

Citation: *Canada Employment Insurance Commission v. T. F.*, 2015 SSTAD 1058

Appeal No. AD-14-115

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

T. F.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: September 9, 2015

DECISION: Appeal allowed

DECISION

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

INTRODUCTION

[2] On April 4, 2013, a panel of the board of referees (the Board) allowed in part the appeal of the Respondent against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On July 14, 2015, a teleconference hearing was held. The Commission and the Respondent each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

- (a) the General Division [or the Board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division [or the Board] erred in law in making its decision, whether or not the error appears on the face of the record; or
- (c) the General Division [or the Board] 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.

[6] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (Attorney General)*, 2012 FCA 190, and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for

questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[7] This case involves alleged unreported earnings which resulted in an overpayment and the imposition of a penalty and a notice of violation, as well as allegations that the benefit payments were withdrawn fraudulently by a third party from the Respondent's bank account.

[8] The Commission submits that the Board failed in their duty to make findings of law and fact in relation to the issues before them and did not properly address the issue of the penalty and notice of violation.

[9] The Respondent submits that she should not be liable for any overpayment or penalty because she was the victim of fraud, but that she simply wishes for this situation to be put behind her. She states that she has been making repayments to the Commission already.

[10] Having reviewed the decision, I find that the Board decision is indeed flawed in the manner suggested by the Commission. Additionally, I note that the Board failed to consider or apply *Canada (Attorney General) v. Lylander*, 2008 FCA 365, a case of the Federal Court of Appeal which deals with situations where the claimant alleges that they have been the victim of fraud.

[11] In that case, the Federal Court of Appeal held in paragraph 13 that the question to be answered in that case (and all cases where an overpayment exists and fraud is alleged by the claimant) was:

[W]ether a third party fraudulently caused the Commission to make the overpayments and, if so, whether the fraud was committed with [the claimant's] knowledge and consent.

[12] If the first part of this question is answered in the positive and the second part in the negative then the claimant, as an innocent victim, is not liable for the overpayments.

[13] Having found the above, it follows that this decision cannot stand and must be returned to the General Division for reconsideration. I further direct that the General Division member assigned to this case consider and apply *Lylander*.

CONCLUSION

[14] For the above reasons, the appeal is allowed. The case will be returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer

Member, Appeal Division