14-1517 and Exhibits GD3-75 and GD3-76 of file GE-14-1519);
- n) She stated that she was always available for work, given the hours that her business required, namely, four-and-a-half hours a week, and that she never refused a job. She stated that her business did not at all interfere with her regular work schedule (Exhibits GD3-31 and GD3-32 of files GE-14-1517 and GE-14-1519). She explained that, despite the shortage of work, which was supposed to be short-term, she continued to look for a permanent and stable job. She stated that she was entitled to file a request for reconsideration since her unemployment was related to the work carried out in another business, and the little work that she performed for 9200-2690 Québec Inc.

was done on weekends as before (Exhibits GD3-161 and GD3-162 of file GE-14-1517 and Exhibits GD3-75 and GD3-76 of file GE-14-1519).

[30] The Commission provided the following observations and submissions:

- a) Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within one of the exceptions in subsection 35(7) of the Regulations or does not arise from employment (Exhibit GD4-3 of files GE-14-1517 and GE-14-1519);
- b) It explained that the Appellant's business generated net profits for the months of June to November 2009 and that these net profits are considered earnings. It stated that this amount constitutes earnings under subsection 35(1) of the Regulations because it was generated by the business that belonged to her. Consequently, the Commission stated that it correctly allocated the earnings to the applicable weeks, according to subsections 36(2) and 36(6.1) of the Regulations, including the weeks starting on July 18, 2010, July 25, 2010, June 26, 2011, July 3, 2011, and July 10, 2011 (Exhibit GD4-4 of file GE-14-1517 and GD4-3 of file GE-14-1519);
- c) It noted that, regardless of the nature of the business, once there is a finding that the claimant is engaged in the operation of a business, any moneys arising from that business are earnings to be considered for EI benefit purposes. The earnings of a self-employed claimant which arise from the performance of services, either by the claimant or someone else, are allocated equally to the specific week or weeks in which the services are performed. This includes earnings received from profits or commissions where services were performed to earn those earnings (Exhibit GD4-4 of file GE-14-1517 and Exhibit GD4-3 of file GE-14-1519);
- d) It specified that it applied the net profits from 9200-2690 Québec Inc.'s operations and that the profits were calculated according to the financial statements provided by the Appellant (Exhibit GD4-5 of files GE-14-1517 and GE-14-1519);
- e) It explained that for the benefit claim starting on May 24, 2009, based on the income statements submitted initially by the Appellant or her representative, the profits were

allocated from when the business generated the profits, which is during the period covered by the benefit claim, namely, the period starting on May 31, 2009 and the period starting on November 29, 2009 (Exhibit GD9-1 of file GE-14-1517);

- f) It explained that for claimants who are self-employed, the amount to allocate is the business's gross income remaining after deducting the operating expenses. Capital expenditures cannot be deducted. The claimant's entire income arising out of employment is considered earnings. Included in the meaning of "employment" is self-employment. Any income arising out of the claimant's self-employment is considered earnings (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);
- g) The week is the basic period used in the Employment Insurance legislation. For the Commission, asking for financial statements monthly, or ideally weekly, is a legitimate request included in the accepted procedures (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);
- h) The most important documents are entitled monthly "INCOME STATEMENTS," and a balance sheet is established based on those documents. The Commission stated that applying earnings based on annual data was not legitimate because the Regulations stipulate that the earnings are allocated to the week or weeks in which the services gave rise to the earnings and that when the earnings arise from a transaction, they are allocated to the week in which the transaction occurred (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);
- i) It wondered how, for a seasonal business such as the one in this case, annual amounts could be justified considering the slowdown period in which the business does not run or barely runs (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);
- j) According to subsection 36(6.2) of the Regulations, the earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that do not arise from the performance of services or from a transaction shall be allocated equally to each week falling within the period in which the earnings

were earned (services performed) (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);

