

[TRANSLATION]

Citation: *J. B. v. Canada Employment Insurance Commission*, 2015 SSTGDEI 22

Appeal No. GE-14-1072

BETWEEN:

J. B.

Appellant
Claimant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance

SOCIAL SECURITY TRIBUNAL MEMBER: Charline Bourque

DATE OF HEARING: September 8, 2014

TYPE OF HEARING: Videoconference

DECISION: Appeal allowed in part

PERSONS IN ATTENDANCE

[1] J. B., the Claimant, participated in the videoconference hearing. He was accompanied by counsel Jean-Guy Ouellet who acted as his representative and by H. L., accountant, who acted as a witness.

DECISION

[2] The Tribunal is satisfied that the Canada Employment Insurance Commission (the Commission) had the authority under subsection 52(5) of the *Employment Insurance Act* (the Act) to reconsider the benefit claim during a period of up to 72 months.

[3] The Tribunal concludes that the profits from the business, of which the Claimant owned 50% of the shares, constitute earnings under section 35 of the *Employment Insurance Regulations* (the Regulations) and that they should be allocated. They should be allocated to each week in which profits were received, pursuant to subsection 36(6) of the Regulations.

[4] The Tribunal concludes that the \$15,000 bonus received as salary by the Claimant constitutes earnings under section 35 of the Regulations and that it should be allocated to the week in which the transaction occurred, pursuant to subsection 36(19) of the Regulations.

INTRODUCTION

[5] On October 21, 2013, the Commission informed the Claimant that it had reconsidered his February 15, 2009, claim for Employment Insurance benefits. The Commission indicated that it was of the opinion that the Claimant had made false or misleading representations by not reporting his business income. On the same day, the Commission informed the Claimant that he had allegedly not reported earnings from the company 9210-0528 Québec. As a result, the Commission allocated those earnings at the rate of \$404.75 to the weeks from May 31, 2009, until the week starting June 13, 2010. This created an overpayment of \$21,384.00.

[6] On November 28, 2013, following the Claimant's request for a reconsideration, the Commission indicated that it was amending its decision of October 21, 2013, regarding the

earnings received. It indicated that it was amending the allocation of the earnings so that the overpayment was \$19,150.00 instead of \$21,384.00. The Commission specified that the earnings indicated in the financial statements (\$21,032.00: 50% of net income (\$6,032.00) plus the bonus \$15,000.00) must be allocated to the period from July 1, 2009, to June 30, 2010 (365 days = \$57.82/day). For the weeks from July 5, 2009, to June 13, 2010, \$403.00 must be allocated to each week. The Claimant appealed the reconsideration decision to the Tribunal on December 20, 2013.

TYPE OF HEARING

[7] This appeal was held by videoconference on September 8, 2014, for the reasons given in the Notice of Hearing dated June 11, 2014.

ISSUES

[8] The issues are as follows:

- (a) Does the Commission have 72 months to reconsider the benefit claim that started February 15, 2009?
- (b) Do the amounts received constitute earnings within the meaning of section 35 of the Regulations?
- (c) If the answer to question (b) is “yes,” were the earnings allocated in accordance with section 36 of the Regulations?

APPLICABLE LAW

Reconsideration

[9] Section 52 of the Act states:

- (1) Despite section 111, but subject to subsection (5), the Commission may reconsider a claim for benefits within 36 months after the benefits have been paid or would have been payable.

(2) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, the Commission must calculate the amount of the money and notify the claimant of its decision.

(3) If the Commission decides that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled,

(a) the amount calculated is repayable under section 43; and

(b) the day that the Commission notifies the person of the amount is, for the purposes of subsection 47(3), the day on which the liability arises.

(4) If the Commission decides that a person was qualified and entitled to receive money by way of benefits, and the money was not paid, the amount calculated is payable to the claimant.

(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.

Earnings

[10] Subsection 35(1) of the Regulations states:

The definitions in this subsection apply in this section.

“employment”

(a) any employment, whether insurable, not insurable or excluded employment, under any express or implied contract of service or other contract of employment:

(i) whether or not services are or will be provided by a claimant to any other person, and

(ii) whether or not income received by the claimant is from a person other than the person to whom services are or will be provided;

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

(c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan*. (*emploi*)

“income”

“income” means 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. (*revenu*)

[11] Subsection 35(2) of the Regulations indicates that the entire income of the claimant, whether wages, benefits or other remuneration, must be taken into account, unless it comes under one of the exceptions in subsection 35(7) of the Regulations.

[12] Subsection 35(10) of the Regulations states:

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;

Allocation

[13] Subsection 36(1) of the Regulations states: “Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.”

[14] Subsection 36(6) of the Regulations states: “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.”

[15] Subsection 36(19) states:

Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

EVIDENCE

[16] The Claimant filed an Employment Insurance claim on February 19, 2009.

[17] Amphibico inc. issued a Record of Employment on February 20, 2009, indicating a shortage of work on February 13, 2009.

[18] On March 30, 2009, the Aquatica Digital website posted an announcement that J. B. had joined the Aquatica team as marketing director.

