[TRANSLATION]

Citation: *G. J. v. Canada Employment Insurance Commission*, 2015 SSTAD 1448

Date: December 17, 2015

File number: AD-15-24

APPEAL DIVISION

Between:

G. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by videoconference on December 8, 2015

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 10, 2014, the General Division of the Tribunal found that:

> - The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* (the Act) and section 30 of the *Employment Insurance Regulations* (the Regulations) was justified for the periods in question because the Appellant failed to prove that he was unemployed;
>
> - The Respondent was justified in reconsidering the benefit claim under section 52 of the Act (file GE-14-2808);
>
> - The imposition of a warning letter or non-monetary penalty was justified under section 41.1 of the Act (file GE-14-2808);
>
> - The imposition of a penalty was justified under section 38 of the Act (files GE-14-2809, GE-14-2810 and GE-14-28-11);
>
> - The issuing of a notice of violation was justified under section 7.1 of the Act (files GE-14-2809, GE-14-2810 and GE-14-2811).

[3] The Appellant filed an application for leave to appeal to the Appeal Division on January 14, 2015. Leave to appeal was granted by the Appeal Division on March 3, 2015.

TYPE OF HEARING

[4] The Tribunal determined that this appeal would be heard by videoconference for the following reasons:

> - the complexity of the issue(s);

- the information on record, including the kind of information that is missing and the need for clarification;

- the fact that the Appellant is represented;

- the Appellant's wishes.

[5] The Appellant did not participate in the hearing, but was represented by counsel Robert Cardinal. The Respondent did not participate in the videoconference hearing, although it had received the notice of hearing.

THE LAW

[6] 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 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.

ISSUES

[7] The Tribunal must decide whether the General Division erred in fact and in law by deciding as follows:

- The disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified for the periods in question because the Appellant failed to prove that he was unemployed;

- The Respondent was justified in reconsidering the benefit claim under section 52 of the Act (file GE-14-2808);

- The imposition of a warning letter or non-monetary penalty was justified under section 41.1 of the Act (file GE-14-2808);

- The imposition of a penalty was justified under section 38 of the Act (files GE-14-2809, GE-14-2810 and GE-14-28-11);

- The issuing of a notice of violation was justified under section 7.1 of the Act (files GE-14-2809, GE-14-2810 and GE-14-2811).

SUBMISSIONS

[8] The Appellant submitted the following reasons in support of his appeal:

- The contract of employment and the contract of enterprise are two separate contracts;

- The General Division misunderstood or confused the notions in civil law of contract of employment (articles 2085 to 2097, *Civil Code of Québec*) and contract of enterprise or for services (articles 2098 to 2129, *Civil Code of Québec*);

- It is the *Civil Code of Québec* that is applied to determine the nature of the contract that covers a person's legal situation, namely, is the person employed under a contract of employment or is the person a contractor under a contract of enterprise;

- Two decisions of the Federal Court of Appeal state that two separate parties, in this case, the Appellant on the one hand and Télédistribution de la Gaspésie (TDG) on the other, cannot simultaneously and at the same time be bound by a contract of employment and a contract of enterprise in the same situation;

- In short, the Appellant cannot at the same time be an employee of TDG and a contractor providing services to TDG, his client;

- At the request of the Respondent, the Canada Revenue Agency (CRA) determined on March 30, 2012, that the Appellant was an employee bound by a contract of employment within the meaning of the Act;

- Approximately fifteen (15) days later, under the same Act, the Respondent claimed that the Appellant was a contractor, and therefore bound by a contract of enterprise with TDG, and determined that he was no longer entitled to receive Employment Insurance benefits;

- The General Division ignored or refused to take into account two decisions of the Federal Court of Appeal (A-559-04 and A-291-08);

- In assessing the evidence, the General Division took into account the [translation] "evidence in the Commission's files" (paragraph 26 and following) and statements made out of Court by individuals to the Respondent's investigators, although these people were not heard as witnesses at the hearing before the Tribunal since the Respondent decided not to participate in the hearing and consequently not to provide evidence at this hearing;

- Therefore, the Appellant did not have an opportunity to cross-examine the people who made the statements to the investigators. These statements are not admissible in evidence as testimony. In any event, these statements do not have the same guarantee of reliability as testimony given at a hearing.

