[TRANSLATION]

Citation: ***A. M. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1463**

Date: December 21, 2015

File number: AD-14-184

APPEAL DIVISION

Between:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

Heard by Videoconference on December 9, 2015

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part and the matter is referred to the General Division for a new hearing only on the issue of the unemployment status.

INTRODUCTION

[2] On February 15, 2014, the Tribunal's General Division concluded that:

> - The disentitlement imposed under paragraph 18(1)(*a*) of the *Employment Insurance Act* (the Act) was justified because the Appellant did not prove her availability for work;
>
> - The disentitlement imposed under sections 9 and 11 of the Act and section 30 of the *Employment Insurance Regulations* (the Regulations) was justified because the Appellant did not prove she was unemployed.

[3] On March 21, 2014, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted by the Appeal Division on January 8, 2015.

TYPE OF HEARING

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

> - the complexity of the issue(s) under appeal;
>
> - 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 fact that there was a prior postponement in the case.

[5] The Appellant did not participate in the hearing but was represented by counsel William Assels. The Respondent was represented by counsel Stéphanie Yung-Hing.

THE LAW

[6] Under 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 law when it concluded that:

> - The disentitlement imposed under paragraph 18(1)(*a*) of the Act was justified because the Appellant did not prove her availability for work;
>
> - The disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified because the Appellant did not prove she was unemployed.

SUBMISSIONS

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

> - In its decision, the General Division erroneously analyzed and based its decision on facts contrary to what the evidence showed, including in particular the Appellant's explanations at the January 13, 2014 teleconference to the effect that, during the periods in question, she was unemployed, available for work, willing to work and searching for employment, especially since the Appellant's testimony was sincere, credible, convincing and undisputed.

- The General Division's decision resulted in a higher burden of proof on the Appellant than the one set out in the Act, despite the preponderant, corroborating and undisputed evidence indicating that the Appellant was unemployed and available for work during the periods in question, as shown in the Appellant's testimony and the evidence on record, especially since the Appellant's employment, like that of her partners, was insurable.

- The General Division also erred in the interpretation and application of the Act by stating that the Appellant was a self-employed person, a finding the Appellant formally denied during her testimony, which was corroborated by the evidence on record.

- In its decision, the General Division unfairly and unlawfully ignored the evidence submitted with respect to the separate judicial personalities of the employer and of the Appellant, especially since the Appellant is only a minority shareholder.

- Consequently, the General Division committed obvious, decisive, serious and evident errors of law and fact that were such as to invalidate the decision rendered.

- The General Division based its decision on hypotheses and/or deductions that are contrary to the evidence by stating that the Appellant's former business was transferred to 9193-6781 Québec Inc., in exchange for 33 1/3% of the shares (paragraphs 21(f) and 29 of the decision).

- This statement is completely false, inaccurate and not supported by the evidence, since it shows that, in 2008, the Appellant and two other people were equal partners in a new corporation.

- At no time did the General Division question the Appellant about the transfer of the business. By making such a deduction, the Tribunal committed an unreasonable error by failing to comply with the rules of natural justice and by violating the *audi alterem partem* rule, which justifies the intervention of the Appeal Division.

- Moreover, at paragraph 30 of its decision, the General Division stipulated freely and without justification that the income statements of the business, during the periods when the Appellant was the sole owner and when she was a shareholder, show a progression,

despite the fact that there was a lack of evidence regarding the Appellant's financial situation as the sole owner, such that the General Division's finding on this point is not supported by the evidence. The General Division therefore committed an unreasonable error that justifies the leave to appeal as well as the appeal.

- The General Division also imposed on the Appellant a higher burden of proof than the one provided for in the Act concerning the Appellant's intention and willingness to seek and immediately accept alternate employment (paragraph 33 of the decision), despite the preponderant evidence submitted and undisputed at the hearing.

- The General Division erred in fact and law when it stated that the Appellant was not unemployed and not available for work, thus rendering a decision in this case contrary to the decision in the case of the Appellant's two partners.

- There is reason for the Appeal Division to intervene in order to prevent an injustice, unfairness and contradictory decisions for equal shareholders of the same business whose responsibilities, tasks and jobs are similar.

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

- The evidence before the General Division revealed that the Appellant was an employee of Resto Chez M. operated by 9193-6781 Québec Inc., of which she is a 33 1/3% shareholder and an administrator.

- The Appellant had a say in all the phases of the business's management and, during an interview with an officer of the Respondent, she stated that she was at the restaurant during the entire period of operation, even though she was not paid.

- A self-employed person is a person who is or was engaged in the operation of a business.

- Subsection 11(1) of the Act defines a week of unemployment as a week in which the claimant does not work a full working week.

- Where 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 their working hours, the claimant is considered to have worked a full working week during that week.

- When a claimant is engaged in the operation of a business under section 30 of the Regulations, there is a presumption that the claimant has worked a full working week.

- According to subsection 30(2) of the Regulations, this presumption can be rebutted by proving that the claimant's employment or engagement is to such a minor extent that the claimant would not normally rely on it as his or her principal means of livelihood. Subsection 30(3) of the Regulations lists the six criteria that are to be analyzed to determine this condition.