[19] On May 25, 2009, a certificate of incorporation issued by the Government of Quebec certified the incorporation of the company 9210-0528 Québec inc.

[20] The Canada Revenue Agency (CRA) form dated June 25, 2009 (signed July 24, 2009) names J. B., N. A. and S. B. as directors of the corporation.

[21] The Enterprise Register form “Notice establishing the address of the head office and list of directors,” filed on May 25, 2009, indicates that the directors of 9210-0528 Québec inc. are J. B., B. S. and N. A.

[22] In the electronic reports filed by the Claimant for the period from June 28, 2009, to June 26, 2010, the Claimant indicated for each week worked at eight hours/week a salary of \$170 (GD3-GD3-191). He stated that he was not self-employed.

[23] On March 5, 2012, the Commission contacted the Claimant about his February 15, 2009, benefit claim after receiving information from the CRA indicating that the Claimant applied for a business registration number on June 22, 2009. The Commission asked the Claimant to send it information about his self-employment and to provide a copy of the commercial lease for Aquatica and financial statements for the years 2009 and 2010.

[24] The Claimant returned the completed document on March 15, 2012, and indicated to the Commission that he had not been personally involved in establishing the business and he had not been involved in its operations either. He indicated that he was not self-employed and that he was actively looking for employment in his field and was available to work (GD3-210 to GD3-216).

[25] The financial statements dated June 30, 2010, for 9210-0528 Québec inc. indicate a net annual income of \$12,094 for the period from July 1, 2009, to June 20, 2010 (GD3-221).

[26] The General Ledger Report for 9210-0528 Québec inc. for the period from July 1, 2009, to June 30, 2010, shows a “bonus to shareholders for the year” in the amount of \$30,677.41. A note indicates that this amount was paid in September 2010 (GD3-226).

[27] A pay stub in J. B.’s name, dated September 17, 2010, indicates a gross salary of \$15,000 (\$10,005.34 net) (GD3-227). Cheque #125, issued on September 15, 2010, indicates an amount of \$10,005.34 made out to J. B. (GD3-234). The pay stubs for N. A. and B. S. indicate that each received \$7,500.00 on the same date.

[28] The interview report written by the investigator, C. L., dated April 5, 2012, provides the following information:

- The Claimant had been the director of marketing for Amphibico since 2000 and he was laid off in February 2009. There is only one other company that does this type of work in Montreal, namely, Aquatica. The Claimant indicated that he was

laid off after his meeting with N. A. and B. S. to propose the idea of building a new case for a video camera that could go underwater. The Claimant said he discussed the situation with his accountant as he did not want to lose his Employment Insurance benefits. He was informed that he could continue to work a certain number of hours without losing his benefits. The Claimant indicated that he started working two hours a day as a client service representative from 11:00 a.m. to 1:00 p.m. He indicated that he was paid \$15-20/hour by Aquatica. He indicated that he did not receive any money from 9210-0528 inc.

- The Claimant indicated that, at the same time, he created an incorporated company with B. S. and N. A. for the product since he wanted to protect his idea. He indicated that he owned 50% of the shares, and N. A. and B. S. together held 50%. He indicated that he had to sign all the cheques with N. A. or B. S. providing the other signature. He did not invest any money; his idea was his investment. The Claimant indicated that he did not have a business plan but just sat down with N. A. and B. S. to discuss it. After that (approximately in May), they allegedly started working on the case. The Claimant said he did not do anything else from that day on, except his work as a client representative for Aquatica which he did for 10 hours a week.
- 9210-0528 Québec inc. is located in the same place as Aquatica, and Aquatica's employees are building the camera case. It will also be sold under Aquatica's name.
- The Claimant indicated that he paid \$900 a month in rent to Aquatica. He indicated that he did not do any marketing or sales. He claimed that he did not buy or sell goods, did not look after pay and salaries for the company and could not explain the transportation or travel cost categories. He finally said that he may have gone to a trade exhibition in the United States to sell his product, but indicated that he was representing Aquatica at the time and not 9210-0528 Québec inc.

- The claimant indicated that Aquatica did not have the means to have him work full time. When presented with the fact that he had announced his appointment as marketing director on the Aquatica website, the Claimant indicated that he had done sales and marketing, but was unable to explain why he had not mentioned this when questioned about it at the beginning. He indicated that when his Employment Insurance benefits ended, he obtained full-time employment with Aquatica and his company ceased operations (GD3-223 and GD3-224).

[29] On April 20, 2012, the Commission's investigator contacted B. G., a former Aquatica employee. He indicated that he had worked for Aquatica from April 26, 2010, to December 25, 2010. He is the nephew of the owner, N. A. He indicated that the premises where Aquatica was located was very large. Part of the premises was reserved for administration and part for assembly. Another part was rented to the Soto family, which manufactured aluminum products. Finally, a last part was a video department that J. B. looked after. He indicated that he saw J. B. every day testing his products (video cases) and that J. B. became his boss two weeks before he returned to school. The employee indicated that he believed J. B.'s company had merged with his aunt's company (GD3-225).

