



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v N. C.*, 2019 SST 58

Tribunal File Number: AD-18-165

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

N. C.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: January 25, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal.

OVERVIEW

[2] The Respondent, N. C. (Claimant), made an initial claim for Employment Insurance benefits beginning August 17, 2014. The Appellant, the Canada Employment Insurance Commission, adjusted the Claimant's earnings for the weeks of August 31, 2014, to December 28, 2014, because the Claimant operated a business. The Claimant asked the Commission to review her case. The Commission modified the allocation of the business's earnings for the weeks of August 31, 2014, to December 28, 2014, and stated that applying the business's earnings for the weeks of August 31, 2014, to September 20, 2014, had no impact because the Claimant did not receive benefits for those weeks. The Claimant appealed this decision to the General Division.

[3] The General Division determined that the Claimant's earnings did not need to be allocated because the business reported losses during the period in question.

[4] The Tribunal granted leave to appeal. The Commission argues that the General Division erred because the evidence shows that, for the period in question from July 1, 2014, to June 30, 2015, the company generated a net profit of \$31,040.

[5] The Tribunal allows the Commission's appeal.

ISSUES

[6] Did the General Division err by finding that the earnings could not be allocated because the company reported losses during the period of July 1, 2014, to June 30, 2015?

[7] If so, should the company's net profit that was used to reduce the company's previous net losses be allocated?

ANALYSIS

Appeal Division's Mandate

[8] The Federal Court of Appeal has established that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *Department of Employment and Social Development Act* (DESDA).¹

[9] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.

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

Issue 1: Did the General Division err by finding that the earnings could not be allocated because the company reported a loss during the period of July 1, 2014, to June 30, 2015?

[11] Yes. The Tribunal finds that the General Division erred by finding that the earnings could not be allocated because the company reported a loss during the period of July 1, 2014, to June 30, 2015.

[12] The Commission does not dispute the General Division's decision to consider the company's annual financial statements for the allocation of earnings.

[13] However, the Commission argues that the General Division erred by finding that the earnings could not be allocated because the company reported losses during the period of July 1, 2014, to June 30, 2015.

[14] The Commission submits that the evidence shows instead that the company generated a net profit of \$31,040 during the period in question and that the earnings should have therefore been allocated.

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

[15] The Tribunal notes that the General Division correctly stated the period of July 1, 2014, to June 30, 2015, in the overview section of the decision. The General Division also alluded to this in the decision's evidence and submissions sections.

[16] However, the General Division referred to the periods of July 1, 2012, to June 30, 2013, and of July 1, 2013, to June 30, 2014, in its analysis and found that no allocation could be carried out because the company was showing losses.

[17] The Tribunal finds that 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. At the very least, the General Division decision is ambiguous and lacks clarity about the period it used to come to its finding about the allocation of earnings, which is an error of law.

[18] The Tribunal is therefore justified in intervening and giving the decision that should have been given, according to section 59 of the DESDA.

Issue 2: Should the company's net profit that was used to reduce the company's previous net losses be allocated?

[19] The Commission submits that, because the company generated a net profit of \$31,040 for the period of July 1, 2014, to June 30, 2015, the allocation of earnings under sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations) should be upheld.

[20] The Claimant argues that the financial statements prepared by the company's external accounting firm clearly show that the company did not report any profit as of June 30, 2015, but rather a loss of \$12,643. She submits that accepting the Commission's position when a company is showing losses and without profits would mean that applying the *Employment Insurance Act* and its regulations would go against the *Québec Business Corporations Act*.

[21] The uncontested evidence shows that the company generated a net profit of \$31,040 during the period of July 1, 2014, to June 30, 2015. However, the net profit was used to reduce the company's losses from previous years.²

[22] A person who operates a company, even as a co-adventurer, is self-employed, and the income that they earn must be allocated in accordance with section 36(6) of the EI Regulations.

[23] In this case, the General Division recognized the Claimant's designation as self-employed because she participates in the operation of her business and she is entitled to the company's dividends.

[24] The Federal Court of Appeal has repeatedly confirmed that certain "constants," although they could lend themselves to criticism, have made the application of provisions on self-employment more consistent and less uncertain.³

[25] 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.

[26] 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.

[27] Therefore, according to the EI Regulations and precedents of the Federal Court of Appeal, it is appropriate to allocate the amounts owed to the Claimant, regardless of the

² GD3-66 and GD3-67.

³ *Laforest v Canada Employment and Immigration Commission*, A-296-86; *Canada (Attorney General) v Bernier*, A-136-96; *Canada (Attorney General) v Drouin*, A-348-96; *Viel v Canada (Employment Insurance Commission)*, 2001 FCA 9; *Lafave v Canada (Attorney General)*, 2003 FCA 66; *Canada (Attorney General) v Talbot*, 2013 FCA 53.

decisions made by shareholders regarding whether to distribute profits or whether net profit was earmarked to pay the company's previous deficit, as in this case.⁴

[28] As the Federal Court of Appeal highlighted, 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.

[29] The Federal Court of Appeal 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.

[30] Based on the evidence before the General Division, especially the company's financial statements that show a net profit of \$31,040 for the period of July 1, 2014, to June 30, 2015, the Tribunal finds that the company's net profit constitutes earnings under section 35(10)(c) of the EI Regulations and that these earnings must be allocated in accordance with section 36(6) of the EI Regulations.

⁴ *Ibid.*; *Canada Employment Insurance Commission v RT*, 2017 CanLII 33772 (SST).

CONCLUSION

[31] For the reasons mentioned above, the Tribunal allows the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	January 15, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Julie Meilleur, Representative for the Appellant N. C., Respondent Jacques Landry, Counsel for the Respondent