

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. R. T.*, 2015 SSTAD 1156

Date: September 29, 2015

File: AD-13-975

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

R. T.

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

In-person hearing on September 11, 2015, at Chicoutimi, Quebec

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the case returned to the Tribunal's General Division (Employment Insurance Section) for a member to conduct a new hearing.

INTRODUCTION

[2] On July 11, 2013, a Board of Referees found that:

- The Appellant's earnings were not allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the Regulations);
- Imposing a penalty under section 38 of the Act was not justified.

[3] On July 18, 2013, the Appellant filed an application for leave to appeal with the Appeal Division. The application for leave to appeal was allowed on January 13, 2013.

TYPE OF HEARING

[4] The Tribunal determined that an in-person hearing of this appeal would be conducted for the following reasons:

- the complexity of the issue(s);
- the fact that the credibility of the parties is not one of the main issues in this case;
- the information on record, including the kind of information that is missing, and the need for clarification;
- the fact that the parties are represented;
- the Appellant's wishes.

[5] The Appellant, represented by Me Lauren Heyer, participated in the hearing. The Respondent and his representative, Sylvain Bergeron, attended the hearing.

THE LAW

[6] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

- (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) the General Division erred in law in making its decision or order, whether or not the error appears on the face of the record; or
- (c) the General Division based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE

[7] The Tribunal must decide whether the Board of Referees erred by finding that:

- a) The Respondent's earnings were not allocated in accordance with sections 35 and 36 of the Regulations;
- b) Imposing a penalty under section 38 of the Act was not justified.

[8] The Tribunal must also decide whether there was a breach of the Respondent's right to natural justice because of the delay in having his case heard.

SUBMISSIONS

[9] The Appellant submits the following reasons in support of its appeal:

- In its July 11, 2013, decision, the Board of Referees erred in fact and in law by amending the allocation of unreported earnings made by the Appellant under sections 35 and 36 of the Regulations;
- The Board of Referees erred by cancelling the penalties imposed on the Respondent under subsection 38(1) of the Act;

- In January 2004, as the result of a lead, the Commission started an investigation of the Respondent's unreported earnings during each of his benefit periods;
- The investigation also dealt with the activities of two companies regarding a system of banking hours and unreported work;
- The representative of the two companies acknowledged the existence of this scheme and the unreported work and confirmed that the dates and periods of employment reported on the Records of Employment issued to several employees, including the Respondent, did not reflect reality;
- On April 14, 2005, the Respondent confirmed for the investigator that he agreed with the representative's statements about him;
- He admitted knowing that he had made false statements when completing the weekly reports while he was receiving Employment Insurance benefits;
- The Appellant stated that the Board of Referees' decision did not meet the requirements of subsection 114(3) of the Act or the directives given by the Umpire in his decision in CUB 75282A;
- The Board of Referees accepted the testimony given at the hearing and again ignored the evidence in the docket. Without explaining why, it set aside the Respondent's initial statements and the statements made by the representative of the two companies;
- The Federal Court of Appeal has clearly established that the Board of Referees must consider all the evidence presented and not just the statements and testimony from the hearing when deciding a case;
- The Appellant argues that, contrary to what the Respondent's representative alleges, the amounts determined by the Appellant did not come from the weighing sheets, but from the documents entitled [translation] "Wage Calculation," which show that the Respondent had earnings during the weeks in question.

- The Appellant argues that the Board of Referees did not explain how the [translation] “Wage Calculation” document from which the amounts used by the Appellant were taken is incorrect or why the Appellant could not rely on this document. It simply ignored the document, which it cannot do;
- The Appellant argues that the Board of Referees erred when it found that the Appellant had to base its calculation on the Records of Employment that the Commission had confirmed as correct when these documents contained false information because of the banking of hours;
- The Appellant stated that the sums payable to the Respondent as wages constitute earnings pursuant to subsection 35(1) of the Regulations and they must be allocated to the weeks during which the work was done, in accordance with subsection 36(4) of the Regulations;
- The case law has established that when a claimant does not report his or her actual earnings because he or she is banking hours, and the claimant is completely aware of it, this is a fraudulent act subject to a penalty;
- The delay in this case is not excessive and the delay is not the Appellant’s fault; the delay results from the fact that the parties have expressed their respective positions before the tribunals.

[10] The Respondent submits the following reasons against the appeal:

- The statutory declaration or interview with the investigators is untrue and not credible;
- The circumstances in which the statutory declaration was made by the Respondent show that this declaration is not relevant;
- The Appellant prefers to take the word of an anonymous third party without a signed declaration, to which the case law gives little probative value;

