Citation: *R. H. v. Canada Employment Insurance Commission*, 2014 SSTAD 307

Appeal No. 2011-1491

BETWEEN:

R. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: October 23, 2014

DECISION: Appeal allowed

DECISION

[1] The appeal is allowed. This matter is returned to the General Division for reconsideration in accordance with these reasons.

INTRODUCTION

[2] On May 11, 2011, 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. In due course, the Appellant appealed that decision to an umpire.

[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 July 24, 2014 a teleconference hearing was held. The Appellant and the Commission each attended and made submissions.

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 an 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] The Appellant submits that no severance moneys are paid or payable to her because she continues to contest her dismissal in the courts. Although she agrees that her employer has made a severance payment available to her, she has not accepted it and will never receive it because she intends to be reinstated in her position. For this reason, she argues that there are no moneys "paid or payable" as required by the Act.

[10] The Commission opposes the appeal, submitting that since the severance moneys were reported by her employer and are available for collection they are "payable". As such, the Commission maintains that the determination of the Board was correct and should be upheld.

[11] It cannot be denied that under normal circumstances the moneys in question would constitute earnings and would need to be allocated. Refusing to collect severance moneys is not usually a bar to allocation because those moneys would remain "payable" according to the Act. In this case, however, things are not so simple.

[12] The Appellant states, and I accept, that she is currently involved in litigation that has as its object her reinstatement. The Appellant also states, and I agree, that if she was reinstated no severance moneys would be payable because she would not have been severed. I note also that even if the Appellant is not reinstated this litigation may result in other moneys becoming payable, which in turn might constitute additional earnings to be allocated.

[13] The Commission conceded that without acceptance by the claimant a mere offer of severance does not automatically mean that the severance is "payable" according to the Act. They maintained their position, however, that in the circumstances of this case the severance

moneys were “payable” and should therefore be allocated as found by the Board in their decision.

[14] Having considered the matter, I find that I cannot agree with the position taken by the Commission. It is clear from the submissions of the Appellant that the severance moneys and indeed her entire dismissal is under appeal elsewhere. I must therefore conclude that the severance which the employer admits to owing to the Appellant is simply an offer, which the Appellant is in the process of going to court to contest.

[15] The Board, by concluding otherwise, was in error. By declining to give proper weight to the evidence and arguments of the Appellant, the Board rendered an unreasonable decision.

[16] In my view, the correct way to deal with this appeal is to return the matter to the General Division for reconsideration, with the direction that so long as the litigation or other appropriate legal measures being undertaken by the Appellant are pursued with due diligence the matter shall be held in abeyance. I further direct that the General Division shall hear and rule upon a motion to bring the case forward if either party has reason to believe that a final and binding determination has been reached on the issue or if the Commission takes the position that litigation or other appropriate legal measures are not being pursued with due diligence.

CONCLUSION

[17] Therefore, for the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer
Member, Appeal Division