Citation: ***Canada Employment Insurance Commission v. S. W.*****, 2015 SSTAD 1429**

Date: December 14, 2015

File number: AD-14-546

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

S. W.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Teleconference on December 1, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated October 8, 2014 is rescinded and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On October 8, 2014, the General Division of the Tribunal determined that:

- The allocation of earnings was performed with modifications in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the "*Regulations*").

[3] The Appellant requested leave to appeal to the Appeal Division on October 31, 2014. Leave to appeal was granted on April 8, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was represented at the hearing by Carol Robillard. The Respondent was also present and represented by John M. Hannah.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the "*DESD Act"*) states that the only grounds of appeal are the following:

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, whether or not the error appears on the face of the record; or

c. The General Division based its decision 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 decide if the General Division erred in fact and in law when it concluded that the allocation of earnings was performed with modifications in accordance with sections 35 and 36 of the *Regulations*.

ARGUMENTS

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

- Earnings of a claimant who is self-employed shall be allocated to the week in which the services that gave rise to those earnings are performed. Although earnings are the entire income arising from services performed, earnings to be considered are the amount of the gross income from that employment remaining after deducting the operating expenses other than capital expenditures, incurred therein. Operating expenses are ongoing expenses incurred while generating the income;

- The Respondent receives $516.00 and $200.00 per month to compensate for rent and food. The Appellant confirmed these monies should not be considered earnings for allocation purposes;

- However, the $1,001.00 received for services rendered less 15% allowed for operating expenses is earnings pursuant to section 35(10)(c) of the *Regulations* and must be allocated to the weeks in which the Respondent performed the services pursuant to section 36(6) of the *Regulations*;

- The General Division erred when it cited section 35(10)(d) in determining that the difference in rent received from that which is deemed fair market value should be deducted from the monthly income paid to the Respondent for services rendered;

- Section 35(10)(d) of the *Regulations* states income monies paid from an employer to compensate an employee for their rent/accommodation. In the case at hand the rent was paid to the claimant not by an employer but from the client she was caring for. The rent money was excluded as income for EI purposes pursuant to section 35(10)(c) of the *Regulations* as it was not paid for the performance of services;

- Furthermore, the Appellant allowed 15% or $150.00 per month deduction from the $1,001.00 earnings to cover miscellaneous expenses;

- The Respondent had an agreement which paid $516.00 for rent and $200.00 for food. The allocation of $1,001.00 self-employment income under section 36(6) of the *Regulations* must be made on the basis of the net income for services performed each week during the benefit period even though the Respondent may have suffered a loss from the portion she received for rent;

- According to the wording of section 35(10)(c), the expenses that a claimant is authorized to deduct from the income derived from his employment are the expenses "incurred therein." The difference in an amount received for rent

versus the fair market value of otherwise renting that space cannot be an expense “incurred therein” according to the *Regulations*;

- The allocation of the Respondent’s $1,001.00 per month self-employment income less 15% operating expenses complies with section 35(10)(c) and section 36(6) of the *Regulations*. Consequently, the Respondent is liable for the resulting overpayment.

[9] The Respondent submits the following arguments against the appeal:

- With respect to paragraph 57 of the General Division decision of October 8, 2014, the Respondent agrees that the reference to section 35(10)(d) is an error since that subsection does not apply under the circumstances;

- It is submitted that the attempt to slot the entire $1,001 per month funding received by the Respondent into section 35(2) of the *Regulations* is inappropriate. Section 35(2) talks about "income" and "earnings";

- The fact is, the funding paid under the Component Services Schedule of the Client Services Agreement is not anywhere referred to as "income" or "earnings";

- The funding paid is fairly appropriated to the requirement for the provision of suitable accommodation as part of the Client Services Agreement;

- This is consistent with the wording in the Community Living Information Sheet (GD2-106 in one of the previous appeals) and the Ministry of Housing and Social Development Fact Sheet dated September 22, 2008 (GD2-90 in a previous appeal), that the income assistance client, receives $906 monthly, of which $716 is towards the client's shelter and support costs;

- The Appellant keeps claiming that this is the only rental amount of all the funds received by the Respondent;

- The Appellant continues to maintain that the payment was made to compensate the Respondent for the "performance of services", continuing to ignore the submissions on the wording in the Client Services Agreement and Component Services Schedule;

- In summary, the only portion of the $1,001 per month funding received under the Contract which is subject to the provisions of Section 35(2) is the portion of the funding fairly allocated to income or earnings, which does not include the allocation of the funding portion attributed to the required provision of suitable accommodation;

- The consistent finding as a fact that a portion of the funding should be allocated to accommodation is not affected by the erroneous section reference by the General Division since it is only the income or earnings portion of the funding which is subject to the portion of the legislation dealing with income or earnings. The portion allocated to the provision of accommodation is not income or earnings.

