

Date: 20090313

Docket: A-351-08

Citation: 2009 FCA 68

**CORAM: DESJARDINS J.A.
LÉTOURNEAU J.A.
TRUDEL J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ELLEN L. MASON

Respondent

Heard at Vancouver, British Columbia, on February 25, 2009.

Judgment delivered at Ottawa, Ontario on March 13, 2009.

REASONS FOR JUDGMENT BY:

DESJARDINS J.A.

CONCURRED IN BY:

**LÉTOURNEAU J.A.
TRUDEL J.A.**

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REASONS FOR JUDGMENT

DESJARDINS J.A.

[1] This is an application for judicial review of the decision of an Umpire (R.C. Stevenson) which allowed an appeal by the respondent from a decision of the Board of Referees (the Board).

[2] The Board unanimously upheld a determination of the Canada Employment Insurance Commission (the Commission) to allocate earnings which the respondent declared on her 2002 and 2003 income tax returns as self-employment income for the taxation years 2002 and 2003.

[3] The respondent worked at Vida Wellness Spa in Vancouver from February 18, 2002 to August 6, 2002. On August 12, 2002 she applied for unemployment insurance benefits. She received benefits from August 11, 2002 to February 8, 2003.

[4] In 2006, through the earnings match program, the Commission learned that the respondent had declared self-employment income on her income tax returns for the taxation years 2002 and 2003. The respondent did not declare any of her work or earnings during the time she received unemployment insurance benefits.

[5] In May 2006, the Commission wrote a letter to the respondent requesting copies of her tax returns for 2002 and 2003 and other documents relating to her business income. In June 2006, the Commission contacted the respondent to request any records she had of her income and expenses. The respondent indicated that she only had her tax returns but that she would try to obtain further records.

[6] On June 14, 2006 the respondent wrote a letter to the Commission providing copies of her 2002 and 2003 tax returns. She did not provide other records.

[7] On her 2002 tax return, the respondent reported gross business income of \$19,630 less business expenses of \$25,128.21 (including capital cost allowance of \$146.34) for a net loss of \$5,498.22. On her 2003 tax return, the respondent reported gross business income of \$30,621.16

less expenses of \$7,085.81 (including capital cost allowance of \$250.04) for a net income of \$11,530.55.

[8] The respondent claimed that the business income she reported in 2002 and 2003 consisted of residual payments of commission or their equivalent from USANA, a direct marketing network she was involved in prior to her claim for benefits. The respondent did not provide any supporting documentary evidence from her own records, from USANA or from the accountants who prepared her tax returns.

[9] The Commission concluded that the business income from USANA constituted earnings pursuant to section 35 of the *Employment Insurance Regulations*, (SOR/96-332) (the Regulations), and allocated the money under subsection 36(6) of the Regulations, which pertains to self-employment income. Since the respondent did not provide any particulars as to when the payments were received, the Commission allocated the amounts reported as annual income in 2002 and 2003 over the 52 weeks of each year in dispute, and, since the respondent did not provide any specifics, it made a general allowance of 25% of the gross business income for operating expenses.

[10] The Commission allocated \$14,722 of the 2002 income at \$283 weekly and \$22,966 of the 2003 income at \$442 weekly. This allocation resulted in an overpayment of \$2,146.

[11] The respondent appealed the Commission's decision.

[12] The Umpire allowed the appeal on the basis of a passage from the Commission's representations to the Board which he assumed was a concession from the Commission. The Umpire stated at page 4 of his decision:

If, in fact, the business income received and reported by Ms. Mason in 2002 and 2003 was generated by service performed, or arose from transactions that occurred, before 2002 it was not subject to allocations during those years. In its representations to the Board of Referees the Commission said Ms. Mason "received monies without having worked." I read that as a concession that the monies were not generated by services or transactions during the time Ms. Mason was receiving unemployment benefits. On that basis her appeal should be allowed.

[Emphasis added.]

[13] The Umpire added a provisional alternative that if the Commission did not so concede, the respondent had not discharged the onus on her to prove that services were not performed or transactions did not occur during 2002 and 2003.

[14] With respect to the expenses deducted by the respondent and the corresponding allocation of earnings by the Commission, he then stated at page 4 of his decision:

The Board of Referees did not consider whether the Commission was correct when it decided that the allocation should be based on 75% of the gross income Ms. Mason reported. It is my view that if the Commission accepts the gross figure for self-employment income on an income tax return the onus is on the Commission to prove that the amounts claimed for expenses are not legitimate rather than on the claimant to prove their validity or accuracy. See my decision in CUB 67641A.

The Board of Referees erred in law when it failed to consider and apply subsection 35(10) of the *Employment Insurance Regulations*. As Ms. Mason had a net business income loss in 2002 there were no earnings to be allocated during that year. In 2003 her net income, before deducting capital cost allowance, was \$11,530.55 or \$221.74 per week. One-half of that amount, i.e. \$110.87 should have been allocated to the week of December 29, 2002 and \$221.74 to each of the weeks of January 5, 12, 19, 26 and February 2, 2003. Provisionally, therefore, the matter should be remitted to the Commission to adjust the allocation and the resulting overpayment.

[Emphasis added.]

[15] The passage from the Commission's representations to the Board, which the Umpire interpreted as a concession, reads as follows:

Sums received from an employer are presumed to be earnings and must therefore be allocated unless the amount falls within an exception in subsection 35(7) of the Regulations or the sums do not arise from employment. In the present case, the claimant received monies without having worked in the form of commissions or residuals from direct marketing. These monies are earnings to be allocated to the weeks of the transactions when known per regulation 36(19)(b). Otherwise, it the Commission may seek to allocate the period of earnings over the tax year where self employment earnings were declared per section 36(6) which was done in this case.