[30] On October 21, 2013, the Commission informed the Claimant that it had reconsidered his February 15, 2009, claim for Employment Insurance benefits. The Commission indicated that it was of the opinion that the Claimant had made false or misleading representations by not reporting his business income. On the same day, the Commission informed the Claimant that he had not reported income from 9210-0528 Qué. Therefore, the income was allocated at the rate of \$404.75 to the weeks starting May 31, 2009, to June 13, 2010. An overpayment of \$21,384.00 was created.

[31] The Commission contacted the Claimant on November 28, 2013, as part of his request for reconsideration. The Claimant stated that he did not receive the amounts indicated while he was receiving Employment Insurance benefits. He indicated that the amounts (profits and bonus) received for 2009 and 2010 were received after his Employment Insurance claim and were then reinvested in the company. The Commission indicated that it had amended its decision regarding the allocation of earnings and had

consequently amended the overpayment from \$21,384.00 to \$19,150.00. The earnings allocated by the Commission consist of an amount of \$21,032.00 (50% of the net income (\$6,032.00) plus a bonus of \$15,000) allocated to the period from July 1, 2009, to June 30, 2010, at the rate of \$57.82 per day (365 days = \$57.82 per day). An amount of \$230.00 was allocated to the week of June 28, 2009, and an amount of \$403.00 per week to the weeks from July 5, 2009, to June 13, 2010 (GD3-257).

[32] On December 9, 2013, the Claimant contacted the Commission and sent the communication to his accountant. The accountant asked the Commission for information regarding the amounts allocated. The accountant also asked the Commission if there would have been an impact had the company not made any profit during the first 20 months of the year, but only during the last two, and if the bonus would be allocated to the entire year. The Commission informed the accountant that the bonus had been allocated according to the information available to the Commission, since the Commission did not have a detailed breakdown of the financial statements.

[33] On July 4, 2014, the Commission sent the explanations for the calculation that resulted in the creation of a \$19,150.00 overpayment (GD8-2/3).

[34] On September 8, 2014, the Claimant sent additional observations after the hearing, including a monthly breakdown of income and expenses produced by the accountant for 9210-0528 Québec inc. (GD10-49). The table explaining the overpayment was also annotated by the Claimant according to his approximate calculations, which are based on the monthly net profits and losses of the company. Calculated this way, the overpayment would be \$12,767.00 (GD10-51/52).

SUBMISSIONS OF THE PARTIES

[35] The Claimant pointed out that:

- (a) The decision is erroneous in fact and in law, in particular, because the Commission reconsidered the case after 36 months and concluded that there were earnings to be allocated, and also because of the assessment of the amount to be allocated and the method chosen for this allocation.

- (b) The Claimant argued that it is up to the Commission and not the Tribunal to show that it can consider that the Claimant had made a false representation in order to make use of the power that is outside the scope of ordinary law or is exceptional as provided in subsection 52(5). Moreover, a later decision that may have the effect of leading to a possible retroactive allocation of earnings cannot be equated to a false representation. The decision, the evidence in the record and the testimonies show that the decision regarding the bonus was made in September 2010 and that the bonus became payable on that date and was paid in September 2010. Therefore, the Commission cannot show that a false representation was made regarding this amount, which has the effect of excluding this amount from the allocation.
- (c) The Claimant maintains that the Commission based the process of reconsidering the claim after 36 months on the Claimant's initial benefit claim, which was filed on February 19, 2012. On that date, 9210-0528 Québec Inc did not exist and could not have been in operation, since it was not created until May 25, 2009, and did not begin operations until July 1, 2009. Since it is up to the Commission to show that a false representation was made, this burden was not met. Referring to other factors such as those invoked by the Commission would be an error of law because it would reverse the burden of proof onto the Appellant.
- (d) The Claimant maintains that the Tribunal must allow the appeal because the point raised by the Commission in order to go beyond the 36 months does not in any way correspond to a false representation and to the burden of proof that it must meet to exercise this power.
- (e) In the alternative, without any admission on our part, if the Tribunal were to decide that the burden under section 52 of the Act had been met by the Commission, and in compliance with the allocation method favoured by the decisions listed in the Commission's observations, the Claimant maintains that the document to which H. L. refers in his testimony, which details the company's monthly income and expenses, should be used instead of an annual breakdown, according to the decisions

referred to by the Commission. We also provide an approximate allocation of the result of the monthly income as an indication of the impact of this allocation method.

