Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. J. J.*, 2017 SSTADEI 253

Tribunal File Number: AD-17-42

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

J. J.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 20, 2017

DATE OF DECISION: July 4, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On December 21, 2016, the Tribunal's General Division found that:

> - The Respondent had not made false or misleading statements and, therefore, the Appellant could not proceed with the reconsideration of his claims beyond 36 months;
>
> - The net profits of a business incorporated under Quebec law, if not paid out by declaring a dividend to shareholders in accordance with the applicable law, cannot be considered earnings received by a claimant within the meaning of the *Employment Insurance Act* (Act) and cannot be allocated in accordance with section 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on January 19, 2017. Leave to appeal was granted on February 7, 2017.

FORM OF HEARING

[4] The Tribunal determined that the hearing of this appeal would be conducted by teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not a key issue;
- the information in the file, including the nature of gaps or the need for clarification in the information; and

- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice.

[5] At the hearing, the Appellant was represented by Elena Kitova. The Respondent also attended the hearing, accompanied by his representative, Daniel Leblanc.

THE LAW

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

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.

ISSUES

[7] The Tribunal must determine whether the General Division erred when it concluded that the Appellant was not justified in reconsidering the benefit claim under section 52 of the Act.

[8] The Tribunal must decide whether the General Division erred in determining that the Respondent's business income did not constitute earnings and could not be allocated.

SUBMISSIONS

[9] The Appellant’s arguments in support of its appeal are as follows:

- The General Division erred in law in its decision. Based on subsection 52(5) of the Act, the Appellant does not have to establish that the claimant knowingly

made false or misleading statements, but rather has to show that it could believe that “a false or misleading statement or representation has been made in connection with a claim.”

- The undisputed evidence is that the Respondent's business generated a net profit during the period of time in dispute. The Respondent's biweekly reports showed that he had only reported working for and receiving earnings from René-Lévesque School Board. He did not disclose earnings from his self-employment and responded in the negative to the question: "Is there any other money that you have not told us about that you received or will receive for the period covered by this statement?"

- The General Division erred when it imposed an excessively heavy burden on the Appellant and ignored insights from the Federal Court of Appeal on the issue.

- The General Division erred in law as well as in fact and law when it found that the Respondent's share in the business was not probative, that he did not participate in the operating of the business and, therefore, that no allocation of earnings was necessary.

- The General Division erred in fact and law when it found that, for the application of the Act and Regulations, the terms "co-adventurer" and "investor" [translation] "are not two qualifications that differ or that lead to different consequences but rather that go in one single direction to overcome the presumption of subsection 30(1) [...]"

- The facts on the record show that the Respondent owns 26% of a business. In 2009, he made his application with the hours worked for his business. Since then, although only occasionally and in a limited way, he has participated in its operation. This participation goes beyond a [translation] "simple interest for his investment." Indeed, he did not invest any personal money.

- The General Division erred when it allowed the appeal based on the Appellant's decision rendered for the application established on June 12, 2016. That request

is not part of the appeal and the Tribunal member did not have all the facts regarding that application at his disposal.

- The Respondent clearly has an interest in the family business, and he operates it as a co-adventurer, although in a limited way, which makes him a "self-employed person" under subsection 30(1) of the Regulations. Therefore, the Respondent's share of the profits from his business constitutes earnings to be allocated in accordance with sections 35 and 36 of the Regulations.

- The General Division erred in law in cancelling the allocation of earnings on the grounds that, because the net profits of a business incorporated under Quebec law are not paid out by declaring a dividend to shareholders in accordance with the *Quebec Business Corporations Act*, they cannot be considered earnings to be allocated under the Act and Regulations.

- The General Division's decision is contrary to the principles of the Federal Court of Appeal, which established many times that income generated from any employment must be deducted from otherwise payable benefits, including income from self-employment as a co-adventurer. It is not necessary for the claimant to have received an actual amount from a business in which he participates for the net income generated from this business to be considered earnings under the Regulations. The mere right to receive such income is sufficient.

- In this case, the facts show that the business had generated net returns during the period at issue. The amount attributable to the Respondent should have been allocated, regardless of the decision made by shareholders on whether or not to divide profits.

- The Federal Court of Appeal has repeatedly confirmed that the scope of paragraph 35(10)(*c*) of the Regulations cannot be limited by considerations related to corporate structure.

[10] The Respondent submits the following reasons against the Appellant’s appeal:

- He demonstrated beyond any doubt that his status was that of an investor and not of a self-employed person. It is appropriate to re-read the Respondent's answers in the 19-page questionnaire used to establish his status.