- The representative's testimony is not credible because he was dismissed shortly before he provided the lead;
- No credibility can be given to a foreman who was dismissed shortly before he provided the lead;
- The Appellant argues that there was a scheme involving the banking of hours and unreported work: If there was such a broad scheme, how is it that only the Respondent out of 40 employees is accused of making false statements?
- In spite of all the explanations, the Appellant refuses to admit that it made a mistake. The numbers correspond to what is called weighing in forestry. This exhibit shows all the wood measured once it reaches the sawmill. It is therefore the amount that the sawmill sends the forestry company. This invoice may represent several weeks of work;
- The Board of Referees mentions the Respondent's arguments in the Evidence at the Hearing section even if this is not included in its conclusions;
- The Board of Referees states in its decision that [translation] "Following analysis of the docket and the testimony by the claimant and his representative, the Board of Referees concludes that the Commission, by incorrectly calculating..."
- By this conclusion, the Board of Referees finds the Appellant's evidence not to be credible and agrees with the Respondent on the points at issue;
- He never made the claim before the Board of Referees that the Records of Employment reflected reality;
- The Respondent maintains that his right to be heard within a reasonable period of time was violated;
- Both systemic and institutional delays are the fault of the Crown and congestion at the Tribunal;

- The excessive delay has directly caused significant psychological prejudice to the Respondent and has sullied his reputation such that the system for protecting human rights is brought into disrepute;
- The Respondent developed a high level of stress, developed a significant fear of receiving letters from the Government of Canada and has resisted applying for Employment Insurance since then. In terms of reputation and dignity, the Appellant is perceived as a fraudster by the Appellant and feels persecuted by the Appellant's relentless efforts, which have dragged on in this case since 2005;
- The Respondent has a right to full answer and defence. The time that has elapsed since the last hearing has created very serious consequences for the Respondent: witnesses (informers) that cannot be found, new Tribunal for which the case law in the docket is obsolete, difficulty in remembering the specific details that are more than 16 years old, etc.;
- The Respondent is therefore entitled to respectfully request that this honourable Tribunal order a stay of proceedings – *Canada (AG) v. Norman*, 2002 FCA 123.

STANDARDS OF REVIEW

[11] The Appellant argues that the issues of allocation of earnings and the penalty are questions of mixed fact and law and that the standard of review is reasonableness. It argues that 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, which constitutes an error of law. The applicable standard of review in this case is correctness - *Hickey v. Canada (AG)*, 2008 FCA 330

[12] The Respondent did not make any representations regarding the applicable standard of review.

[13] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a Board of Referees or an Umpire regarding

questions of law is the standard of correctness - *Martens v. Canada (AG)*, 2008 FCA 240, and that the standard of review applicable to questions of mixed fact and law is reasonableness - *Canada (AG) v. Hallée*, 2008 FCA 159, *Hickey v. Canada (AG)*, 2008 FCA 330.

ANALYSIS

Allocation of earnings and penalty

[14] In this case, the Board of Referees had to decide whether the allocation of the Respondent's earnings complied with sections 35 and 36 of the Regulations and if a penalty needed to be imposed on the Respondent under section 38 of the Act.

[15] The role of the Board of Referees (now the General Division) is to examine the evidence presented by both parties in order to identify the relevant facts, namely, the facts that concern the particular dispute that it must decide, and to explain in writing the decision that it made concerning these facts.

[16] A Board of Referees must obviously justify its determinations. When it is faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious - *Bellefleur v. Canada (A.G.)*, 2008 FCA 13.

[17] In this case, the Board of Referees once again ignored the Appellant's evidence. The case has been sent back to the Board of Referees several time by Umpires for the same reasons (see CUB 72474 and CUB 75282A). Without explaining why, the Board of Referees set aside the Respondent's initial statements and those of the representative of the two companies. It did not explain how the [translation] "Wage Calculation" document from which were taken the amounts used by the Appellant erred or why this document could not be relied on. It simply ignored the document.

[18] Moreover, the Board of Referees asked that the Appellant redo its calculations using the Records of Employment that the Appellant acknowledged as correct whereas the Appellant was challenging their correctness before the Board of Referees on the ground that

the documents contained false information because of the banking of hours. Even the Respondent's representative acknowledged during the appeal hearing that he had not argued before the Board of Referees that the Records of Employment were correct but rather had argued before the Board that it had to take into account the actual payroll records.

[19] Finally, the Board of Referees failed to state briefly and clearly the essential facts on which it based its decision, which constitutes another error of law – *Inkell v. Canada (AG)*, 2012 FCA 290.

[20] Given the above-mentioned errors, the Tribunal is justified in intervening and returning this case to the General Division for a new hearing on the issues.

Denial of natural justice because of the delay

[21] The Respondent argues that his right to natural justice was breached because of the delays in his case. He argues that the delays, both systemic and institutional, are the fault of the Appellant and the congestion at the Tribunal and have caused him psychological prejudice and have sullied his reputation.

[22] The Respondent also argues that the psychological and sociological prejudice caused by the delay has to be taken into account, and not just the procedural and legal impact, but whether the ability to present a full and complete defence has been compromised.

[23] The Respondent testified under oath before the Tribunal that the excessive delays have caused him significant stress. He became very afraid each time that he received a letter and resisted claiming Employment Insurance. He can no longer really remember the facts of his case, which date back fifteen years. He claimed Employment Insurance last year. He has not consulted a professional.