- The General Division ignored or rejected the testimony given by Mr. M. (paragraphs 37 to 41), particularly regarding the fact that the Appellant worked only approximately four (4) months a year for the cable distribution company (paragraph 39) and that he was always available during his benefit periods, without explaining why it did so, especially since this testimony was not contradicted and, moreover, it was corroborated by the documentary evidence provided during the hearing;

- It ignored or rejected the testimony given by the Appellant, particularly regarding confirmation of the facts recounted by Mr. M. in his testimony, and by the statements made by his counsel at the beginning of the hearing, without explaining why it did so, especially since this testimony was not contradicted and, moreover, it was corroborated by the documentary evidence provided during the hearing;

- Therefore, the Appellant asked the Tribunal to revise the General Division's decision because the decision was based on the Appellant operating a business, when he was actually an employee.

[9] The Respondent submitted the following reasons against the Appellant's appeal:

- The General Division did not err in fact or in law, and it acted within the limits of its jurisdiction;

- According to section 52 of the Act, the Respondent may reconsider benefits that have already been paid to a claimant. It has 36 months to reconsider any benefit claim and the Respondent maintains that this deadline was not exceeded in this case;

- However, the General Division has to determine to what extent the Appellant was self-employed, and if it was to such a minor extent that he would not normally rely on it as his principal means of livelihood;

- To answer the question, the General Division looked at all the facts in the case and analyzed them against the six factors in subsection 30(3) of the Regulations. By doing this, the General Division met all the legal criteria for determining unemployment status;

- On the other hand, the Appellant did not provide any reasonable explanation to rebut the assumption that the false or misleading statements had been made knowingly. The General Division took into consideration all the evidence brought before it, but the evidence did not justify the false statements;

- The penalty imposed on the Appellant is justified in the circumstances;

- It exercised its discretion judicially by issuing a notice of violation to the Appellant. After taking into consideration all the relevant circumstances, the Respondent is of the opinion that a notice of violation issued under section 7.1 of the Act was appropriate;

- The General Division does not have the authority to retry a case or substitute its discretion for that of the General Division. The Appeal Division's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*;

- Unless the General Division failed to observe a principle of natural justice, erred in law or 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, and the decision is unreasonable, the Tribunal must dismiss the appeal.

STANDARDS OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submitted and the Tribunal agrees that the Federal Court of Appeal determined that the standard of judicial review applicable to a decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) regarding questions of law is 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.

ANALYSIS

[12] This decision concerns files AD-15-24, AD-15-25, AD-15-26 and AD-15-27 since the facts presented before the General Division were identical in each of the Appellant's files.

[13] The Appellant owns twenty-six percent of the shares of 2545-3739 Québec Inc., a cable distribution company operating in Percé. In an initial interview, the Appellant stated that he created this company with H. C., his friend and associate. He has been a shareholder since the company was registered in 1995.

[14] He specified that his job is to ensure that everything operates smoothly. Nothing is decided without him. He works every day. In the summer, he works 8 to 9 hours a day, 6 or 7 days a week. In winter, he is unemployed. He is always in the office, but he does not draw a salary. He ensures that everything operates smoothly and if there is a problem, he leaves with Mr. H. C. to repair it. He said that no one else can perform his management duties. He is the only one. According to the Record of Employment, he nevertheless applied for Employment Insurance

benefits following a shortage of work. At the hearing before the General Division, he corroborated Mr. M.'s testimony that he was involved only for a period of four months a year.

[15] On March 30, 2012, the CRA rendered a decision regarding the insurability of the Appellant's employment for 2545-3739 Québec Inc. It was determined that his employment was insurable for the periods from October 1, 2007, to March 1, 2008, from January 26, 2009, to May 16, 2009, from April 5, 2010, to July 24, 2010, and from June 13, 2011, to October 1, 2011, under subsection 5(1) of the Act. This decision was not appealed.

[16] On May 16, 2012, the Respondent informed the Appellant that he could not receive Employment insurance benefits as of March 3, 2008, because he was operating a business and could not be considered to be unemployed.

[17] Before the General Division and before the Tribunal, counsel for the Appellant argued for the most part that the Respondent could not apply section 30 of the Regulations and decide that the Appellant was operating a business when the CRA had previously decided that, during the periods in question, he was an employee and that his employment for 2545-3739 Québec Inc. was insurable under paragraph 5(1)(*a*) of the Act. Since the Appellant was an employee, this eliminated the possibility that he was operating a business.