- The arguments related to the reconsideration period are inapplicable, because the recognized status as investor renders any reconsideration period obsolete and out of context.

- The arguments related to the standard of review are far-fetched and are only intended to overwhelm the Respondent with items that are irrelevant to his file. The General Division only endorsed Service Canada's decision, which confirmed the status of investor and particularly the Respondent's good faith.

- The arguments related to the allocation of earnings are also inapplicable, because the recognized status of investor excludes any allocation of earnings.

STANDARDS OF REVIEW

[11] The Appellant submits that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law, as well as for questions of fact, the Appeal Division must show deference to the General Division. It can intervene only if the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Respondent did not make any submissions regarding the applicable standard of review.

[13] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court."

[14] The Federal Court of Appeal further indicated that:

> Not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[15] The Federal Court of Appeal concludes by emphasizing that "[w]here it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act."

[16] The mandate of the Tribunal's Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[17] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it or its decision was unreasonable, the Tribunal must dismiss the appeal.

ANALYSIS

INTRODUCTION

[18] This decision concerns file numbers AD-17-42, AD-17-43, AD-17-44, AD-17-45, AD-17-46, AD-17-47 and AD-14-48.

Reconsideration period

[19] The General Division found that the Appellant was not justified in reconsidering the Respondent's claim for benefits under section 52 of the Act.

[20] The Federal Court of Appeal determined in *Langelier* (A-140-01), *Lemay* (A-172-01) and *Dussault* (A-646-02) that, to be granted the extended time to reconsider set out in subsection 52(5) of the Act, the Appellant does not have to establish that the claimant in

question made false or misleading statements but must instead simply **show that it could reasonably find that a false or misleading statement was made** in connection with a benefit claim.

[21] The General Division determined that for the Appellant to be able to extend the reconsideration period from 36 to 72 months, there had to be false or misleading statements made knowingly by the Respondent.

[22] The Tribunal is of the opinion that the General Division erred in law on the issue of the reconsideration of the Respondent's benefit claim.

[23] At the reconsideration stage, the Appellant did not have to show that the Respondent had knowingly made a false or misleading statement. The Appellant merely had to suspect that a false or misleading statement had been made.

[24] In this case, could the Appellant have reasonably found that the Respondent had made a false or misleading statement or representation?

[25] The Appellant found that a false or misleading statement or representation had been made in connection with the Respondent's statements because he did not declare business 3088-5669 Quebec Inc. and its profits. It was a business where he held an administrative position or, more specifically, secretarial. In his electronic reports, the Respondent did not declare self-employed work or income from the business.

[26] In a telephone interview held on September 10, 2015, the Respondent stated that he owned 26% of the business 3088-5669 Quebec Inc. and that his wife, who held the position of president, owned the other 74%. He mentioned that his wife consulted him regarding certain decisions.

[27] In the form used to determine his involvement in the business, the Respondent reiterated that he was a consultant for the business and that he had a bachelor's degree in business administration. He performed light maintenance and supervision duties for the business, without receiving any remuneration. He or his wife signed the cheques for the business. He devoted only a few hours to preparatory activities for the business. He focused

on the business as needed and his involvement was limited. He considers the business' success to be reasonable because it provides its co-owner, his wife, with annual work.

[28] During the investigation, the Respondent provided the business' financial statements for the relevant years and the Appellant was able to determine the existence of the business' net profits.

[29] Based on the above-mentioned evidence, and in applying the teachings of the Federal Court of Appeal to this case, the Tribunal considers, on the basis of the evidence, that the Appellant could reasonably find that the Respondent made a false or misleading statement or representation and could therefore be granted a period of 72 months to reconsider the Respondent’s benefit claim.

Investor or self-employed person

[30] The Respondent argues that he established beyond any doubt that his status was indeed that of an investor and not of a self-employed person. The Respondent invited the Tribunal to re-read his answers on the form used to establish his involvement in the business. He alleges that the arguments related to the allocation of earnings are inapplicable, because the Respondent’s recognized status as investor excludes any allocation of earnings.

[31] The Tribunal extensively examined the evidence on the record, specifically the form used to determine the Respondent's involvement in the business. The Respondent stated that he was a consultant for the business and that he had a bachelor's degree in business administration. He mentioned that he had performed light maintenance and supervision duties for the business, without receiving any remuneration. He acknowledged that he or his wife signed the cheques for the business. He stated that he devoted only a few hours to preparatory activities for the business and that he only intervened if needed. He noted that his participation in the business was limited. He stated that the success of the business was reasonable because it provided his wife, the co-owner, with work throughout the year.