- (f) Finally, and without any admission on our part that this amount can be allocated and in the event that the Tribunal does not accept the monthly allocation method but uses the Commission's annual method, we also submit that the bonus cannot be retroactively allocated and that only the unallocated profits of \$6,032.00 should be allocated using the Commission's method since the bonus was not payable until September 2010 and must be allocated to the week of the transaction as the attached decisions indicate.
- (g) On October 15, 2014, the Claimant submitted additional observations following the Commission's submissions of September 11, 2014. The Claimant argues that since the Commission acknowledges that the bonus cannot be allocated, contrary to the basis of the decision it issued, it is acknowledging that its decision is erroneous. Therefore, if we use the allocation method that the Commission applied, just the \$6,032.00 can be allocated, which would give a weekly amount of \$119.00 for the weeks in question and would significantly reduce the claim to approximately \$5,488.00.
- (h) The Claimant feels that, after the evidence had been finalized at the hearing, the Commission could not present new evidence to support its right to reconsider the claim as it has done in its observations in this case.
- (i) The letter of appeal to the Social Security Tribunal challenging the decision was explicit in that it challenged the right to reconsider the case after 36 months (GD2-2). On the other hand, the Commission clearly indicated that it was the false representation in the initial claim that gave it the right to reconsider the case after 36 months because the Claimant did not report his participation in a business in that claim (GD4-1 and GD3-6). However, this argument cannot be accepted because the company had not even been created when the claim was filed (February 2009 vs. May 2009).

- (j) The Claimant also maintains that, in its additional submissions, the Commission stated that the reasons for the reconsideration after 36 months (GD12-1) were the company's financial results and his failure to report his status as a self-employed worker on the reports that he filed to receive his benefits. He believes that the reference to this new information is not admissible because it was brought up after the presentation of evidence before the Tribunal had ended. In its additional submissions, the Commission can justify the reasoning behind the grounds given and show that the evidence in the file supports the grounds that are contrary to the Appellant's claims, but it cannot raise new evidence that it did not give as the reason for exercising this power. The Commission was duly invited to participate in the hearing (GD1-1) and decided not to do so. It now gives new grounds to justify the reconsideration after 36 months. The Claimant submits that these are late and were not given as the basis for the challenged decision and should not be used to justify this reconsideration after 36 months.
- (k) In case this argument is not accepted, he believes that he did not make any false representations. On the subject of failing to report his self-employment as a basis for a possible false representation, the Commission states in its *Digest of Benefit Entitlement Principles*, section 4.6.8, that "some persons allege that the business' activities in which they are engaged are on behalf of the corporation not on their own account and that they are not self-employed." The evidence shows that the business was incorporated. Consequently, we submit that the Claimant's answer on his reports in the record cannot be considered false representations and cannot be accepted as the basis for reconsideration after 36 months.
- (l) As for the company's financial results and the bonus, the profits were not known until the representations had been made and the bonus was decided when the company's financial situation was learned (acceptance of the financial statement – Mr. H. L's testimony) in September 2010. This factor cannot demonstrate that false representations were made, especially since the Claimant always answered "yes" to the question regarding earnings. He answered "yes" to the question and always reported his earnings during the period in question. He could not report amounts that

were not defined and that were not determined until the financial statements were accepted after the reports had been filed.

- (m) We reiterate that it is up to the Commission and not the Tribunal to show that it can consider that the Claimant had made a false representation in order to make use of the power that is outside the scope of ordinary law or is exceptional as set out in subsection 52(5) (GD4-5). Moreover, a later decision that may have the effect of retroactively creating a need to allocate earnings cannot be equated to a false representation. Therefore, the Commission cannot show that this amount gave rise to a false representation.
- (n) Consequently, we submit that the Tribunal must allow the appeal on the basis that the information given by the Commission to go beyond 36 months does not in any way correspond to a false representation or provide the proof that it needs in order to use this power (GD14-1 to GD14-4).

[36] The Respondent submitted that:

- (a) In this case, the Commission maintains that the Claimant received money from the operation of a business while he was receiving Employment Insurance benefits. The Claimant did not inform the Commission that he was self-employed or involved in the operation of a business. The Claimant provided false or misleading information, either knowingly or not.
- (b) The Claimant received a bonus and money as a shareholder from the net income of 9210-0528 Québec inc. The Commission maintains that these amounts are earnings pursuant to subsection 35(1) of the Regulations since the payment represents the results of the company's activities for the fiscal year from July 1, 2009, to June 30, 2010. The Commission maintains that, under subsection 36(6) of the Regulations, these earnings were correctly allocated to the period from July 1, 2009, to June 30, 2010, in addition to the earnings reported by the Claimant in his reports.

- (c) The Commission maintains that the Claimant received net income and a bonus from the operation of a business and that these amounts, both the net income generated and the bonus, must be allocated to each week during the entire benefit period.
- (d) On September 11, 2014, in its additional submission, the Commission stated that, with respect to the Claimant's representations related to subsection 52(5) of the Act, [translation] "by false or misleading representations, the Commission means any information presented in connection with a benefit claim that is false. A false representation may arise from an intentional, knowing or negligent action or from an honest mistake resulting in the real or possible payment of benefits. In this case, it should be noted first that the Claimant never reported being self-employed (pages GD3-20 to 191). However, the Claimant registered the company, 9210-0528 Québec Inc., on May 25, 2009 (pages GD3-193 to 196), which showed profits (page GD3-221), and paid the Claimant a bonus for the fiscal year from July 1, 2009, to June 30, 2010 (page GD3-227). Failure to report his self-employment, even if the Claimant played only a limited role in it, is a false representation, whether it was made knowingly or not. Consequently, the Commission demonstrated that a false representation was made by the Claimant and it could therefore use its power under subsection 52(5) of the Act."
- (e) Second, the document that shows the income and expenses for the company 9210-0528 Québec Inc. for the fiscal year from July 1, 2009, to June 30, 2010, (page GD10-49) shows the same net profit as the document given earlier to the investigator (page GD3-221). This information does not change the Commission's decision to apply 50% of the net profits of \$12,094.00 to the period from July 1, 2009, to June 30, 2010, (50% - page GD3-223).
- (f) Third, the Commission concurs with the arguments made by the representative. The \$15,000 bonus must be considered a transaction under subsection 36(19) of the Regulations and applied to the week when payment was made, namely, September 15, 2010 (page GD3-234). Subsection 36(19) provides for the allocation of earnings to which none of the other subsections apply. The allocation period