- k) According to the annual financial statements submitted by the Appellant (Exhibits GD6-1 to GD6-12), in the periods from June 1, 2010, to May 31, 2011, part of the monthly financial statements were used to calculate the applicable amounts as of the weeks starting on May 31, 2009, November 29, 2009, July 18, 2010, and July 25, 2010, but the periods concerned could not be explained in detail because the financial statements are annual statements (Exhibit GD9-2 of files GE-14-1517 and GE-14-1519);
- l) It stated that in the financial statements on May 31, 2010 (Exhibit GD6-3), it was mentioned that these statements were prepared based on the information provided by the business's management, the balance sheet for 9200-2690 Québec Inc., on May 31, 2010. It stated that there is no audit or review engagement in respect of these financial statements, and, accordingly, no assurance is expressed thereon. It stated that the documents indicate that readers are cautioned that these statements may not be appropriate for their purposes, and that the partner with power of attorney is the sister-in-law of the business's sole shareholder (Exhibit GD9-3 of files GE-14-1517 and GE-14-1519);
- m) It determined that the new documents submitted by the Appellant (Exhibits GD6-1 to GD6-17 of files GE-14-1517 and GE-14-1519) did not reflect the net profits at the end of each month of the business's operations and that it could not take them into consideration (Exhibit GD9-3 of files GE-14-1517 and GE-14-1519);
- n) It explained that, to comply with the legislation, it had to apply the net profits to each week in which the services were performed and/or the business was in operation (Exhibit GD9-3 of files GE-14-1517 and GE-14-1519).

ANALYSIS

[31] In *McLaughlin* (2009 FCA 365), Justice John M. Evans of the Federal Court of Appeal (the Court) stated the following:

Hence, when subsection 35(2) states that “the entire income of a claimant arising out of any employment” is to be taken into account in calculating the amount to be deducted from benefits and for the purposes of section 46, “employment” is not limited to insurable employment.

[32] The Court upheld the principal according to which sums that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone*, 2002 FCA 257).

[33] In *Caron Bernier* (A-136-96), Justice Louis Marceau of the Court stated the following:

Over time, as the result of certain “constants” that have emerged from the decisions of umpires, the application of these provisions has become more consistent and less uncertain. ... Third, actually receiving income from the operation or business while unemployed is unnecessary, as the mere right to receive such income is sufficient.

[34] In *Murray* (2013 FC 49), the applicant, Norman Murray, asked the Federal Court to:

quash a decision of the Public Service Staffing Tribunal [PSST] dismissing his request to submit post-hearing evidence and dismissing his complaint of discrimination in a staffing process undertaken by the Immigration and Refugee Board [IRB] in 2006.

[35] In this decision (*Murray*, 2013 FC 49), Justice Russel W. Zinn stated as follows with regard to the test that should be applied to admit evidence produced after the closure of the hearing:

... The parties agreed that the three-part test summarized in *Whyte v Canadian National Railway*, 2010 CHRT 6 [Whyte], which followed that used in *Vermette v Canadian Broadcasting Corporation*, [1994] CHRD 14, should be used. The test is the following: 1. It must be shown the evidence could not have been obtained with reasonable diligence for use at the trial; 2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and 3. The evidence must be such as presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[36] In this regard, the Tribunal takes into account in its analysis the new documents and additional evidence submitted following the hearing held on August 28, 2014 (Exhibits GD6-1 to GD6-17 of appeal files GE-14-1517 and GE-14-1519) because these documents have an

important or decisive impact on this case and they contain information that would probably have an influence on the Tribunal's decision (*Murray, 2013 FC 49*).

Net income generated by 9200-2690 Québec Inc.

[37] The evidence in the file first shows that 9200-2690 Québec Inc. generated net income in the period from the week starting on May 31, 2009, to the week starting on November 29, 2009 (Exhibits GD3-34 to GD3-49, GD3-158, GD3-159, GD2-10, GD2-11, GD4-1, GD4-2 and GD4-4 of file GE-14-1517), and in the weeks starting on July 18, 2010, July 25, 2010, June 26, 2011, July 3, 2011, and July 10, 2011 (Exhibits GD3-34 to GD3-49, GD3-72 and GD3-73 of file GE-14-1519).

