A-136-96

CORAM: MARCEAU J.A.
HUGESSEN J.A.
DESJARDINS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

DENISE CARON BERNIER,

Respondent.

REASONS FOR JUDGMENT

MARCEAU J.A.

In defining the parameters and operating rules of its unemployment insurance system for workers who hire their services out to others under contracts of employment, the Unemployment Insurance Act[1] could not fail to refer constantly to self employed persons who do not hire their services out to others but work for themselves, on their own account and for their own profit. This is because, first of all, the contract of employment concept that makes it possible to identify persons who hire their services out can be understood and considered in greater detail only if it is compared with the various contracts into which self-employed persons can enter. A second reason is that workers who hire their services out to others can also,

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[1] It is the Act in its form prior to the recent coming into force of the Employment Insurance Act that is at issue. I therefore felt that I should refer directly to the former Act, which has simply been incorporated into the new Act, without constantly referring to numbers of concordance.

at the same time or subsequently, work on their own account, which cannot be disregarded in determining the extent and nature of the protection to be granted. Workers who temporarily and involuntarily lose all means of benefiting by their work are not in exactly the same situation and state of need as those who, although losing their employment, are nevertheless deprived of only part of what they currently receive from their work.

Thus, pursuant to paragraphs 44(c) and (q) of the Act[2] and with the approval of the Governor in Council, the Commission has adopted a number of regulatory provisions to be applied to determine, first, at what time claimants who, after losing their employment, work on their own account are no longer considered unemployed and are accordingly not entitled to benefits, and second, what impact the income claimants earn working on their own account while remaining unemployed has on the calculation of the benefits to which they are entitled under the Act.[3] The provisions in question are section 43, subsection 57(1) (definition of "employment"), paragraph 57(2)(a), and subsections 57(6), 58(6) and 58(7) of the Unemployment Insurance Regulations. I will reproduce them here and will underline the relevant words:

> **43.** (1) Subject to subsections (2) and (3), where a claimant is

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[2] These paragraphs read as follows:

> **44.** The Commission may, with the approval of the Governor in Council, make regulations
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> . . .
>
> (c) prescribing the conditions and circumstances under which a claimant while self-employed or employed in employment that is not insurable employment or whose pattern of full-time employment differs from the normal and customary employment pattern of employed persons generally has worked or has not worked a full working week;
>
> . . .
>
> (q) defining and determining earnings for benefit purposes, determining the amount of those earnings, providing for the allocation of those earnings to weeks and determining the average weekly insurable earnings in the qualifying weeks of claimants. . . .

[3] The fundamental principle for this is stated in section 15 of the Act, which reads as follows:

> **15.** (1) If a claimant has earnings in respect of any time that falls in his waiting period, an amount not exceeding those earnings may, as prescribed, be deducted from the benefits payable in respect of the first three weeks for which benefits are otherwise payable.
>
> (2) If a claimant has earnings in respect of any time that falls in a week of unemployment that is not in his waiting period, the amount of those earnings that is in excess of an amount equal to twenty-five per cent of the claimant's weekly benefit rate shall be deducted from the benefit payable to the claimant in that week.

(a) self-employed or engaged in the operation of a business on his own account or in partnership or a co-adventure, or

(b) employed in any employment other than that described in paragraph (a) in which he controls his working hours,

he shall be regarded as working a full working week.

(2) Where a claimant is employed as described in subsection (1) and the employment is so minor in extent that a person would not normally follow it as a principal means of livelihood, he shall, in respect of that employment, not be regarded as working a full working week.

(3) Where a claimant is employed in farming and subsection (2) does not apply to his employment, he shall not be regarded as working a full working week at any time during the period that begins with the week in which October 1st falls and ends with the week in which March 31st falls, if he proves to the satisfaction of the Commission that during that period,

(a) he did not work; or

(b) the work he performed was so minor in extent that it would not have prevented him from accepting full-time employment.

. . .

57. (1) In this section,

. . .

"employment" means

(a) any employment, whether insurable, not insurable or excepted employment, under any express or implied contract of service or other contract of employment,

(i) whether or not services are or will be performed by the claimant for any person, and

(ii) whether or not income received by a claimant is from a person other than the person for whom services are or will be performed;

(b) any self-employment whether on the claimant's own account or in partnership or co-adventure; and

(c) the tenure of an office as defined in subsection 2(1) of the Canada Pension Plan;

. . .