varies depending on whether the earnings arise from the performance of services or a transaction. In the first case, they are allocated to the period in which the services were performed, and in the second, to the week in which the transaction occurred. In the case at hand, the Claimant's participation in the company's operations is limited and the bonus cannot be associated with his performance. Although there is no previous condition determining his payment, this bonus is paid on the basis of the Claimant's share in the company (50% - page GC3-223) (GD12-1/2).

- (g) On October 21, 2014, the Commission made an additional submission in response to the Claimant's arguments of October 15, 2014. The Commission indicated that [translation] "in order to reconsider a benefit claim after 36 months, the Commission simply has to show that a false representation or false information was involved, whether or not the Claimant was aware of it. The Commission does not doubt that the Claimant did not know that he had to report the employment in question. However, at the moment that the Commission learned about it, the Commission was in the presence of new information which allows it, under section 52 of the Act, to reconsider the benefit claim. For these reasons, the Commission respectfully asks the Tribunal to confirm its decision to the effect that it could reconsider the decision after 36 months as set out in section 52 of the Act.
- (h) Second, concerning the allocation of earnings, the representative explained that, according to the allocation method the Commission applied, only the amount of \$6,032.00 can be allocated, which would generally give a weekly amount of \$119.00 to be allocated to the weeks in question and would significantly reduce the amount claimed to approximately \$5,488.00. With respect to the amount to be allocated, the Commission referred to its submissions (GD12-1): the document showing income and expenses for the company 9210-0528 Québec Inc. for the fiscal year from July 1, 2009, to June 30, 2010, (page GD10-49) gives the same net profit as the document previously given to the investigator (page GD3-221). This information does not change the Commission's decision to apply 50% of the net profits of \$12,094.00 to the period from Wednesday, July 1, 2009, to Wednesday, June 30, 2010 (50% - page GD3-223).

(i) Therefore, the Commission calculated the allocation this way and rounded the amounts to the nearest dollar:

- 50% of \$12,094 = \$6,047 / 365 days = \$16.57 X 7 days = \$115.96 per week.
- \$66.28 is to be allocated to the week of July 1, 2009.
- \$115.96 is to be allocated to the weeks from July 5, 2009, to June 26, 2010.
- \$66.28 is to be allocated to the week of June 27, 2010.

(j) The exact overpayment will be known when the Commission does the recalculation. A notice of debt will be sent to the Claimant.” (GD16-1)

ANALYSIS

Commission’s arguments following the hearing

[37] The Claimant indicated that the Commission had been duly invited to participate in the hearing, but had decided not to do so. Now the Commission is giving new grounds to justify reconsideration of the claim after 36 months. The Claimant indicated that these grounds are late and should not be accepted as justification for this reconsideration after 36 months.

[38] The Claimant submitted the decision in *Francella*, where the Court indicated that “it would seem to me that, except in the most unusual circumstances, it would be procedurally unfair to remit a matter for reconsideration for the sole purpose of giving one party an opportunity to introduce new evidence that could have been introduced at a prior hearing. Generally, once parties close the evidentiary portion of their cases, they proceed to argument and the case is decided on the basis of the evidence submitted. If evidence was deliberately or even accidentally withheld and it is later found that the evidence would be helpful to the party, it will generally be too late to admit it.” (*Francella v. Canada (Attorney General)*, 2003 FCA 441).

[39] The Tribunal noted that the Commission made additional arguments on two occasions following the hearing. In one of these arguments, the Commission indicated,

among other things, that it sided with the Claimant on the issue of the bonus. The Tribunal also noted that in these additional arguments, the Commission did not present any new evidence but presented new arguments in order to have them taken into consideration by the Tribunal. The Tribunal also gave the Claimant an opportunity to respond to these new arguments.

[40] Therefore, although the Tribunal strongly encourages the Commission to follow the established process by submitting its evidence and arguments before the hearing, by attending the hearing and by making submissions after the hearing only in unusual circumstances, the Tribunal is of the opinion that, in the case of this appeal, taking the Commission's arguments into consideration is in the interest of all the parties involved. In fact, the Tribunal cannot accept the Claimant's argument according to which the Tribunal cannot take into consideration the arguments regarding the reconsideration period, while accepting the argument regarding the suggestion that the bonus be allocated to the week in which it was paid, depending on whether these arguments are applicable or not.

