[TRANSLATION]

Citation: ***P. R. v. Canada Employment Insurance Commission*****, 2015 SSTAD 611**

Date: May 21, 2015

File number: AD-13-117

APPEAL DIVISION

Between:

P. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Hearing held by teleconference on May 19, 2015

DECISION

[1] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing.

INTRODUCTION

[2] On April 5, 2013, a Board of Referees found that:

- The Appellant's earnings had been allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* ("the *Regulations*").

[3] The Appellant filed an application for leave to appeal the Board of Referees' decision on April 29, 2013. The application for leave to appeal was allowed on January 5, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant and his counsel, Christian Lajoie, attended the hearing. The Respondent, represented by Elena Kitova, also attended the hearing.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must determine whether the Board of Referees erred in fact and in law in finding that the Appellant's earnings had been allocated in accordance with sections 35 and 36 of the *Regulations*.

ARGUMENTS

[8] The Appellant's arguments in support of his appeal are as follows:

- The Board of Referees erred in its calculation of income under subsection 35(10) of the *Regulations*;

- The Board of Referees erred in law in making its decision or order;

- The Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

- According to the Appellant, all annual expenses of the business must be taken into account;

- The Board of Referees erred in establishing income from a business over a period of less than 12 months pursuant to accounting concepts. Those concepts also apply in employment insurance matters;

- What must be calculated under paragraph 35(10)(*c*) is the income generated over a 12-month period. The operating expenses incurred during the year must therefore be subtracted from the gross income generated during the year. The income so calculated is then allocated in accordance with subsection 36(6) to the number of weeks in which services were performed;

- The Board of Referees erred in excluding some operating expenses under paragraph 35(10)(*c*) of the *Regulations*, namely depreciation costs. Only capital expenditures are excluded, and depreciation is not a capital expenditure;

- Undistributed profits must be used to keep the business going the entire year and ensure its survival between snow removal seasons.

[9] The Respondent's arguments against the appeal are as follows:

- The Board of Referees' decision is not based on an error of law or fact and the Board did not act beyond or refuse to exercise its jurisdiction;

- Paragraph 35(1)(*b*) of the *Regulations* defines the word "employment" as any self-employment, whether on the claimant's own account or in partnership or co-adventure. In this case, the Appellant had a 30% share in the business, his spouse had a 30% share and his children each had a 20% share. He was a director and an officer, as president.

- Subsection 36(6) of the *Regulations* states that 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.

- Since this is a seasonal business (snow removal), profits were not supposed to be allocated to 52 weeks;

- According to the Federal Court of Appeal (FCA), profits constitute income within the meaning of the *Regulations*. Citing *Caron Bernier* (A-136-96), the

FCA upheld the decision while noting the three constants that emerged from the decisions on self-employed workers in respect of income earned from a business: (1) the legal status of the business is irrelevant; (2) the amount of time spent is irrelevant; and (3) actually receiving income from the business is unnecessary, as the mere right to receive such income is sufficient;

- The Respondent was justified in considering undistributed profits to be income and in allocating them, since they were income that the Appellant could earn from the operation of the business;
- The Respondent is of the opinion that the Board of Referees' decision is consistent with the legislation and the case law in this area and is reasonably consistent with the facts on file. The Board relied on all the evidence submitted to it and explained its findings using reasoning that was coherent and logical;
- The Board of Referees is in the best position to assess evidence and credibility, and the Tribunal cannot substitute itself for the Board of Referees in the absence of an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness (*Martens v. Canada (Attorney General)*, 2008 FCA 240). The standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

[12] The Tribunal acknowledges that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness (*Martens v. Canada (Attorney General)*, 2008 FCA 240) and

that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

ANALYSIS

[13] In dismissing the Appellant's appeal, the Board of Referees simply stated the following:

> [Translation]
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> After considering the facts on file and the claimant's testimony, the Board of Referees recognizes that the profits generated by the business constitute income under sections 35 and 36 of the *Employment Insurance Regulations*.
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> The Board of Referees finds that 2912-2647 Québec Inc. is 30% owned by the claimant and generates profits that were correctly allocated by the Commission.

[14] The role of the Board of Referees (now the General Division) is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before it and to articulate, in its written decision, its own independent decision with respect thereto.

[15] A Board of Referees does not satisfy the requirements of the *Act* when it states laconically that it has reviewed all the information on file and that the income was correctly allocated by the Commission.

[16] Failure to briefly but clearly state the essential facts on which the Board of Referees' decision is based means that such a decision does not meet the requirements of the *Act*, which constitutes an error of law (*Inkell v. Canada (AG)*, 2012 FCA 290).

[17] It is also an error of law to disregard the opposing party's evidence and arguments in its decision (*Bellefeuille v. Canada (AG)*, 2008 FCA 13).

[18] For the reasons set out above, it is difficult to determine whether the Board of Referees actually followed the principles laid down by the Federal Court of Appeal in *Canada (AG) v. Talbot*, 2013 FCA 53, which indicates the following:

> [21] In my view, the period selected by the Commission is the correct one. The income contemplated in paragraph 35(10)(*c*) is not annual income, which is a concept foreign to the Act. Rather, one must calculate the income generated during the period in which the services were performed and allocate that amount to the number of weeks in that period in accordance with subsection 36(6). Under paragraph 35(10)(*c*), it is the amount of income that the respondents earn "from that employment" that must be calculated, and the period of "that employment" is that during which the services were performed (compare *Canada (Attorney General) v. Vernon*, [1995] F.C.J. No. 1394 at paras. 10 and 11).
>
> [22] Now what of the expenses that may be deducted from this amount? The deduction of the operating expenses incurred during the period is obviously permitted. However, was the Commission correct in reducing the so-called annual expenses according to the number of weeks of activity? I do not think so.
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> [23] According to the wording of paragraph 35(10)(*c*), the expenses that the respondents may deduct in calculating the income from their employment are those that each of them "incurred therein". The characterization of the expense must therefore be based on the object sought in incurring the expense and not the time at which it is incurred. In this case, all of the so-called annual expenses were incurred for the purpose of generating income during the snow-clearing season, since the respondents' business has no other source of income. It follows that all of these expenses must be taken into consideration for the purpose of calculating the income generated during this period.
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> [24] It is the income thus calculated that must be allocated to the weeks in which the services were performed, in accordance with subsection 36(6) of the Regulations.
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> [25] Finally, the Umpire erred in excluding depreciation costs from operating expenses under paragraph 35(10)(*c*) of the Regulations. Only capital expenditures are excluded, and depreciation is not a capital expenditure.

[19] In light of the foregoing errors, the Tribunal's intervention is warranted in this case.

[20] During the hearing of his appeal, the Appellant told the Tribunal that his financial statements did not include all annual expenses of the business, but only expenses at the date the statements were given to the Respondent. Since, according to the Appellant, the filed financial statements are incomplete, the Tribunal is not able to give the decision that the Board of Referees should have given.

[21] For the reasons set out above, the Tribunal refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member having regard to the principles laid down by the Federal Court of Appeal.

CONCLUSION

[22] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member having regard to the principles laid down by the Federal Court of Appeal in *Canada (AG) v. Talbot*, 2013 FCA 53.

[23] The Tribunal orders that the Board of Referees' decision dated April 5, 2013, be removed from the file.

Pierre Lafontaine
Member, Appeal Division