- Even though the Appellant believes that she is only an employee and a shareholder in the business, the General Division rendered a reasonable decision by finding that the facts show that the Appellant is engaged in the operation of a business and is a self-employed person within the meaning of the Act.

- With respect to the evidence, the General Division concluded that the Appellant is a key person in the business and that she was engaged in the operation of the business and was a self-employed person.

- The General Division was not convinced that the Appellant could step back sporadically from the business when there was no termination or reduction of operations.

- The General Division correctly chose to give more weight to the explanations given by the Appellant in a report and a questionnaire before she knew the Respondent's decision.

- An abundant and uniform case law has clearly established that a Board of Referees must attach more weight to the initial, spontaneous statements made by the persons concerned before the Respondent's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Respondent renders an unfavourable decision.

- The General Division is the trier of fact and its role is to weigh the facts, all the evidence brought before it and the credibility of witnesses.

- It has been established that the Tribunal hearing an appeal from a decision of the General Division must not substitute its own opinion for that of the General Division unless the decision appears to have been made in a perverse or capricious manner or without regard for the material before it. The Tribunal's role is limited to deciding whether the view of facts taken by the General Division was reasonably open to it on the record.

- The General Division's decision was reasonably open to it on the record and compliant with the legislation and the applicable case law. The Tribunal therefore should not intervene.

- A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

- The General Division determined that the Appellant's statements and behaviour were not convincing enough to show a real availability for work, and it even doubted whether efforts had been made to find suitable employment other than at the restaurant she operated in partnership with her son and his wife.

- In her Notice of Appeal, the Appellant submitted that the General Division should have considered the separate judicial personality of the company that is her employer and of which she holds 33 1/3% of the shares.

- The judicial personality of the company is not relevant to the review of the issues concerning the unemployment status and availability for employment.

- The Federal Court of Appeal indicated that the legal status of the operation or the business in which the self-employed person is engaged is irrelevant.

- The General Division is in no way bound by the decisions rendered by the Board of Referees in the cases of the Appellant's partners; each decision is rendered on the basis of the specific facts of each case.

- The General Division's decisions in this case are reasonable because they fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and the law."

STANDARDS OF REVIEW

[10] The Appellant did not make any submissions concerning the applicable standard of review.

[11] The Respondent submitted that the Federal Court of Appeal has consistently ruled that Umpires (now the Appeal Division) must apply the standard of correctness to questions of law concerning the interpretation of Employment Insurance legislation, and the standard of reasonableness to questions of fact and questions of mixed fact and law – *Chaulk v. Canada (AG)*, 2012 FCA 190.

[12] Although the word "appeal" was used in section 113 of the Act (formerly section 115 of the Act) to describe the proceeding before the Appeal Division, the substance of the General Division's jurisdiction is largely identical to that which was formerly conferred on Umpires and that which is conferred on the Federal Court of Appeal in section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) v. Merrigan*, 2004 FCA 253.

[13] The Tribunal is of the opinion that the deference owed by the Appeal Division to the General Division's decisions should be consistent with the deference owed to the decisions of the former Boards of Referees on appeal before an Employment Insurance Umpire.

[14] The Federal Court of Appeal ruled that the standard of review applicable to the decision of a Board of Referees (now the General Division) and an Umpire (now the Appeal Division) on questions of law is correctness, and the standard of review applicable to questions of mixed fact and law is reasonableness - *Chaulk v. Canada (AG)*, 2012 FCA 190; *Martens v. Canada (AG)*, 2008 FCA 240; *Canada (AG) v. Hallée*, 2008 FCA 159.

ANALYSIS

Preamble

[15] This decision concerns files AD-14-184, AD-14-185, AD-14-186 and AD-14-187 since the issues presented on appeal before the General Division are identical in each of the Appellant's files.

Separate judicial personality of the employer

[16] Before the General Division and before the Tribunal, the Appellant's counsel argued that the Respondent could not apply section 30 of the Regulations and conclude that the Appellant was engaged in the operation of a business when the Canada Revenue Agency had previously determined that she was an employee and that her employment for 9193-6781 Québec Inc. was insurable under paragraph 5(1)(*a*) of the same Act. Since the Appellant was an employee, this eliminates the possibility that she was engaged in the operation of a business.

[17] The Tribunal must follow the teachings of the Federal Court of Appeal in *Canada (AG) v. D'Astoli*, 1997 CanLII 5609 (FCA), which specifically answered the question raised by the Appellant.

[18] In that case, the Federal Court of Appeal instructed that the Respondent must perform two different operations in respect of a person who claims unemployment insurance benefits.

[19] It must first determine whether the claimant was employed in insurable employment during his or her qualifying period, then establish a benefit period for the claimant during which his or her entitlement will be verified.

[20] Once the first operation concerning the claimant's insurability has been performed, as in this case with the decision of the CRA, the Respondent must establish a benefit period, and once it is established, benefits are payable to the claimant for each week of unemployment that falls 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).

[21] According to subsection 30(1) of the Regulations, where 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 their working hours, the claimant is considered to have worked a full working week during that week.