Reconsideration

[41] Subsection 52(5) of the Act states that 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.

[42] The Claimant maintains that he did not make any false or misleading representations since he always reported that he was working and included his income in his reports. The Claimant also maintains that he could not report his participation in 9210- 0528 Québec inc. because, at the time that he filed his Employment Insurance benefit claim, the company was not in operation since it did not come into being until May 25, 2009, at the earliest. The Claimant also maintains that the decision regarding the bonus was made in September 2010 and became payable on that date and was paid in September 2010. Therefore, the Commission cannot show that a false representation was made regarding this money.

[43] On the other hand, the Commission maintains that the Claimant never reported that he was self-employed although he had registered a company, 9210-0528 Québec Inc., on

May 25, 2009, which showed a profit and paid the Claimant a bonus for the July 1, 2009, to June 30, 2010, fiscal year. The failure to report his self-employment, even though the Claimant played only a limited role in the company, is a false representation, regardless of whether it was made knowingly or not. Consequently, the Commission maintains that, since the Claimant made a false representation, it can use the power that it has under subsection 52(5) of the Act.

[44] In *Dussault*, the Federal Court of Appeal quotes *Langelier* as follows:

With respect, I consider that the Umpire misdirected himself when he imposed on the Commission a burden pursuant to s. 43(6) of proving [Translation] “that the Claimant knowingly made false statements”. That is actually the burden imposed by s. 33(1), dealing with penalties. All Parliament requires in s. 43(6) is that “in the opinion of the Commission, a false or misleading statement . . . has been made”.... Of course, in order to arrive at this conclusion the Commission must be reasonably satisfied that “a false or misleading statement or representation has been made in connection with a claim”.

In other words, the mere existence or presence of a false or misleading statement suffices, to the degree that the Commission is reasonably satisfied of this fact, to trigger the application of subsection 43(6) without the need to find intention in the person making the statement. Its existence is inferred objectively from the fact. (*Canada (Attorney General) v. Dussault*, 2003 FCA 372).

[45] The Claimant maintains that the Commission did not ask him whether he owned a business except at the time that he filed his claim for benefits. He did not own a business at that time. Consequently, he maintains that the Commission did not ask him for this information and that he therefore did not make a false or misleading representation since he reported that he worked and indicated his earnings. Moreover, he indicated that the Commission itself acknowledged in section 4.6.8 of the *Digest of Benefit Entitlement Principles* that “Some persons allege that the business’ activities in which they are engaged are on behalf of the corporation not on their own account and that they are not self-employed.”

[46] The Tribunal notes that, when filing his reports, the Claimant was asked “are you self-employed?” The Claimant answered in the negative. The Tribunal also notes that since the earnings from the business were not reported when the reports were filed, this created a discrepancy between the amount reported and the amount received.

[47] Although it is not up to the Tribunal to make this determination, the Tribunal is of the opinion that subsection 52(5) should be interpreted very broadly since it must be that “in the opinion of the Commission,” a false or misleading statement or representation has been made.

[48] The Tribunal is of the opinion that, although the Claimant may have reported that he was working and indicated his income at the time that he filed his reports, and although the business was not created until after he had filed his claim for benefits, he should have reported his participation in the business or at least his earnings from it. The Claimant indicated at the hearing that he did not know that he had to do so, but the Tribunal is of the opinion that ignorance of the law cannot justify this failure and does not counter the fact that the Commission may determine, as required by the Act, that the Claimant made a false or misleading representation.

[49] Therefore, the Tribunal is of the opinion that the Commission was reasonably satisfied that a false or misleading representation had been made, whether knowingly or not, in order to apply subsection 52(5) of the Act. The Tribunal is satisfied that the Commission acted judicially in reviewing the Claimant’s benefit claim within the 72 months provided for in the Act.

Earnings

[50] Subsection 35(2) of the Regulations states that the earnings to be taken into account are the entire income of a claimant arising out of any employment, unless they come under an exception such as those set out in subsection 35(7) of the Regulations.

[51] Paragraph 35(1)(b) defines employment as including “any self-employment, whether on the claimant’s own account or in partnership or co-adventure.”

[52] Paragraph 35(10)(c) states that, in the case of a claimant who is self-employed in employment other than farming, income includes the amount of the gross income from that employment remaining after deducting the operating expenses, other than capital expenditures, incurred therein.

[53] The Federal Court of Appeal also confirmed the principle whereby amounts that constitute earnings under section 35 of the Regulations must be allocated according to section 36 of the Regulations (*Boone et al v. Canada (Attorney General)*, 2002 FCA 257).

[54] In *McLaughlin*, the Federal Court of Appeal confirmed the principle 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 (*McLaughlin v. Canada (Attorney General)*, 2009 FCA 365).