[18] The Appellant argued that the General Division acknowledged that the Appellant was working in insurable employment and the Respondent did not have the authority to decide on the issue (paragraph 54 of the decision).

[19] However, the Tribunal must follow the teachings of the Federal Court of Appeal in *Canada v. D Astoll*, 1997 CanLII 5609 (FCA), since the Court already specifically answered the question raised in this appeal.

[20] In this case, the Federal Court of Appeal teaches us that the Respondent must perform two successive operations when it considers a claimant's claim for Employment Insurance benefits. It must first determine whether the claimant worked at insurable employment during the

qualifying period and then establish a benefit period for the claimant while the claimant's entitlement is verified.

[21] Once the first step concerning the claimant's insurability has been completed, as in this case with the CRA's decision, the Respondent must establish a benefit period and benefits are then payable to the claimant for each week of unemployment in the benefit period (section 9 of the Act). A week of unemployment for a claimant is a week in which the claimant does not work a full working week (section 11 of the Act).

[22] Subsection 30(1) of the Regulations states that a claimant is considered to have worked a full working week during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls his or her working hours. Subsection 30(2) of the Regulations provides that where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[23] Insurability and entitlement to benefits are two factors that the Respondent must evaluate in respect of two separate periods. Parliament intended the analysis of these two factors to be subject to separate rules that must not be confused since the insurability process is unrelated to the entitlement process.

[24] There is no question that insurability must be decided by the CRA according to the terms of section 90 of the Act, and by the Tax Court of Canada if there is an appeal, and must refer to the qualifying period, whereas entitlement must be decided by the Respondent and by the General Division in case of an appeal, and must refer to the benefit period.

[25] The Tribunal came to the conclusion that the Respondent cannot be bound by the CRA's insurability decision in deciding entitlement to benefits and the Respondent can apply section 30 of the Regulations and conclude that the Appellant was operating a business during his benefit period.

[26] Therefore, the Tribunal cannot accept this ground of appeal from the Appellant.

[27] The Appellant's second argument was that the General Division accepted in evidence witnesses' statements that were just hearsay. However, the Federal Court of Appeal decided in *Caron v. Canada (AG)*, 2003 FCA 254 that the General Division is not bound by the strict rules of evidence that apply to criminal and civil courts, and that it can receive and accept hearsay evidence.

[28] Moreover, the General Division allowed the Appellant to present its witnesses and arguments regarding the entire case in question. The Appellant therefore could have contradicted the allegations in the statements made by the Respondent's witnesses.

[29] Therefore, the Tribunal cannot accept this ground of appeal from the Appellant.

[30] The Appellant's last argument is that the General Division ignored or rejected his testimony, specifically regarding his confirmation of the facts presented in the testimony of Mr. M. and the statements made by his counsel at the beginning of the hearing.

[31] The General Division's decision shows that it obviously did not attribute any credibility to the testimonies of the Appellant and Mr. M. when they said that the Appellant devoted only four months a year to managing and planning the business. The testimony before the General Division was in complete contradiction to the statements of the people who worked for the business and to the Appellant's own initial statements in which he said that he devoted 8 to 9 hours a day, 6 or 7 days a week, to the business during the summer, and was always present during his periods of unemployment, although he was not paid.

[32] There is a long line of authority to the effect that unless there are obvious special circumstances, the issue of credibility must initially be left to the members of the General Division who are better placed to decide on it. The Tribunal will intervene only if it is obvious that the General Division's decision on the issue is unreasonable, in light of the evidence before it. The Tribunal finds no reason here to intervene on the issue of credibility,

[33] Therefore, the Tribunal cannot accept this ground of appeal from the Appellant.

[34] It is important to remember that the Tribunal does not have the authority to retry a case or substitute its discretion for that of the General Division. The Tribunal's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

[35] In *Le Centre de valorisation des produits marins de Tourelle Inc.* (A-547-01), Umpire Létourneau indicated that the role of the Tribunal is limited "to deciding whether the view of facts taken by the Board of Referees (now the General Division) was reasonably open to them on the record."

[36] The Tribunal concludes that the General Division's decision is based on the material before it, and that this is a reasonable decision that is consistent with the legislative provisions and the case law.

[37] Nothing justifies the Tribunal's intervention on the issues in question.

CONCLUSION

[38] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division