



Reasons for decision

In the matter of an appeal of the Minister's decision under section 14 of the *Wage Earner Protection Program Act*

Ms. Tania Fagnoli,

applicant.

Board File: 33268-C

Neutral Citation: 2020 CIRB 932

July 10, 2020

The panel of the Canada Industrial Relations Board (the Board) was composed of Ms. Ginette Brazeau, Chairperson, assigned to this matter pursuant to section 14.1 of the *Wage Earner Protection Program Act* (the *WEPP Act*).

I. Nature of the Application

[1] On September 19, 2019, the Board received an application to appeal filed by Ms. Tania Fagnoli (the applicant) pursuant to section 14(1) of the *WEPP Act*.

[2] The dispute concerns the Minister's review decision which found that Ms. Fagnoli was not dealing at arm's length with her former employer, 8978611 Canada Inc.

[3] Having reviewed the application, the Board considers it to be untimely. However, even if it had been timely, the Board would have confirmed the Minister's review decision.

II. Background and the Minister's Decision

[4] On January 22, 2019, Ms. Fagnoli filed an application to receive a payment under the Wage Earner Protection Program (WEPP). In her application, she indicated that she was related to her former employer. Under the *WEPP Act*, wages earned while an individual was related to a person who is a director, officer or manager of the former employer or who has a controlling interest in the former employer are not eligible for payment unless an applicant can show that their contract of employment is substantially similar to that of an employee who is not related to

their employer. Such applicants are invited to answer follow-up questions on the nature of their contract of employment. In Ms. Fagnoli's responses, she indicated that her terms and conditions of employment were similar to those of the other employees but that she had invested or lent money to her former employer.

[5] On March 6, 2019, Service Canada, who administers the WEPP on behalf of the Minister of Labour, issued a decision denying payment under the *WEPP Act* on the basis that Ms. Fagnoli was "not dealing at arm's length with a person who held an excluded position: an officer, a director, a manager or a person with a controlling interest."

[6] Ms. Fagnoli requested a review of the decision. She stated that following litigation between the shareholders of the former employer, a judgement was issued by the Superior Court of Quebec determining that her father, the person to whom she is related and who held an excluded position, only owned 26 percent of the shares. She argued that 26 percent does not constitute control. She appended an excerpt of the judgement to her request for review.

[7] Furthermore, Ms. Fagnoli stated that her involvement with the business was as an ordinary employee with no special or particular benefits. She stated that she was hired because she had the necessary qualifications, worked standard hours and received the same benefits as other employees.

[8] On May 7, 2019, Service Canada issued its review decision on behalf of the Minister confirming the initial decision. It stated the following:

Pursuant to section 6 of the Wage Earner Protection Program Act (WEPPA), an individual is not eligible for a WEPP payment where the individual was not dealing at arm's length with related persons who occupy excluded management positions.

After an evaluation of the circumstances of employment, it was determined that you were not dealing at arm's length with your former employer.

Consequently, you are not eligible to receive a WEPP Payment.

[9] It is this decision that Ms. Fagnoli seeks to have changed on appeal. She filed her application to appeal with the Board on September 19, 2019. It appears that she also attempted to file her application with Service Canada in July or August 2019.

III. Positions of the Parties

A. Position of the Applicant

[10] The applicant bases her appeal on a question of law. She states that the shareholding structure of her former employer was the subject of litigation and that the Superior Court of Quebec determined that her father owned 26 percent of the shares.

[11] She states that the review decision does not take that court ruling into consideration. She argues that in order to establish that a person is dealing with a party who is not at arm's length, that party must have a controlling interest in the company. She indicates that there were four shareholders and no controlling party. She states that she was neither a decision-maker nor a director of the company but only an employee with specific tasks and functions. She also indicates that even though she was related to one shareholder, there was no controlling interest and that the decision to liquidate the company was made by the Court. She states that all the shareholders agreed to have her work at the company, that she worked the same hours as the other employees and that she was paid similarly to the other employees. She submits that she should not be penalized because the other employees were not.

[12] She asks that the review decision be reversed.

B. Position of the Minister

[13] Although the Minister has the right to make representations to the Board pursuant to section 15(4) of the *WEPP Act*, the Minister declined to do so in this matter.

