

Federal Court of Appeal



Cour d'appel fédérale

Date: 20130225

Docket: A-333-12

Citation: 2013 FCA 52

**CORAM: NOËL J.A.
TRUDEL J.A.
MAINVILLE J.A.**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

BERNARD LAPOINTE

Respondent

Hearing held at Québec, Quebec, on February 21, 2013.

Judgment delivered at Ottawa, Ontario, on February 25, 2013.

REASONS FOR JUDGMENT BY:

NOËL J.A.

CONCURRED IN BY:

**TRUDEL J.A.
MAINVILLE J.A.**

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an application for judicial review of a decision by Umpire Jacques Blanchard (the Umpire) dismissing an appeal by the Employment Insurance Commission (the Commission) against an earlier decision of a Board of Referees. The Umpire found that the Board of Referees had not erred in determining the earnings of Bernard Lapointe (the respondent) pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (SOR/96-332) (the Regulations) and therefore dismissed the Commission's appeal.

[2] The issue relates to amounts deducted from the respondent's income by his employer and remitted on his behalf to the Commission de la Construction du Québec (CCQ). The CCQ was then to pay these amounts to the respondent as vacation pay in July and December of each year (Board of Referees' Decision, p. 2).

[3] The respondent, who was receiving benefits, failed to include these amounts in the calculation of the earnings he reported to the Commission. Following an investigation, the Commission notified the respondent that the amounts in question constituted earnings and had to be allocated, resulting in an overpayment of \$150.

[4] For the purposes of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act), earnings are defined at sections 35 and 36 of the Regulations, the relevant portions of which provisions read as follows:

35. (1) The definitions in this subsection apply in this section.

...

“income”

“income” means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy. (*revenu*)

35. (1) Les définitions qui suivent s'appliquent au présent article.

[...]

« revenu »

« revenu » Tout revenu en espèces ou non que le prestataire reçoit ou recevra d'un employeur ou d'une autre personne, notamment un syndic de faillite. (*income*)

...

[...]

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

...

36 (4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

...

(8) Where vacation pay is paid or payable to a claimant for a reason other than a lay-off or separation from an employment, it shall be allocated as follows:

(a) where the vacation pay is paid or payable for a specific vacation period or periods, it shall be allocated

(i) to a number of weeks that begins with the first

(2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :

(a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

[...]

36(4) La rémunération payable au prestataire aux termes d'un contrat de travail en échange des services rendus est répartie sur la période pendant laquelle ces services ont été fournis.

[...]

(8) Sauf si elle est payée ou payable par suite de son licenciement ou de la cessation de son emploi, la paie de vacances payée ou payable au prestataire est répartie de la façon suivante :

(a) si elle se rapporte à une ou plusieurs périodes de vacances précises, elle est répartie :

(i) sur un nombre de semaines qui commence

week and ends not later than the last week of the vacation period or periods, and

(ii) in such a manner that the total earnings of the claimant from that employment are, in each consecutive week, equal to the claimant's normal weekly earnings from that employment; and

(b) in any other case, the vacation pay shall, when paid, be allocated

(i) to a number of weeks that begins with the first week for which it is payable, and

(ii) in such a manner that, for each week except the last, the amount allocated under this subsection is equal to the claimant's normal weekly earnings from that employment.

[Emphasis added.]

par la première semaine de ces périodes et se termine au plus tard par la dernière semaine de celles-ci,

(ii) de sorte que la rémunération totale tirée par lui de cet emploi dans chaque semaine consécutive soit égale à sa rémunération hebdomadaire normale provenant de cet emploi;

b) autrement elle est répartie, lorsqu'elle est payée :

(i) sur un nombre de semaines qui commence par la première semaine pour laquelle elle est payable,

(ii) de sorte que le montant attribué en vertu du présent paragraphe à chacune de ces semaines, sauf la dernière, soit égal à la rémunération hebdomadaire normale du prestataire provenant de cet emploi.

[Je souligne.]