[32] Given these facts, the Tribunal concludes that the Respondent's position that he is merely an investor is untenable. For the Tribunal, this is by no means pure investment on the part of the Respondent.

[33] A person who operates a company, even as a co-adventurer, is a self-employed person and the income that he or she thus earns must be allocated in accordance with subsection 36(6) of the Regulations. Engaged in a co-adventure in a business within the meaning of that provision when, regardless of the legal forms, he has an interest in it with others—*Canada (Attorney General) v. Tremblay*, A-674-85.

[34] The Tribunal recognizes that the Respondent's involvement in the business was limited. However, this factor does not settle the issue of the remuneration and resulting allocation. The Respondent provided services, though limited, to a business of which he was a co-adventurer, and the earnings must be allocated.

Allocation of Earnings

[35] The Tribunal must decide whether the General Division erred when it concluded that the net profits of a business incorporated under *the Quebec Business Corporations Act* (QBCA), if not paid out by declaring a dividend to shareholders, cannot be considered earnings received by a claimant and therefore allocated.

[36] The General Division, after underscoring in its decision that the Federal Court of Appeal intervened in order to clarify the application and interpretation of provisions relating to the allocation of earnings of self-employed persons, concluded the following:

> [83] Herein, given that the *Employment Insurance Regulations* do not define the types of companies listed in ss. 30(1) and 35(1)b) and given that s. 35(10)c) does not specify whether the income that a self-employed person draws from his/her company includes the net profits of an incorporated company, the Tribunal must apply the rule of complementarity set down by the Federal Court of Appeal and refer to the applicable rules of Quebec civil law.
>
> [84] The *Business Corporations Act* of Quebec, CQLR c. S-31.1, prescribes the separation of a business's property and that of its shareholders. In order for the property of the net profits of a corporation to become that of its shareholders, these profits must be paid by a dividend to shareholders.
>
> [85] In the absence of a unanimous shareholder agreement, s. 112 of the *Act* lists the powers of the board of directors and s. 118(6) provides that the board of directors cannot delegate its power to declare dividends. Section 104 of the same Act further states that a dividend may not be paid if there are reasonable grounds for believing

> that the corporation is, or would after the payment be, unable to pay its liabilities as they become due.
>
> [86] The Tribunal must find that the net profits of a business incorporated under Quebec law, if not paid out by declaring a dividend to shareholders in accordance with the applicable law, cannot be considered earnings received by a claimant within the meaning of the *Employment Insurance Act* and cannot be allocated in accordance with section 36 of the *Employment Insurance Regulations*.

[37] With respect, the General Division decision cannot stand since it conflicts with the Federal Court of Appeal case law and the state of law.

[38] As previously mentioned, a person who operates a company, even as a co-adventurer, is a self-employed person and the income that he or she thus earns must be allocated in accordance with subsection 36(6) of the Regulations.

[39] In the first Federal Court of Appeal decision on a series of dispositions related to self-employed workers, *Laforest v. Commission et al.*, A-296-86, rendered on February 2, 1988, the claimant had started a business selling ladies' clothing while receiving benefits, and became the sole proprietor and prime mover of a company operating under the name, "Boutique D. L. Inc." The claimant argued at the time that it was unnecessary to make corporate disclosures and that a company's undistributed profits are not earnings.

[40] After determining that the undistributed net profits of this business could constitute earnings within the meaning of the Regulations, the Federal Court of Appeal dismissed the application for a judicial review of the decision by Pierre Denault J.A., who had previously found as follows:

> We must therefore examine the activity in which the claimant is engaged and it matters little at this point whether the business is registered or incorporated. It is true that people usually draw income from a company either in the form of salary if they are employed by the company, or a dividend, if their interest is an investment and the company has decided to pay its shareholders. In this regard, the undistributed profits belong to the company, not to the shareholder, even a sole shareholder. However, the scope of the aforementioned s. 57(6)(*c*) cannot be limited by considerations related to the corporate framework.

[41] Later, in *Canada (Attorney General) v. Bernier*, A-136-96, in a decision rendered on February 27, 1997, the claimant filed a claim for benefit shortly after becoming

unemployed. She submitted two records of employment, one from the Commission scolaire de la Mitis and the other from La Ferme Duregard Inc., a corporation that owned a dairy operation, where she had worked as a day labourer from July 4 to October 21. The Respondent held 40% of the corporation's shares and her husband held the remainder.