[38] At the hearing, the Appellant stated that the amounts on the documents sent to the Commission on April 2, 2012 were accurate and that she was not contesting them (Exhibits GD3-34 to GD3-49 of files GD4-1517 and GE-14-1519). She also stated that she was denying the fact that she was running a business that generated income while receiving Employment Insurance benefits.

[39] In its submission, the Commission explained that it made the following calculations to establish the net income to apply to each week in question:

[Translation]

Example JUNE 2009: \$9,215.52 divided by 30 days = \$307.18 a day. First week of June 2009 had six days X \$307.18 = \$1,843.00 Second week of June 2009 for a full week of seven days = \$2,150.00. Each week was allocated as such. When the claimant reported earnings from her job at her employer's, the portion of the net profits applied was added to the gross salary reported by the claimant (Exhibit GD4-2 of file GE-14-1517).

[40] The Tribunal finds that the net income generated by 9200-2690 Québec Inc., of which the Appellant is the sole shareholder, is clearly earnings under section 35 of the Regulations.

[41] In this case, the net income generated by the business is related to the Appellant's employment in the business as a "self-employed person," which is defined in subsection 30(5) of the Regulations as an individual who:

(a) ... is or was engaged in a business; or (b) ... is employed but does not have insurable employment by reason of paragraph 5(2)(b) of the Act.

[42] Paragraph 35(1)(b) of the Regulations also specifies that the term employment includes in particular:

... (b) any self-employment, whether on the claimant's own account or in partnership or co-adventure.

[43] Subsection 35(2) of the Regulations specifies the following:

... the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment ...

[44] Paragraph 35(10)(c) also stipulates the following:

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

[45] In this case, it was clearly established that the income arose from the Appellant's employment in her business and that the income is not covered by the exceptions in subsection 35(7) of the Regulations.

Allocation by the Commission

[46] The Tribunal finds that the net income generated by the Appellant's business in the periods in question must be allocated pursuant to the provisions in section 36 of the Regulations.

[47] The Tribunal cannot disregard the principal according to which sums that constitute earnings under section 35 of the Regulations must be allocated under section 36 of the Regulations (*Boone, 2002 FCA 257*).

[48] For the benefit claims starting on May 24, 2009, and July 18, 2010, the Commission stated that it allocated the business's profits from when the business generated the profits, according to the income statements submitted initially by the Appellant or her representative, which cover the benefit claims, namely, in the periods starting on May 31, 2009, November 29, 2009, July 18, 2010, and July 25, 2010 (Exhibit GD9-1 of files GE-14-1517 and GE-14-1519).

[49] The Appellant stated that her business ran on a seasonal basis during the benefit periods in question, and that therefore, the Commission should have allocated the business's income to a full year to take into account the fact that expenses are incurred throughout the year to cover all the operating costs. That is why the Appellant submitted a copy of the financial statements (income statements) for the fiscal years from June 1, 2009, to May 31, 2010; from June 1, 2010, to May 31, 2011; and from June 1, 2011, to May 31, 2012 (Exhibits GD6-1 to GD6-17 of appeal files GE-14-1517 and GE-14-1519).

[50] The Tribunal finds that the financial statements (income statements) of 9200-2690 Québec Inc. for the fiscal years from June 1, 2009, to May 31, 2010; from June 1, 2010, to May 31, 2011; and from June 1, 2011, to May 31, 2012 confirm that the Appellant's earnings must be allocated to the periods in question based on the Commission's initial calculations (Exhibits GD6-1 to GD6-17 of appeal files GE-14-1517 and GE-14-1519).