IV. The Board's Role on Appeal

[14] A person who is unsatisfied with the Minister's review decision may appeal it to the Board but only on a question of law or jurisdiction (section 14(1) of the *WEPP Act*). The appeal is limited to a review of the information that is contained on the Minister's file:

16 The appeal is to be an appeal on the record and no new evidence is admissible.

[15] Accordingly, the Board is provided with a copy of the file containing all the documents and information that were before the Minister's delegate when the review decision was issued. The Board is prohibited from obtaining additional evidence or documents that would assist it in clarifying the disputed facts. Its only role is to consider the review decision and the information

that was before the Minister's delegate to determine what facts were considered and how the legal questions were analyzed.

[16] The Board may then confirm, vary or rescind the Minister's review decision (section 17 of the *WEPP Act*).

[17] In this case, the applicant is basing her application to appeal on a question of law.

[18] As explained in a recent decision of the Board in *Au*, 2020 CIRB 931, a question of law is a question about the legal test. In the context of an appeal pursuant to section 14(1) of the *WEPP Act*, the Board will have to consider the following:

1. Whether the Minister's delegate applied the correct legal test and asked the right questions in coming to the decision;
2. Whether all aspects of the legal test were applied to the facts;
3. Whether the Minister's delegate took into account all the key facts and the evidence that the law requires the delegate to take into account in the application of a test.

[19] The Board will therefore, review the record and assess the review decision with these principles in mind.

V. The Record

[20] The record that was provided to the Board for this appeal consists of the Review File Summary (the Summary) and the various documents that Service Canada obtained from the trustee and from the applicant.

A. The Summary

[21] The Summary is a document prepared by the Minister's delegate that contains the summary of the facts considered as well as the reasoning behind the Minister's delegate review decision.

[22] The Summary makes it clear that Ms. Fagnoli's wages were not excluded because of a position that she held herself but because she indicated being related to her former employer through her father, Mr. Carlos Fagnoli.

[23] The Minister's delegate then examined the arm's length assessment starting with sections 2(5)(a) and 2(5)(b) of the *WEPP Act* which provide the test to apply to determine whether wages earned by an individual who was not dealing at arm's length with an excluded individual can still qualify for a payment under the *WEPP Act*.

[24] In the Summary, it is indicated that Ms. Fagnoli's father was one of the four company owners and that he was also the only director/officer of the company. The Minister's delegate reported that Ms. Fagnoli had confirmed that her father owned 26 percent of the shares and had a non-controlling interest. The Minister's delegate also indicated that Ms. Fagnoli maintained that she was dealing at arm's length and that she had not received any special treatment. Ms. Fagnoli also confirmed that she had lent \$72,000 of her own money in 2017 in order to keep the company afloat and allow it to continue to pay the employees.

[25] In the "Decision Outcome—Confirm" section of the Summary, the Minister's delegate stated that even though Ms. Fagnoli did not receive preferential treatment and had similar earnings to other employees, she had paid other employees' wages out of her pocket and had invested her own money in the company in order to keep it afloat. It is also stated that her father was one of four shareholders.

[26] In her fact-finding efforts, the Minister's delegate contacted Ms. Fagnoli in order to obtain further information about her relationship with the former employer and confirmed the information provided in the arm's length supplementary questionnaire. This information was used to assess whether Ms. Fagnoli would have entered into a substantially similar contract of employment with her former employer. The trustee was also contacted and confirmed that Ms. Fagnoli's father was registered as an officer/director on the Quebec corporate registry ("Registraire des entreprises Québec") and that he was also the first shareholder ("Premier actionnaire").

[27] The Minister's delegate concluded that Ms. Fagnoli was not dealing at arm's length with her former employer:

Pursuant to the Wage Earner Protections Program Act (WEPPA) .6(d), an individual is not eligible for a WEPP payment where the individual was not dealing at arm's length with related persons who i) are an officer or director, ii) possess controlling interest, or iii) occupied an excluded management position.

Based on an evaluation of the circumstances of employment as stated through applicant statements and answers to the supplementary questions, it was determined that the individual was not dealing at arm's length with the former employer.

B. Other Documents

[28] In addition to the Summary, the record contains a “Supplementary Record of Review” and a number of documents which are reflected in the Summary.

[29] The information statement from the Registraire des entreprises Québec, the province’s corporate registry confirms that Ms. Fagnoli’s father was the former employer’s first shareholder but that he was not a majority shareholder. It also names Mr. Fagnoli as the only director (“administrateur”) of the corporation.