[Emphasis added.]

[16] There is no evidence on the record, in the Board's decision or in the Umpire's decision which suggests that the Commission or the applicant made a concession before the Board or the Umpire. The possible existence of a concession was made by the Umpire on his own initiative. It had not been raised by the parties at the proceedings. Consequently, they did not have the opportunity to address this issue in their submissions.

[17] In doing as he did, the Umpire breached the rule of procedural fairness within the meaning of subsection 18.1(4)(b) of the *Federal Courts Act* (the Act). He also ignored the ruling of this Court in *Attorney General of Canada v. Badwal*, [1998] F.C.J. No. 1697 (F.C.A.) according to which an Umpire is not and cannot be seized of an argument unless it had been raised before the Board (See also *Attorney General of Canada v. Garg*, 2004 FCA 410).

[18] This breach in itself warrants the intervention of this Court.

[19] But, as mentioned above, the Umpire took the unusual step of making a provisional alternative, namely, that if a concession had not been made by the applicant, then the respondent had failed to meet her burden of proof. His finding on this point is in harmony with section 48 of the *Employment Insurance Act* (S.C. 1996, c. 23), which reads:

Claim Procedure

Claim required

48. (1) No benefit period shall be established for a person unless the person makes an initial claim for benefits in accordance with section 50 and the regulations and proves that the person is qualified to receive benefits.

Procédure de présentation des demandes

Nécessité de formuler une demande

48. (1) Une personne ne peut faire établir une période de prestations à son profit à moins qu'elle n'ait présenté une demande initiale de prestations conformément à l'article 50 et aux règlements et qu'elle n'ait prouvé qu'elle remplit les conditions requises pour recevoir des prestations.

Information required

(2) No benefit period shall be established unless the claimant supplies information in the form and manner directed by the Commission, giving the claimant's employment circumstances and the circumstances pertaining to any interruption of earnings, and such other information as the Commission may require.

Renseignements requis

(2) Aucune période de prestations ne peut être établie à moins que le prestataire n'ait fourni, sous la forme et de la manière fixées par la Commission, des précisions sur son emploi et sur la raison de tout arrêt de rémunération, ainsi que tout autre renseignement que peut exiger la Commission.

Notification

(3) On receiving an initial claim for benefits, the Commission shall decide whether the claimant is qualified to receive benefits and notify the claimant of its decision.

Notification

(3) Sur réception d'une demande initiale de prestations, la Commission décide si le prestataire remplit ou non les conditions requises pour recevoir des prestations et lui notifie sa décision.

[20] Since the respondent did not provide supporting evidence which would have indicated the dates of these transactions, the Commission and the Board could reasonably infer that they were

earnings following transactions which occurred during the benefit period 2002 and 2003 as per subsection 36(6) of the Regulations, which reads:

(6) 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.

(6) La rémunération du prestataire qui est un travailleur indépendant exerçant un emploi non relié aux travaux agricoles ou la rémunération du prestataire qui provient de sa participation aux bénéfices ou de commissions est répartie sur la semaine où ont été fournis les services qui y ont donné lieu ou, si la rémunération résulte d'une opération, sur la semaine où l'opération a eu lieu.

[Emphasis added.]

[21] The said earnings will therefore be allocated pursuant to subsection 36(6) of the Regulations.

[22] With respect to the calculation and allocation of the earnings, the applicant filed with the Court the following consent to judgment on behalf of the Commission:

- a. The Employment Insurance Commission (the "Commission") agrees with the Umpire's Provisional Alternative in CUB 68737A.
- b. The Commission agrees with the Umpire's calculation of the earnings to be allocated under sections 35 and 36 of the Employment Insurance Regulations.
- c. For 2002, no earnings should be allocated during that year, based on the Respondent's expenses.
- d. For 2003, earnings should be allocated based on the Respondent's net income for that year (after deduction for expenses) = \$11,530.55 or \$221.74 per week.
- e. As noted by the Umpire, one-half of that amount, i.e. \$110.87 should be allocated to the week of December 29, 2002 and \$221.74 to each weeks of January 5, 12, 19 and 26 and February 2, 2003.

[23] Consequently, I would allow this application for judicial review, I would set aside the decision of the Umpire and I would refer the matter back to the Chief Umpire or his designate for a redetermination on the basis that the earnings were received from transactions which occurred during the benefit period 2002 and 2003 and that the earnings shall be calculated and allocated in accordance with the above consent to judgment.

[24] I would allow no costs since the applicant seeks none.

"Alice Desjardins"

J.A.

"I agree.
Gilles Létourneau J.A."

"I agree.
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-351-08

STYLE OF CAUSE: THE ATTORNEY GENERAL
OF CANADA and ELLEN L.
MASON

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 25, 2009

REASONS FOR JUDGMENT BY: DESJARDINS J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
TRUDEL J.A.

DATED: March 13, 2009

APPEARANCES:

GERALDINE CHEN FOR THE APPLICANT

ELLEN L. MASON RESPONDENT, ON HER OWN
BEHALF

SOLICITORS OF RECORD:

JOHN H. SIMS. Q.C. FOR THE APPLICANT
DEPUTY ATTORNEY GENERAL OF CANADA

ELLEN L. MASON RESPONDENT, ON HER OWN
VANCOUVER, BRITISH COLUMBIA BEHALF