

Citation: *P. S. v. Canada Employment Insurance Commission*, 2014 SSTAD 157

Appeal No. 2013-0044

BETWEEN:

P. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: June 23, 2014

DECISION: Appeal allowed in part

DECISION

[1] The appeal is allowed in part. The matter is returned to the General Division of the Tribunal for reconsideration of the warning letter and notice of violation only.

INTRODUCTION

[2] On November 1, 2012, a panel of the board of referees (the “Board”) determined that the appeal of the Appellant from the previous determination of the Commission should be denied. The Appellant appealed that decision to the Office of the Umpire on December 28, 2012.

[3] On April 1, 2013 the Appeal Division of the Social Security Tribunal of Canada (“the Tribunal”) became seized of any appeal not heard by an Umpire by that date.

[4] On May 13, 2014 a teleconference hearing was held. The Commission attended and made submissions, but the Appellant did not. As I was satisfied that the parties had received proper notice, I proceeded with the hearing.

THE LAW

[5] To ensure fairness, this matter will be examined based upon the Appellant’s legitimate expectations at the time of the appeal to the Office of the Umpire. For this reason, the present appeal will be decided in accordance with the legislation in effect immediately prior to April 1, 2013.

[6] According to subsection 115(2) of the *Employment Insurance Act* (“the Act”) which was in effect before April 1, 2013, the only grounds of appeal are that:

- (a)) the board of referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the board of referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(c)) the board of referees based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[7] The standard of review for questions of law and jurisdiction is correctness.

[8] The standard of review for questions of fact and mixed fact and law is reasonableness.

ANALYSIS

[9] There are two distinct issues to be determined in this appeal. The first is a relatively straightforward issue of whether or not the Board properly determined and allocated certain earnings. The second, however, goes to the heart of the jurisdiction of the Board (now the General Division) and the correct manner in which issues are identified and addressed.

[10] In his notice of appeal, the Appellant states that he is appealing because he has had difficulty finding documents regarding the earnings in question due to the fact that his former employer has passed away. He further states that he has collected what information he can.

[11] I note that the Appellant has not alleged any particular error on the part of the Board, has not appended any new evidence, and despite being properly notified did not attend the hearing to offer a further explanation of his appeal.

[12] The Commission supports the decision of the Board and asks that its determination be upheld.

[13] Having considered the appeal docket, the submissions of the parties, and the decision of the Board, I find that the Board conducted a proper hearing on this issue, weighed the evidence, made findings of fact, established the correct law, and applied the facts to the law. There is no reason for me to intervene with regard to the amount and allocation of the earnings.

[14] As noted above, however, there is more to this case than just the allocation of earnings. In the decision letter sent by the Commission to the Appellant, the Commission also notified him that it intended to issue a warning letter and notice of violation for knowingly making false misrepresentations regarding those earnings.

[15] In his initial appeal to the Board, the Appellant pleaded that his employer had incorrectly reported the alleged earnings.

[16] The Commission, in framing the issues to be considered by the Board, stated that the only issue to resolve was the allocation of earnings. As such, they did not mention the warning letter or the notice of violation in their submissions. No explanation was given as to why the other two issues were not considered as well.

[17] The failure of the Commission to do so appears reasonable at first glance. After all, the Appellant did not mention the warning letter or notice of violation by name in his notice of appeal.

[18] On closer consideration, however, the Board does not appear to have independently assessed what issues were properly before it, instead accepting the Commission's framing of the question without comment. The Board does not reference the other issues in its decision in any way, nor did it appear to have asked the Appellant what part of the decision letter was being appealed.

[19] In argument before me, the Commission made submissions supporting the jurisdictional determination of the Board and opposing any appeal on that basis. However, they were admirably candid in expressing their opinion that reasons for issuing the warning letter and the notice of violation do not appear to be present in the appeal docket. As such, in their view it is not clear that these decisions were made judicially or that the Appellant knowingly made the misrepresentations in question. For this reason they would not oppose returning these two issues back to the General Division in the interests of justice.

[20] The Tribunal was created by Parliament relatively recently, and is governed by several statutes and its own regulations. These regulations set out, among other things, the general principles upon which the Tribunal is based.

[21] Sections 2 and 3(1) of the *Social Security Tribunal Regulations* (“the Regulations”) stipulate that

2. These Regulations must be interpreted so as to secure the just, most expeditious and least expensive determination of appeals and applications.

3.(1) The Tribunal

(a)) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; and

(b) may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.

[22] It is clear to me from the foregoing that Parliament intended the Tribunal to be informal, and to have a wide discretion to decide on procedural issues to ensure that justice and fairness is preserved.

[23] As a practical matter, most claimants appearing before the Tribunal are unrepresented and unfamiliar with legal procedures. They are, by and large, honest but legally unsophisticated citizens who feel that they have not been treated fairly but are unclear on what constitutes grounds of appeal.

[24] As an example, a large number of appellants reference s.115(2)(a) of the Act and refer to natural justice when they really mean fairness and equity. These appellants are often very disappointed to learn that the Tribunal has no discretion to ignore any part of the Act, even in the interests of justice.

[25] Because of this, it is my view that the Tribunal must whenever possible make enquiries with the Appellant to determine what part of the Commission’s decision letter is being appealed, especially when unrepresented, and include a very brief reference to this in

the ensuing decision. To be clear, this does not mean that the Tribunal may assume jurisdiction over issues as they see fit, only those that are mentioned in the decision letter under appeal.

[26] On the facts of this case, it is clear to me that the Board failed to properly determine its jurisdiction. The Board should not have relied solely upon the submissions of the Commission without further analysis. In my view, failing to properly identify the issues to be ruled upon is an error of jurisdiction reviewable on the correctness standard.

[27] I stress that this need not have been an onerous or lengthy analysis. It would have been sufficient in this case, for example, for the Board to simply have referenced the other two issues in the Commission's decision letter and stated whether or not they were under appeal. If the Appellant or the Commission had taken issue with that finding, they could then have appealed on that basis to the Appeal Division.

CONCLUSION

[28] For the above reasons, the appeal is allowed in part. The matter is returned to the General Division of the Tribunal for reconsideration of the warning letter and notice of violation only.

Mark Borer

Member, Appeal Division