

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190327

Docket: A-248-17

Citation: 2019 FCA 58

**CORAM: DAWSON J.A.
WEBB J.A.
NEAR J.A.**

BETWEEN:

CRETECO-GUNNER CORPORATION

Appellant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

Heard at Regina, Saskatchewan, on March 25, 2019.
Judgment delivered from Winnipeg, Manitoba, on March 27, 2019.

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**WEBB J.A.
NEAR J.A.**

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REASONS FOR JUDGMENT OF THE COURT

DAWSON J.A.

[1] For reasons delivered orally in Court files 2015-2836 (EI), 2015-3563 (EI), 2015-3564 (CPP) and 2015-2838 (CPP), the Tax Court of Canada dismissed the appellant's appeals made under the *Employment Insurance Act*, S.C. 1996, c. 23 and the *Canada Pension Plan*, R.S.C. 1985, c. C-8. The sole issue before the Tax Court was whether during the relevant periods four workers were employees of the appellant for the purposes of subsection 5(1) of the *Employment*

Insurance Act and subsection 6(1) of the *Canada Pension Plan*. The Tax Court concluded that they were.

[2] Two issues are raised on this appeal from the judgments of the Tax Court: first, was the appellant denied procedural fairness in the hearing before the Tax Court?; second, did the Tax Court err in dismissing the appellant's appeals?

[3] On the first issue, the appellant submits that the Tax Court had an obligation to assist it and its agent during the hearing and that the Court breached the principles of procedural fairness by failing to order the respondent to provide a witness list and disclosure of documents at the start of the hearing and by failing to allow a short recess to permit the appellant's agent to examine the documents and witness list. The Court's failure is said to have resulted in the situation where the appellant did not know the full extent of the case he had to meet. The appellant further asserts that the Court erred by failing to allow the appellant to introduce rebuttal evidence after the respondent had presented its case.

[4] I reject the submission that the Tax Court breached the principles of procedural fairness for the following reasons. First, I accept the respondent's submission that the appellant was given full notice of the case to be met through the replies that were filed to the notices of appeal. I note that the appellant did not point to any matters that arose at the hearing that did not flow directly from the respondent's case as set out in the replies. Similarly, the documents produced at the hearing by the respondent were related to the assumptions set out in the replies. Second, neither the *Tax Court of Canada Rules of Procedure respecting the Canada Pension Plan*, SOR/90-689,

nor the *Tax Court of Canada Rules of Procedure respecting the Employment Insurance Act*, SOR/90-690, contain any requirement that the parties disclose documents or exchange lists of witnesses in advance of the hearing. Third, the appellant's agent did not ask the Tax Court for any adjournment. In the circumstances of this case, I see no obligation on the part of the Tax Court to suggest an adjournment. Finally, the Court did not err by failing to allow rebuttal evidence. The appellant had full notice of the respondent's position that the appellant operated as G-Force Deployment Group or G-Force Industrial Deployment Action and had the opportunity to introduce evidence to rebut the Crown's assumption when it adduced its evidence. The appellant did not, and instead sought to adduce new evidence that was simply confirmatory of its case in chief. Evidence which is simply a rebuttal of evidence led as part of the defence case, and which could have been led in chief, generally should not be admitted as rebuttal evidence. I see no unfairness in the circumstances of this case.

[5] On the second issue, the appellant asserts that the Tax Court erred by relying upon a document entered for identification purposes only, by improperly applying the balance of probabilities test to the evidence and by failing to consider that the Tax Court had previously determined that the appellant did not carry on any commercial activity.

[6] I reject these submissions as well. The information contained in the document marked for identification was also adduced in oral evidence by the appeals officer who testified for the respondent. In any event, in light of the many findings of fact made by the Tax Court this evidence was not in any way determinative of the result. The appellant's argument regarding the balance of probabilities is similarly misplaced. The Tax Court made a number of findings of fact

supporting the conclusion that the workers were engaged in insurable and pensionable employment with the appellant. These findings were supported by both documentary evidence and oral testimony. No palpable or overriding error has been made out, nor has any error been demonstrated in the Court's finding that the appellant's sole witness was not a credible witness. The Court concluded that the appellant's witness was intentionally vague in some of his testimony and that he intentionally attempted to mislead the Court about both his role and the appellant's role as the employer of the workers. Finally, in its written submissions the appellant argues that in a previous decision the Tax Court had found the appellant to have had no taxable supplies during the reporting periods at issue in that case, however the Tax Court failed to consider this prior result when it decided the present case. I accept the respondent's submission that the fact that the appellant had no taxable supplies during a particular period is not relevant to the issue of whether the workers were employed by the appellant during the periods here in issue.

[7] It follows that I would dismiss the appeal with costs.

“Eleanor R. Dawson”

J.A.

“I agree.

Wyman W. Webb J.A.”

“I agree.

D. G. Near J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-248-17

STYLE OF CAUSE: CRETECO-GUNNER
CORPORATION v.
THE MINISTER OF NATIONAL
REVENUE

PLACE OF HEARING: REGINA, SASKATCHEWAN

DATE OF HEARING: MARCH 25, 2019

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

DATED: MARCH 27, 2019

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