[30] The record also contains a request for appeal that was received by Service Canada on August 20, 2019. Appended to the request is a note signed by the applicant and dated July 17, 2019, stating that it was her second attempt at sending her request for appeal as “[t]he initial appeal was sent 30+ days ago but was returned to sender.” There is also an envelope addressed to the WEPP Processing Centre stamped August 1, 2019, by Canada Post.

VI. Analysis and Decision

A. Timeliness

[31] The present application to appeal was filed with the Board on September 19, 2019. In her application to appeal, Ms. Fagnoli states that she was notified of the Minister’s review decision on May 9, 2019. In other words, the Board received the application to appeal more than five months after Ms. Fagnoli was notified of the Minister’s review decision. She did not provide any reason for the delay in filing her appeal and did not request an extension of time to file from the Board.

[32] The Board’s Rules of Procedure for eligibility appeals provide the following with regard to the filing of an application to appeal:

The Board has determined that an appeal pursuant to section 14(1) of the *WEPP Act* shall, unless circumstances beyond the control of the appellant justify a longer period, be made within 60 days after the day on which the appellant is notified of the Minister’s decision.

If the appellant is unable to file their appeal within the 60-day period, they must provide the reasons for the delay. An extension **may** be granted if the appellant can demonstrate that there were circumstances beyond their control that prevented them from filing within the prescribed time period.

[33] The Board notes that the appeal form prompts applicants to request an extension of time if they are filing their appeal more than 60 days after having been notified of the Minister's decision. In those cases, applicants are invited to explain and demonstrate that there were circumstances beyond their control that prevented them from filing within the prescribed period. The form also invites such applicants to provide supporting documentation.

[34] In her application to appeal filed using the Board's form, Ms. Fagnoli acknowledged that she was filing her appeal beyond the deadline but did not provide any explanation for the delay and did not request an extension from the Board.

[35] The Board is cognizant of the fact that at the time the review decision was issued, it did not have jurisdiction over WEPP eligibility appeals. The Board only acquired such jurisdiction on July 29, 2019, when certain provisions of the *Budget Implementation Act, 2017, No. 1*, (S.C. 2017, c. 20) came into force. Prior to that date, appeals were made to ad hoc adjudicators through Service Canada. The Board is sensitive to the fact that this legislative change may have been a source of confusion for some applicants.

[36] Prior to July 29, 2019, the time limit for filing an appeal was provided in the *Wage Earner Protection Program Regulations*:

13 An appeal to an adjudicator under section 14 of the Act shall, unless circumstances beyond the control of the applicant justify a longer period, be made within 60 days after the day on which the applicant is notified of the Minister's decision.

[37] Therefore, the applicant had 60 days after she was notified of the Minister's decision to file her appeal. That period ended on July 8, 2019, and her appeal request was recorded as received by Service Canada on August 20, 2019, more than a month beyond the time limit. The date stamp on the envelope indicates that it was mailed on August 1, 2019. In her correspondence to Service Canada signed and dated July 17, 2019, she stated that her initial appeal was sent more than 30 days before but that it was returned to her. However, she did not provide any evidence in support of that statement.

[38] The Board finds that the application to appeal is untimely. The applicant may have provided an explanation for her late filing to Service Canada but she did not provide any explanation or any supporting evidence in her application to appeal filed with the Board. It may have been considered differently had Ms. Fagnoli provided a detailed explanation accompanied by a copy of her original correspondence and the envelope that was returned to her with the Canada Post "return to sender" stamp. Her correspondence sent to Service Canada is dated July 17, 2019,

passed the 60-day time limit. It appears from the date stamp on the envelope that it was mailed two weeks later on August 1, 2019. Applicants are expected to act diligently with respect to their rights. Barring circumstances beyond the control of the applicant, the time limits are meant to be firm in order to provide finality and certainty of process. The Board has no basis in this case on which it can grant Ms. Fagnoli an extension and accordingly, dismisses the application on the basis that it is untimely.

[39] However, even if the Board had found the application to appeal to be timely, it would have confirmed the Minister's review decision.

B. Dealing at Arm's Length from the Employer

[40] The Minister's delegate determined that Ms. Fagnoli's wages were not eligible as they were earned while she was not dealing at arm's length with her former employer.

[41] The *WEPP Act* excludes certain wages from eligibility for payment:

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with

“(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.”