[42] Writing for the Court, Marceau J. stated the following:

> Over time, as the result of certain "constants" in the case law that have emerged from the decisions of umpires, the application of these provisions has become more consistent and less uncertain. First, the legal status of the operation or business in which the self-employed person works is irrelevant. Second, the relative amount of time spent on the operation or business is irrelevant. Third, actually receiving income from the operation or business while unemployed is unnecessary, as the mere right to receive such income is sufficient. These constants were of course influenced by this Court's only decision (as far as I know) on the subject, *Laforest v. C.E.I.C et al*, file no. A-296-86, rendered on February 2, 1988 (CUB 12019), I pointed out that these constants had seemed necessary in order to give effect to Parliament's intention to include all income directly or indirectly related to work, as opposed to pure investment income.

[43] In *Canada (Attorney General) v. Drouin*, A-348-96, in a decision also rendered on February 27, 1997, Marceau J. spoke further about the constants he had established in *Bernier*, stating that although they could lend themselves to criticism, they nevertheless constituted the state of law concerning the application of provisions related to the allocation of earnings from self-employment.

[44] In *Viel v. Canada (Employment Insurance Commission)*, 2001 FCA 9, a decision rendered on February 9, 2001, the claimant owned 20% of "D" shares, which entitled him to dividends in the company, yet he had not collected the income available to him and the company had not declared or issued any dividends. The Federal Court of Appeal reiterated that no exceptional circumstance gave it cause to reconsider the decision given in *Bernier*.

[45] The Tribunal notes from the aforementioned case law that the argument of separation of patrimonies and non-sharing of profits with shareholders is nothing new. Over time, even after the principle of the complementarity between private provincial law and federal legislation was codified in June 2001, as referenced by the General Division in its decision, the Federal Court of Appeal stood by the application of these constants.

[46] In February 2003, in *Peter Lafave v. Canada (Attorney General)*, 2003 FCA 66, Desjardins J. allocated the income of the claimant's company even though the claimant held only one-third (1/3) of the company's shares and no dividends had been paid out.

[47] The Federal Court of Appeal was not convinced that it should disregard the principles set out in *Drouin*, *Bernier* and *Viel*, for which leave to appeal to the Supreme Court of Canada was refused on October 4, 2001, after the codification of June 2001.

[48] The same situation occurred in 2013, in *Canada (Attorney General) v. Talbot*, 2013 FCA 53, a case in which the claimant and his father were equal shareholders in a company whose activity was limited to snow removal.

[49] In the Tribunal's view, the General Division erred in this case when it applied the first and third constant. In fact, it erroneously placed importance on the legal status of the Respondent's business, and erred by refusing to recognize the Respondent's right to profits.

[50] The Federal Court of Appeal has repeatedly confirmed that the scope of paragraph 35(10)(*c*) of the Regulations cannot be limited by considerations related to corporate structure.

[51] It is true that shareholders receive no dividends until net profits are available to cover their payment, and until the directors determine that they must be paid. However, based on the third constant identified by the Federal Court of Appeal, the simple entitlement to dividends suffices, and dividends need not have been paid out.

[52] Therefore, pursuant to the Regulations and precedents of the Federal Court of Appeal, it is appropriate to allocate the amounts owed to the Respondent, regardless of the legal status of the company or decisions by 3088-5669 Quebec Inc. shareholders concerning whether or not to distribute profits.

[53] As noted by the Federal Court of Appeal in *Bernier*, *supra*, the constants are necessary to give effect to Parliament's intention to include all income directly or indirectly related to work, as opposed to pure investment income.

[54] The Court also pointed out that the requirements and purposes of justice would not be served if it were to challenge or even reverse the constants arising from the application of these provisions concerning self-employed persons.

[55] In reaching its conclusion, the Tribunal considers that the General Division disregarded the continuing and well-established case law of the Federal Court of Appeal concerning provisions applicable to self-employed persons. The General Division therefore erred in law in making its decision.

[56] Since the Tribunal's intervention is justified, it will make the decision that should have been made herein. Based on the evidence before the General Division, the Tribunal has determined that the net profits of 3088-5669 Quebec Inc. constitute earnings under paragraph 35(10)(*c*) of the Regulations and that such earnings must be allocated pursuant to subsection 36(6) of the Regulations.

CONCLUSION

[57] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division