- The deduction for the balance of the fair market rent was incorrectly categorized as an expense by the Appellant. It is submitted that it is not an expense that is being claimed, but rather it is rent.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review for question of law is correctness – *Martens v. Canada (AG)*, 2008 FCA 240. The Respondent did not make any representations regarding the applicable standard of review.

[11] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada* (*AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Chaulk v. Canada (AG)*, 2012 FCA 190, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[12] The central issue in this appeal is the determination of what portion, if any, of the payment received by the Respondent from the Contract with Community Living British Columbia (CLBC) should be considered income under the *Employment Insurance Act* and what should be considered as being on account of rent for the client's accommodation.

[13] The client receives directly a monthly income under Persons With Disability Assistance and from that he pays the Respondent $716 per month. $200 of this is for groceries and $516 is applied towards shelter costs. The Respondent stated before the General Division that the market value of the carriage house occupied by the client during the relevant period had a market rental value of $950 per month.

[14] In addition, the Respondent, under the CLBC, receives $1,001.00 per month based on the matters set out in the Component Services Schedule.

[15] On October 14, 2014 the General Division allowed the appeal of the Respondent with modification to re-calculate the deductions so that the Respondent’s income of $1,001.00 per month less 15% allowed by the Appellant be further reduced by the difference between the market value for rent/utilities minus that which the Respondent received [$1,001.00 – ($950.00 -516.00 - $150.00)].

[16] The General Division based its decision on section 35(10)(d) of the *Regulations*. Both parties in appeal recognize that this was an error in law committed by the General Division. The Tribunal agrees with the parties.

[17] In the case at hand, the Respondent did not receive from or on behalf of her employer in respect of her employment monies for the value of her board, living quarters and other benefits as per the requirements of section 35(10)(d) of the *Regulations*. The rent is paid to the Respondent not by an employer but directly from the client she is taking care of.

[18] In view of this error by the General Division, the Tribunal will intervene to render the decision that should have been rendered.

[19] The Respondent takes the position that since the Appellant has acknowledged that the $516, a portion of the $716 received from the client, is "on account of rent" and therefore not "Income" for El purposes, the Respondent argues that it is similarly open and totally reasonable for the Appellant to find that only a portion of the $1,001 per month paid by the CLBC is a fee for services and the balance is on account of fair market rent for the accommodation. The balance of the market rent ($950 - $516 from client equals $434) would leave $417 as the fee for the actual direct services provided by the Respondent.

[20] The Respondent did not seriously contest before the General Division and the Tribunal that the amount received by the Respondent from the CLBC was income from self-employment.

[21] The Tribunal finds that the evidence demonstrates that the CLBC is paying the Respondent to care for the disabled adult, and for that care, they provide a compensation of $1001.00 per month. The position of the Respondent that the fee for the actual direct services provided by the Respondent would be $417.00 after deducting the loss of rent is untenable. Other monies are specifically attributed to rent and food by the Ministry of Housing and Social Development of British Columbia and are paid to the Respondent by the client himself. Thus any monies paid as a result of the CLBC agreement are to be considered earnings arising out of employment under section 35 of the *Regulations*.

[22] According to the wording of paragraph 35(10)(c), the expenses that the Respondent may deduct in calculating the income from her self-employment are those that she “incurred therein”.

[23] The Tribunal is not convinced that “the difference between the market value for rent/utilities minus that which the Respondent received” can be an expense “incurred therein” according to the *Regulations* – *Canada (AG) v. Talbot*, 2013 FCA 53.

[24] Therefore, the Tribunal finds that the allocation of the Respondent’s $1,001.00 per month self-employment income less 15% operating expenses complies with section 35(10)(c) and section 36(6) of the *Regulations*.

CONCLUSION

[25] The appeal is allowed, the decision of the General Division dated October 8, 2014 is rescinded and the appeal of the Respondent before the General Division is dismissed.

[26] The allocation of the Respondent's $1,001.00 per month self-employment income less 15% operating expenses complies with section 35(10)(c) and section 36(6) of the *Regulations*.

Pierre Lafontaine
Member, Appeal Division