[5] The Board of Referees was of the view that the respondent did not have to report the amounts remitted to the CCQ, since these were to be allocated under subsection 36(8), not subsection 36(4) as the Commission had concluded. According to the Board of Referees, subsection 36(8) [TRANSLATION] “establishes the mode of allocation of income earned and paid as vacation pay” (Board of Referees’ Decision, p. 2).

[6] In disposing of the resulting appeal, the Umpire agreed with the Board of Referees' reasoning but also provided further reasons. According to the Umpire, the CCQ, upon receiving the amounts deducted by the employer, acts as a trustee and in that capacity holds them on the respondent's behalf. The effect of this relationship is that these amounts lose their character of earnings and become savings. The Umpire relies in particular on two decisions of this Court: *Canada (Attorney General) v. Brière*, [1994] F.C.J. No. 1708 [*Brière*], and *Canada (Attorney General) v. Whelan*, [1989] F.C.J. No. 531 [*Whelan*] (Reasons, pp. 2 and 3).

[7] In support of his application for judicial review, the applicant submits that these decisions do not have the effect attributed to them by the Umpire. He adds that, if the Board of Referees' decision were to be upheld, the consequence would be that the amounts in question would never be taken into account for the purposes of the Act: neither when they are paid in the form of wages, nor when they are paid in the form of vacation pay.

Analysis and decision

[8] I agree with the applicant's assertion that neither of the decisions cited by the Umpire supports his finding. The rule laid down by the Supreme Court in *Bryden v. Canada Employment and Immigration Commission*, [1982] 1 S.C.R. 443 [*Bryden*], and reiterated by this Court in, among other cases, *Whelan*, *Brière* and, more recently, *Sarazin v. Canada (Attorney General)*, 2006 FCA 313 at paragraph 8, is to the effect that vacation pay paid out by a trustee to a claimant after having been remitted to the trustee by the employer no longer has the character of earnings but constitutes, rather, savings (*Bryden*, p. 449).

[9] In this case, the sole issue is whether the amounts remitted to the CCQ by the employer on the respondent's behalf constitute earnings.

[10] With regard to that, it is well established that the amounts withheld by an employer from the earnings of an employee and remitted to a trustee for the employee's benefit have the character of earnings at the time they are so remitted (*Canada (Attorney General) v. Nield*, [1990] F.C.J. No. 862 (FCA), 124 N.R. 333 [*Nield*]; see also *Canada (Attorney General) v. Haycock*, [1990] F.C.J. No. 863 (FCA)). It is not until the amounts are paid out by the trustee to the employee that they lose their character of earnings and acquire that of savings (*Nield*, para. 5):

In order for the vacation pay to lose its normal character of earnings and acquire that of savings, the moneys have to be clearly set aside at each period of pay, after deduction of income tax and unemployment insurance premiums, since they are part of the employee's remuneration; and thereafter they must be kept separate and beyond the needs and control of the employer's operations. Anything less would make it impossible to claim, at the time they are remitted to the employee, that the moneys have already been paid and were merely being kept and "saved" on behalf of the employee.

[Emphasis added.]

[11] Both the Umpire and the Board of Referees confused these two payments and failed to take into account the fact that the issue before them concerned the first payment. In short, the amounts remitted by the employer to the CCQ are not covered by the cases cited by the Umpire and cannot be treated as vacation pay under subsection 36(8) of the Regulations because that is not their character.

[12] I would therefore allow the application for judicial review, set aside the Umpire's decision and refer the matter back to the Chief Umpire or his designate for redetermination on the basis that the respondent's earnings within the meaning of subsection 35(2) include the amounts withheld from his salary and remitted to the CCQ for later payment to the respondent as vacation pay, and that these amounts should therefore have been allocated under subsection 36(4) of the Regulations.

“Marc Noël”

J.A.

“I agree.

Johanne Trudel J.A.”

“I agree.

Robert M. Mainville J.A.”

Certified true translation

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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STYLE OF CAUSE: THE ATTORNEY GENERAL
OF CANADA v. BERNARD
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MAINVILLE J.A.

DATED: February 25, 2013

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