(2) Subject to this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings has occurred and the amount to be deducted from benefits payable under subsection 15(1) or (2), 17(4), 18(5), or 20(3) of the Act and for the purposes of sections 37 and 38 of the Act are

(a) the entire income of a claimant arising out of any employment;

. . .

(6) For the purposes of paragraph (2)(a), "income" includes

(a) in the case of a claimant who is not self-employed, only that amount of his income remaining after deducting

(i) expenses incurred by him for the direct purpose of earning that income, and

(ii) the value of any consideration supplied by him;

(b) in the case of a claimant who is self-employed in farming, only 15 per cent of that farmer's gross income from

(i) farming transactions, and

(ii) any subsidies he receives under any federal or provincial program;

(c) in the case of a claimant who is self-employed other than in farming, only the amount remaining of the gross income from that employment after deducting the operating expenses, other than capital expenditures, incurred therein; and

(d) in any case, the value of board, living quarters and other benefits of any kind received by a claimant from or on behalf of his employer in respect of his employment.

. . .

58. (6) The earnings of a claimant who is self-employed, other than in farming, or of a claimant whose earnings are by way of participation in profits or on the basis of a commission, shall be allocated to the week in which the services that gave rise to those earnings are performed and, where no services are performed, allocated to the week in which the transaction that gave rise to the earnings occurred.

(7) The earnings of a claimant who is self-employed in farming shall be allocated

(a) if they arose out of a transaction, to the week in which the transaction occurred; and

(b) if they were received in the form of a subsidy, to the week in which the subsidy was paid.

It is not surprising that this set of provisions on self-employment has constantly raised difficulties of implementation. Of course, many of these difficulties were and still are unavoidable, since they relate to the fact that the provisions in question set out rules applicable to a vast number of unrelated cases that must be decided on the basis of their facts. However, some of them result from the obscurity of the language used. The provisions contain highly equivocal ideas (self-employment), ambiguous concepts (business, partnership, co-adventure), unconvincing logical relationships (time spent on self-employment and the relative importance of self-employment among the claimant's means of livelihood) and an imprecise concordance between their respective texts (paragraph 43(1)(a) v. paragraph (b) of the definition of "employment" in subsection 57(1)), while some of them are undeniably obscure (subsections 58(6) and (7)).

Over time, as the result of certain "constants" 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), but I believe that they came to the fore primarily due to what was perceived as Parliament's intention to include all income directly or indirectly related to work, as opposed to pure investment income. The umpires undoubtedly thought, which is understandable, that any work, however slight, for the business, whether incorporated or not, remained at root, at least in part, income arising out of it.[4] However, the

[4] See, inter alia, CUB-10530, CUB-10936, CUB-12219, CUB-13429, CUB-14085, CUB-20266, CUB-21358, CUB-22717 and CUB-25111.

constants are open to criticism: how can it be so easy to lift the corporate veil and consider the business that of the shareholder rather than of the corporation? Does it not encourage complete idleness to favour a claimant who carefully avoids doing anything for the operation in which he or she has an interest over one who spends a minimal amount of time on it? Does it not stifle the initiative of workers to deprive them of any income they might earn working for themselves while waiting to find regular employment on the labour market?

It is therefore understandable that some umpires have hesitated to confirm the standard interpretation. The decision submitted to the Court for judicial review in fact runs counter to the prevailing case law.

The respondent submitted a claim for benefit shortly after becoming unemployed, on October 24, 1994. Her claim was based on two records of employment, one from the Commission scolaire de la Mitis and the other from La Ferme Duregard Inc., a corporation owning a dairy products business for which she had worked as a day labourer from July 4 to October 21. The respondent held 40 percent of the shares in the corporation and her husband held the remainder; the respondent lived on the farm and continued to render services to the business after October 21, although she spent no more than an hour and a half a day, five days a week, working for it.

The Commission approved the claim and established a benefit period after obtaining confirmation from the Minister of National Revenue that the respondent's employment on the farm up until October 24 was insurable and determining that the limited time she spent on the business over the winter did not affect her unemployed status. Shortly thereafter, however, it informed her that pursuant to sections 57 and 58 of the Unemployment Insurance Regulations, the income she received from La Ferme Duregard Inc. constituted earnings for benefit purposes and therefore had to be declared. The respondent objected and appealed to the Board of Referees, which upheld the Commission's decision. However, the Umpire allowed her appeal.