[51] In an additional submission, provided after the Appellant sent the new documents, the Commission explained that the statements did not reflect the net profits at the end of each month of the business's operations and that it therefore could not take them into consideration (Exhibit GD9-3 of files GE-14-1517 and GE-14-1519).

[52] In this regard, the Commission provided the following explanation:

[Translation]

... Earnings are allocated to the week or weeks in which the services gave rise to the earnings, and when the earnings arise from a transaction, they are allocated to the week in which the transaction occurred. The week is the basic period used in the Employment Insurance legislation. For the Commission, asking for financial statements monthly, or ideally weekly, is a legitimate request included in the accepted procedures. The most important documents are entitled monthly INCOME STATEMENTS, and a balance sheet is established based on those documents. Applying earnings based on annual data is not legitimate because the *Employment Insurance Regulations* stipulate that the earnings are allocated to the week or weeks in which the services gave rise to the earnings and that when the earnings arise from a transaction, they are allocated to the week in which the transaction occurred. For a seasonal business such as the one in this case, how could annual amounts be justified considering the slowdown period in which the business does not run or barely runs. ... According to the annual financial statements submitted recently ... part of the monthly financial statements were used to calculate the applicable amounts ... but the periods concerned cannot be explained in detail because the financial statements are annual statements. ... There is no audit or review engagement in respect of these financial statements, and, accordingly, no assurance is expressed thereon. Readers are cautioned that these statements may not be appropriate for their purposes. In addition, the partner with power of attorney is the sister-in-law of the business's sole shareholder. The Commission therefore applied the net profits according to the monthly data in the financial statements to the period in which the business was in operation, namely, the period in which the services were performed. (Exhibits GD9-2 and GD9-3 of files GE-14-1517 and GE-14-1519).

[53] The Commission also explained that it had to comply with the Regulations and apply the net profits to each week in which the services were performed and/or the business was in operation (Exhibit GD9-3 of files GE-14-1517 and GE-14-1519).

[54] Concerning this factor, the Tribunal reiterates that subsection 36(6) of the Regulations specifically stipulates the following:

(6) The earnings of a claimant who is self-employed, or the earnings of a claimant that are from participation in profits or commissions, that arise from the performance of services shall be allocated to the weeks in which those services are performed.

[55] The Tribunal therefore finds that the new documents submitted by the Appellant cannot lead to an amendment of the Commission's calculations in the allocation of the Appellant's earnings for the Employment Insurance benefit periods concerned (Exhibits GD6-1 to GD6-17 of files GE-14-1517 and GE-14-1519).

[56] The Tribunal finds that the Commission showed that it was not possible to take into account the profits generated by 9200-2690 Québec Inc. for a full year (for example, from June 1, 2009, to May 31, 2010; from June 1, 2010, to May 31, 2011; and from June 1, 2011, to May 31, 2012) and to then prorate on a monthly basis the profits calculated on an annual basis (Exhibits GD6-1 to GD6-17 of appeal files GE-14-1517 and GE-14-1519).

[57] The Tribunal also does not accept the Appellant's submission that she did not receive any money based on the net income generated by her business because she needed any amounts earned by the business to cover her operating costs or to reinvest in the business. It is unnecessary for a person to actually receive an amount from a business in which the person participates for the net income from the business to be considered earnings under the Regulations, as the mere right to receive such income is sufficient (*Caron Bernier, A-136-96*).

[58] In short, the Appellant did not submit reasons that could lead the Tribunal to find that her earnings from the profits generated by the business, for which she is the sole shareholder, should result in an allocation that is different from the one established by the Commission.

[59] On the basis of the above case law, the Tribunal finds that the Appellant's earnings were allocated pursuant to the provisions in sections 35 and 36 of the Regulations.

[60] The appeal on the issue has no merit.

CONCLUSION

[61] The appeal is dismissed.

Normand Morin
Member, General Division

DATE OF REASONS: November 10, 2014