[42] Wages earned while an individual was not dealing at arm's length with their former employer may still be eligible for payment if the individual meets the requirements of section 2(5)(a) of the *WEPP Act*.

(5) Despite subsection 4(5) of the *Bankruptcy and Insolvency Act*,

(a) for the purposes of paragraph 6(d), an individual is considered to deal at arm's length with a related person if the Minister is satisfied that, having regard to the circumstances — including the terms and conditions of the individual's employment with the former employer, their remuneration and the duration, nature and importance of the work performed for the former employer — it is reasonable to conclude that the individual would have entered into a substantially similar contract of employment with the former employer if they had been dealing with each other at arm's length; and

(b) for the purposes of subsection 21(4), individuals who are related to each other are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length while so related.

[43] In other words, an individual's wages may still be eligible for payment if the Minister's delegate is satisfied that the individual worked under a contract of employment that is comparable to what would be place for other employees doing similar work even if that individual was dealing at arm's length with the employer. In order to make that determination, the Minister looks at the general circumstances of the individual's employment such as the terms and conditions of their employment, their remuneration, the duration of their employment as well as the nature and the importance of the work they performed for the former employer.

[44] The Board notes that the list of circumstances enumerated at section 2(5)(a) is introduced by the term "including." Such language indicates that the list is not intended to be limitative and therefore, the Minister's delegate can take into account other relevant circumstances in order to make a determination.

[45] The Board will now look at whether the Minister's delegate applied the tests provided in sections 2(5)(a) and 6(d) of the *WEPP Act*, and did so in an unaltered manner, taking into account the appropriate evidence.

[46] Ms. Fagnoli's argument on appeal is that she was related to a shareholder who had a non-controlling interest in the company and that therefore, she qualifies for a payment pursuant to the *WEPP*. She further explains that she worked like the other employees. In other words, she argues that the individual to whom she was related did not have a controlling interest in the former employer and that in any case, she entered into a contract of employment that was substantially similar to that of other employees of the former employer.

[47] It is noted in the Summary that Ms. Fagnoli's father was a shareholder of the former employer. However, it does not appear that this formed the basis of the Minister's determination.

[48] In any event, being related to someone who had a controlling interest in the former employer is not the only basis for exclusion pursuant to section 6(d). The *WEPP Act* also excludes wages earned by a person who was not dealing at arm's length with a director or officer of the former employer or with an excluded manager.

[49] In this case, it appears from the Summary that the Minister's delegate considered that Ms. Fagnoli's father was a director of the former employer and that Ms. Fagnoli was thus not dealing at arm's length with a director of the corporation. Even though it is not clearly stated in the Summary or in the letter communicating the review decision, it can be elicited from the record that the Minister's delegate effectively applied the exclusion provided at section 6(d)(i) of the *WEPP Act* which excludes wages earned by an individual while they were related to a corporate director of the former employer. It is clear from the corporate registry documents that Ms. Fagnoli's father was listed as the sole director and officer of the corporation. The Board sees no error in the application of exclusion provided at section 6(d) of the *WEPP Act*.

[50] The Minister's delegate then turned her mind to whether Ms. Fagnoli's wages could still be eligible for payment pursuant to section 2(5)(a). In doing so, the Minister's delegate applied the substantially similar contract of employment test. The Summary shows that the Minister's delegate took into account the entire circumstances of Ms. Fagnoli's employment to make that determination. While she accepted that Ms. Fagnoli's terms and conditions of employment were similar to those of other employees, the Minister's delegate also found that Ms. Fagnoli lent a substantial amount of money to her former employer in order to pay the salaries of the other employees when the business experienced financial difficulties. For the Minister's delegate, this indicated that Ms. Fagnoli's contract of employment or employment relationship was not substantially similar to that of arm's length employees.

[51] Such a fact is one that the Minister is entitled to take into account when assessing the general circumstances of employment of an individual in order to determine whether an individual entered into a substantially similar contract of employment. The Board sees no error of law in the Minister's application of the test and would dismiss Ms. Fagnoli's appeal.

VII. Conclusion

[52] The Board finds that the application to appeal was filed beyond the time limit and sees no reason to extend it. Therefore, the Board dismisses this appeal on the basis that it is untimely.

[53] Had the application been timely, the Board would have confirmed the Minister's review decision as the Board considers that there is no error of law in the Minister's delegate conclusion on the eligibility of Ms. Fagnoli's wages.

Ginette Brazeau
Chairperson