The Umpire relied on a semantic argument based on a comparison between the expressions used in paragraph 43(1)(a) and those found in paragraph 57(6)(b). Paragraph 43(1)(a) refers disjunctively to being self-employed and being engaged in the operation of a business, whereas paragraph 57(6)(b) does not mention a person engaged in the operation of a business. As a result, the Umpire argued, the fact that the respondent is engaged in the operation of a business does not mean that this provision of the Regulations and the others related thereto apply to her work.

This argument of construction is clearly unconvincing. A self-employed person cannot be distinguished from one who is engaged in operating a business. Furthermore, if the words are to be construed literally, in the case of an incorporated business it is the corporation that engages in operating the business, not its shareholders.

There was in fact an argument that could have been used more convincingly to challenge the Commission's determination: was it logical to adopt a position in favour of the claimant prior to October by recognizing that she was indeed an employee of La Ferme Duregard Inc. under a contract of employment that qualified her for benefits and then to adopt another position in October by saying that the claimant was thenceforth "engaged in operating" La Ferme Duregard Inc., which made it necessary to consider her earnings from the business? This argument has already been used by an umpire to challenge the Commission's determination in a similar case (CUB-20498). However, to eliminate the logical inconsistency between the two positions, it should be noted that it would suffice for the Commission to modify the first one, which would be defensible and would be far more unfortunate for the claimants.

It is with this in mind that, after considering the matter at length, I am satisfied that this Court would fail to meet the requirements and ends of justice were it to question, and perhaps overturn, the constants that have emerged from the application of these provisions on self-employment. If it were clear that these constants were not supported by the wording of the provisions or contradicted the

clear intention of Parliament, there would be no reason to hesitate, but that is not the case. In my view, it would be patently unreasonable to change an established practice on the basis of provisions as obscure as these without knowing what practical consequences might result from a change in direction. Only a revised version of the provisions using less ambiguous language would make an enlightened intervention possible, if that were Parliament's wish. It is my view that, as the law now stands, the Court must reproach the Umpire for contradicting a long-standing case law without being able to base that decision on an argument of any value.

I would accordingly allow the application for review, quash the impugned decision and refer the matter back to the Umpire to decide it by dismissing the appeal from the Board of Referees' decision.

Louis Marceau
J.A.

"I concur.
James K. Hugessen, J.A."

"I concur.
Alice Desjardins, J.A."

Certified true translation

Stephen Balogh

A-136-96

OTTAWA, Ontario, Thursday, February 27, 1997.

CORAM: MARCEAU J.A.
HUGESSEN J.A.
DESJARDINS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

DENISE CARON BERNIER,

Respondent.

J U D G M E N T

The application is allowed, the impugned decision of the Umpire is quashed and the matter is referred back to the Chief Umpire to be decided by himself or an umpire designated by him on the basis that the appeal from the Board of Referees' decision must be dismissed.

Louis Marceau
J.A.

Certified true translation

Stephen Balogh

A-136-96

CORAM: MARCEAU J.A.
HUGESSEN J.A.
DESJARDINS J.A.

BETWEEN:

ATTORNEY GENERAL OF CANADA,

Applicant,

- and -

DENISE CARON BERNIER,

Respondent.

Hearing held at Québec, Quebec on Tuesday, February 11, 1997.

Judgment delivered at Ottawa, Ontario on Thursday, February 27, 1997.

REASONS FOR JUDGMENT BY **MARCEAU J.A.**

CONCURRED IN BY: **HUGESSEN J.A.**
DESJARDINS J.A.

IN THE FEDERAL COURT OF APPEAL

A-136-96

BETWEEN:

ATTORNEY GENERAL OF CANADA,

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- and -

DENISE CARON BERNIER,

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REASONS FOR JUDGMENT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	A-136-96
STYLE OF CAUSE:	Attorney General of Canada v. Denise Caron Bernier
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	Tuesday, February 11, 1997
REASONS FOR JUDGMENT BY:	Marceau J.A.
CONCURRED IN BY:	Hugessen J.A. Desjardins J.A.
DATED:	Thursday, February 27, 1997

APPEARANCES:

Carole Bureau	for the applicant
Andrée St-Pierre	for the respondent

SOLICITORS OF RECORD:

George Thomson Deputy Attorney General of Canada Ottawa, Ontario	for the applicant
St-Pierre & Côté Québec, Quebec	for the respondent