[24] The Respondent informed the Tribunal at the hearing that he is pleading his case on the applicable principles of administrative law rather than on the *Canadian Charter of Rights and Freedoms*. He is basing his arguments on the Federal Court of Appeal decision in *Canada (AG) v. Norman*, 2002 FCA 423, and asking that proceedings against the Respondent be stayed.

[25] The relevant events, with respect to delays, can be summarized as follows:

- The Appellant rendered five decisions on August 30, 2005. These five decisions resulted in an \$11,558 overpayment;
- On September 16, 2005, the Respondent appealed these five decisions of the Appellant to the Board of Referees and on November 10, 2005, the Board of Referees allowed the appeal in part;
- The Appellant appealed the decision of the Board of Referees to an Umpire. On August 4, 2006, the Umpire allowed the Appellant's appeal;
- On July 25, 2007, the Respondent filed an application for judicial review with the Federal Court of Appeal, alleging a breach of natural justice. The Court granted the application and returned the matter to a new Umpire for a new decision. The Umpire, in turn, sent the case to a new Board of Referees for a new determination;
- On June 6, 2008, a new Board of Referees allowed the Respondent's appeal in part and the Appellant appealed this decision. The Respondent also appealed the Board of Referees' decision to an Umpire (CUB 66770A);
- On May 7, 2009, Umpire Goulard sent the matter to a new Board of Referees for a new determination. In his decision, the Umpire pointed out that the Board of Referees could not take just the Respondent's submissions into consideration and ignore the evidence submitted by the Appellant, which is based on the information provided by the employer. The Umpire also encouraged the Board of Referees to explain how the Respondent's explanations could justify the fact that he did not report all his earnings (CUB 72474);
- On December 23, 2009, a new Board of Referees unanimously allowed the Respondent's appeal. On February 17, 2010, the Appellant appealed this decision to the Umpire;
- On September 6, 2011, Marin J. allowed the Appellant's appeal and sent the case to a new Board of Referees (CUB 75282A). The Respondent then filed an

application for a judicial review of this decision. On November 7, 2012, the Federal Court of Appeal denied this application;

- On July 11, 2013, the case was heard by a Board of Referees and the Board allowed the Respondent's appeal. The Appellant appealed from this decision to the Social Security Tribunal on July 18, 2013;
- Leave to appeal was granted by the Appeal Division on January 13, 2015;
- The hearing before the Appeal Division was held on September 11, 2015.

[26] The Tribunal notes that the above-mentioned delays are the result of the parties exercising their legitimate right to appeal both to an Umpire and to the Federal Court of Appeal. The delays are therefore not due to the negligence or fault of the Appellant and the Appellant cannot be blamed for them.

[27] The Respondent maintains that the Tribunal must nevertheless take into account the institutional delay of 26 months for this appeal to be heard when the normal delays for the Tribunal are around 11 months.

[28] Therefore, the Tribunal must determine whether this delay constitutes a denial of natural justice and whether a stay of proceedings is the remedy that should be granted.

[29] The Federal Court of Appeal tells us in *Canada (AG) v. Norman*, 2002 FCA 423, that delay, without more, will not constitute an abuse of process that warrants a stay of proceedings at common law. To justify a stay in the administrative law context, the Court says proof that significant prejudice has resulted from an unacceptable delay is required.

[30] A breach of natural justice and the duty of fairness may occur when the delay impairs a party's ability to answer the complaints against him or her because, for example, memories have faded, essential witnesses have died, or evidence has been lost. In short, the undue delay must impair the fairness of the hearing.

[31] An unacceptable delay may constitute an abuse of process in certain circumstances, even if the fairness of the hearing has not been impaired. Therefore, to constitute an abuse of

process in cases where the fairness of the hearing has not been impaired, the delay must be clearly unacceptable and have directly caused significant prejudice. In addition to its long duration, the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected.

[32] In this case, although the delay seems in fact to be unacceptable, the Tribunal concludes that the Respondent did not suffer any significant prejudice because of the delay, given that the facts in this case are not the most complex. This case involves calculating the earnings, allocating them and determining whether the Appellant knowingly made a false representation. He has been the sole witness at the hearings before the Boards of Referees. No witnesses have been lost. The Respondent did not argue before the Tribunal that any evidence had been lost since the start of proceedings. Therefore, the Tribunal considers that the Respondent is able to respond to the complaints made against him and that the fairness of the hearing has not been affected.

[33] The Tribunal also heard the Respondent's testimony at the appeal hearing, and the evidence submitted of psychological and sociological prejudice does not justify the granting of a remedy based on the applicable principles of administrative law. The Tribunal cannot conclude, based on the teachings of the Federal Court of Appeal, that the delay caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected.

[34] The Tribunal sympathizes with the Respondent but it cannot, however, ignore the directives from the Federal Court of Appeal regarding the delay.

CONCLUSION

[35] The Respondent's application for a stay of proceedings is denied.

[36] The appeal is allowed and the case is referred to the Tribunal's General Division (Employment Insurance Section) for a member to conduct a new hearing.

Pierre Lafontaine
Member, Appeal Division