[55] In *Roch*, the Court speaks of a connection between the earnings and the services provided. It indicates that an amount that is not in consideration of work done in the traditional sense and that was not expressly included by the Commission in the Regulations can be considered earnings if “this amount is comparable to earnings and there is a ‘certain connection’ or a ‘sufficient connection’ between the claimant’s employment (in the absence of work done in the traditional sense) and the sum received” (*Canada (Attorney General) v. Roch*, 2003 FCA 356).

[56] In *Lafave*, the Court pointed out that “in this case, the amount of the applicant’s income is determined not from the company’s net profit, but from the gross income of the company remaining after deducting the operating expenses incurred other than capital expenditures, as provided in section 35 of the *Employment Insurance Regulations*” (*Lafave v. Canada (Attorney General)*, 2003 FCA 66).

(i) Company profits

[57] The company’s documents indicate that the Claimant owned 50% of the shares in 9210-0528 Québec inc. The financial statements show a net profit of \$12,094/\$12,095 for the fiscal year from July 1, 2009, to June 30, 2010 (GD3-221 and GD10-49).

[58] Therefore, based on the evidence presented, the Tribunal is satisfied that the Claimant can be considered self-employed as a co-adventurer in 9210-0528 Québec inc, of which he owns 50% of the shares. The Tribunal is satisfied that the income from this company, after operating expenses are deducted, constitutes earnings under subsection 35(10) of the Regulations and must therefore be allocated.

(ii) Bonus

[59] The Claimant received a cheque in the amount of \$15,000 (\$10,005.34 net) from this same company on September 15, 2010 (GD3-234). The pay stub for September 17, 2010, indicates \$15,000 paid as salary. The Claimant indicated that this was a bonus paid out for tax reasons and based on the company's financial results on June 30, 2010.

[60] The Tribunal took into consideration the fact that the bonus was paid as salary by the company of which the Claimant was co-owner. The Tribunal is of the opinion that, although the Claimant may not have directly provided services for this bonus, it is directly connected to his participation in the company. Moreover, since it was identified as salary on the pay stub and placed on the "wage and salaries" line of the financial report, the Tribunal is of the opinion that the connection between the employment and the amount received has been established and that, consequently, it represents earnings within the meaning of subsection 35(2) of the Regulations. This amount must therefore be allocated.

Allocation of earnings

(i) Company profits

[61] Subsection 36(6) of the Regulations states that: "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."

[62] The Claimant maintains that the company's income should be allocated on a monthly basis as detailed in the document submitted at the hearing (GD10-49) and to which Mr. H.

L.'s testimony refers. The Claimant also submitted an approximate calculation of the overpayment based on this allocation.

[63] The Claimant submitted CUB 80207, which states that: "The case law has established very clearly that the allocation of income received through the operations of a business must be based on the net income generated each week during the benefit period, even if the claimant suffered a net loss during the business's operations for a longer period (CUB 28198, CUB 63911 and CUB 71595)."

[64] The Commission maintains that the Claimant received net income and a bonus by operating a business and that these amounts must be allocated to each week during the entire benefit period, according to the net income generated and the bonus. In its additional arguments, it specified that [translation] "the document listing the income and expenses for 9210-0528 Québec Inc. for the fiscal year from July 1, 2009, to June 30, 2010 (page GD10-49) shows the same net profit as the document previously given to the investigator (page GD3-221). This information does not change the Commission's decision to allocate 50% of the net profits of \$12,094 to the period from July 1, 2009, to June 30, 2010 (50% - page GD3-223)" (GD12-1).

[65] The Commission allocated the amounts in the following manner: "The Commission exposed its position that earnings reported on the financial statement (\$21,032.00: 50% of net revenue = \$6032.00 and bonus (\$15,000.00)) are to be allocated during the period of July 1st, 2009 to June 30, 2010 (365 days = \$57.82 per day) according to legislation and regulation. For the week of June 28, 2009, an amount of \$230.00 is allocated. For the weeks from July 5, 2009 to the week beginning June 13, 2010, an amount of \$403.00 is allocated each week (pages GD3-258 to 259). Consequently, the allocation of the sums created an overpayment of \$19,150.00" (GD4-2). The Commission also maintains that the document provided at the hearing detailing the income and expenses on a monthly basis (page GD10-49), [translation] "shows the same net profit as the document previously given to the investigator (page GD3-221). This information does not change the Commission's decision to allocate 50% of the net profits of \$12,094 to the period from July 1, 2009, to June 30, 2010 (50% - page GD3-223)" (GD12-1).

[66] The Tribunal notes that the net profits from 9210-0528 Québec inc. for the fiscal year from July 1, 2009, to June 30, 2010, are \$12,094 (GD3-221) and \$12,095 according to the monthly details (GD10-49), or approximately the same profits. Since the Claimant owns 50% of the shares in the company, the profits to be allocated are \$6,047.50 or 50% of the net profits of \$12,095.

[67] The Tribunal notes that the Commission and the Claimant refer a few times to an amount of \$21,032, namely the \$15,000 bonus plus \$6,032 in net profits, but the Tribunal is of the opinion that there was a calculation error since the amount of net profits shown in the annual and monthly financial statement indicates a net profit of \$12,094 or \$12,095 and the Claimant owns 50% of the shares. The Tribunal is of the opinion that the amount to be allocated is \$6,047.50 as net profits from the company of which the Claimant owns 50% of the shares. The rounded amount is \$6,048.¹

[68] The Tribunal is of the opinion that subsection 36(6) of the Regulations clearly states that earnings must be allocated to the weeks in which the services that gave rise to the earnings were performed. Therefore, given that the company provided services for each of the weeks in which it was in operation, the Tribunal is of the opinion that the earnings must be allocated to each of these weeks since these are the weeks in which the services were performed. Therefore, these are not earnings that arise from a transaction but earnings that arise from services provided.

[69] Moreover, this position is also supported by the fact that the Claimant's reports also ask for the income for each week concerned to be reported. Therefore, the Tribunal is of the opinion that, given that a statement of monthly results was sent by the Claimant, this statement of results must be taken into consideration and consequently, the earnings must be allocated to all of the weeks included in the period during which the services were performed that gave rise to the earnings.

[70] Therefore, the amounts to be allocated must be based as follows for each of the months in the monthly details submitted by the Claimant (GD10-49):

¹. See paragraph 71.

- July 2009 \$13,419 (50% of \$26,837)
- August 2009 \$257 (50% of \$514)
- September 2009 \$685 (50% of \$1,370)
- October 2009 \$14,377 (50% of \$28,754)
- November 2009 \$5,267 (50% of \$10,534)
- December 2009 \$542 (50% of \$1,084)
- January 2010 \$6,771 (50% of \$13,541)
- February 2010 \$613 (50% of \$1,226)
- March 2010 \$2,071 (50% of \$4,141)
- April 2010 \$1,703 (50% of \$3,405)
- May 2010 \$0
- June 2010 \$0

[71] The Tribunal wants to point out that, given that the monthly detail is given priority in the allocation of earnings, the total amount to be allocated is \$6,047.50 (rounded to \$6,048) instead of \$6,047.

(ii) Bonus

[72] Subsection 36(6) of the Regulations reads: “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.”

[73] Subsection 36(19) of the Regulations reads:

Where a claimant has earnings to which none of subsections (1) to (18) apply, those earnings shall be allocated

(a) if they arise from the performance of services, to the period in which the services are performed; and

(b) if they arise from a transaction, to the week in which the transaction occurs.

[74] The Claimant received a bonus of \$15,000, which was paid as salary. As mentioned earlier, the Tribunal indicated that this amount was considered earnings under subsection 35(2) of the Regulations. Therefore, the issue is to what period these earnings should be allocated under section 36 of the Regulations.

[75] The Claimant maintains that the bonus cannot be allocated retroactively and that there are only the unallocated profits of \$6,032.00 to be allocated according to the method used by the Commission since this bonus was not payable until September 2010 and must therefore be allocated to the week of the transaction.

[76] At the hearing, Mr. H. L., the company's accountant, indicated that the bonus had not been decided until September after the financial statements had been prepared. The bonus was a tax issue, intended to reduce taxes. Mr. H. L. pointed out that a company has three months to file its financial statements after the end of its fiscal year. Consequently, the decision to pay out a bonus was not made until September 2010.

[77] In its additional arguments, the Commission indicated [translation] "that it agreed with the arguments made by the representative. It indicated that the \$15,000 bonus should be considered a transaction under subsection 36(19) of the Regulations and applied to the week in which the payment was made, namely, September 15, 2010 (page GD3-234). It added that since the Claimant's participation in the company's operations was limited, the bonus cannot be associated with his performance. Even if there was no prior condition determining its payment, the bonus was paid according to the Claimant's share in the company (50%) (GD12-2).

[78] The \$15,000 bonus was paid on September 17, 2010, as the Claimant's salary (GD3-227). However, the bonus appears in the books, according to the monthly details submitted by the Claimant, under the month of June 2010 (GD10-49). The "wages and salaries" line of the "statement of operations" also shows for the period from July 1, 2009, to June 30, 2010, a total of \$30,833 (GD3-221) and an identical total is arrived at by adding the "wages and salaries" and "DAS" lines in the monthly details document provided (GD10-49). A note indicates "... Distribution of bonuses made at year end and DAS paid in Dec 2010".

[79] Subsection 36(19) provides for the allocation of earnings to which none of the other subsections apply. The allocation period varies depending on whether the earnings are from the performance of services or from a transaction. In the first case, they are allocated to the period in which the services were performed. In the second case, they are allocated to the week in which the transaction occurred.

[80] Given that this was a tax decision and no services were rendered in exchange for this money, the Tribunal is satisfied that this was indeed a transaction. Therefore, based on the evidence presented, the Tribunal is of the opinion that the \$15,000 bonus received by the Claimant on September 17, 2010, must be allocated to that week since it is the week in which the transaction occurred.

CONCLUSION

[81] The appeal is allowed in part.

Charline Bourque

Member, General Division

DATE OF REASONS: February 6, 2015