[22] According to subsection 30(2) of the Regulations, 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 assess with respect to two different periods. Parliament determined that the analysis of the two factors in question would be performed according to different rules which must not be combined because the insurability proceeding is separate from that of entitlement.

[24] There is no doubt that the issue of insurability must be decided by the CRA under section 90 of the Act, and by the Tax Court of Canada on appeal, and must refer to the qualifying period, whereas the issue of entitlement must be decided by the Respondent and by the General Division on appeal, and must refer to the benefit period.

[25] The Tribunal finds that the CRA's insurability decision cannot be binding on the Respondent and the Tribunal with respect to entitlement to receive benefits, and that the Respondent can apply section 30 of the Regulations and find that the Appellant was engaged in the operation of a business during her benefit period.

[26] This ground of appeal submitted by the Appellant therefore cannot be accepted by the Tribunal.

Unemployment status

[27] In its analysis of the six criteria set out in subsection 30(3) of the Regulations, concerning the financial success or failure of the business, the General Division concluded that:

> [Translation]
> The income statements of the business in which the Appellant is involved, as a sole owner/proprietor in the past and currently as a company shareholder, show a progression.

[28] As submitted by counsel for the Appellant, there was a lack of evidence before the General Division concerning the Appellant's financial situation as the sole owner, such that the General Division's conclusion on this point is not supported by the evidence.

[29] Regarding the nature and the amount of capital and other resources invested, the General Division concluded that:

> [Translation]
> During the interview with the investigator whose report is on record, the Appellant said that she had been the sole owner of the business for more than 15 years before it was transferred to the current corporation, 9193-6781 Québec Inc. In exchange for this transfer to the corporation, the Appellant received 33 1/3% of the equity shares issued. Normally, a person who withdraws from a business requires the full value of the shares of which the person disposes or, otherwise, retains control over them with "preference" shares giving the person payment protection of this value of the transferred shares. Why would this have been different in the Appellant's case? The Appellant did not provide any reasons to the Tribunal to contradict this interpretation.

[30] The evidence before the General Division, more specifically the interview conducted by the officer of the Respondent, does not refer to a transfer of the Appellant's shares to 9193-6781 Québec Inc., even though she was the sole owner. Furthermore, the General Division formed its own hypothesis when it stated that [translation] "Normally, a person who withdraws from a business requires the full value of the shares …"

[31] There is no evidence to conclude, as the General Division did, that when a person withdraws from a business, he or she [translation] "requires the full value of the shares" and that this fact is so notorious as not to be the subject of dispute. This is an essential condition for judicial notice to be taken – *Gosselin v. Canada (AG)*, 2006 FCA 405.

[32] The Tribunal must find that the General Division based its decision regarding the unemployment status on erroneous findings of fact that it made in a perverse or capricious manner. The analysis of the six criteria set out in subsection 30(3) of the Regulations therefore

cannot have been conducted correctly, and the General Division's decision is not reasonably open to it on the record.

[33] There is reason for the Tribunal to intervene and refer the matter to the General Division on the issue of the unemployment status.

Availability

[34] On the issue of availability, the General Division concluded that:

> [Translation]
> [37] The Tribunal further assessed the Appellant's intention and the conditions she set that limit her chances or possibility of obtaining alternate employment. The Tribunal finds that the Appellant's statements and behaviour are not convincing enough to demonstrate a real availability for employment, and it even doubts that efforts were made to find suitable employment other than at the restaurant she operated in partnership with her son and his wife.

[35] In an interview dated March 27, 2012, the Appellant stated that:

> [Translation]
> She countersigns all cheques, approves the schedules with her son, she works as a cook, she is the one who makes the pizza. Since this is a family business, she does a bit of everything, as do her two partners. She admits that she is always there, except when she is on a break between 2 and 4 p.m. every day, as are her other two partners. She is paid $9.50/hour, which is less than the other two cooks make on an hourly basis. She explained that, in order to avoid losing staff, the three of them decided to meet their employees' wage request and guarantee sufficient hours to qualify for unemployment. She said that if they could not make that guarantee to employees, no one would want to work for them anymore. She added that the restaurant was not profitable enough to pay full-time wages to everyone over long periods. She admitted that she was almost always at the restaurant, even though she was not paid; she worked the lunch and dinner hours, she did preparation for the following day, and she was the one who made the pizza. She was shown the schedule board for 2010, where she reported eight hours of work a week, her son 20 hours, and three full-time employees, during the months of June, July and August; however, these are the busiest periods where the rate of turnover is the highest. She admitted that she did not work only eight hours during those weeks, but said she did not remember how many hours she worked. She added that she did not understand what happened. She repeated that, to keep staff, she had to give them hours. She admitted that, when the restaurant is open, she is not available for alternate employment because she is indispensable at the restaurant…
>
> (Emphasis added by the undersigned)

[36] The evidence before the General Division demonstrates that the Appellant initially admitted that, when the restaurant is open, she is not available for alternate employment because she is indispensable to the restaurant. She is the owner and oversees everything with her son. She takes part in decisions and she still has the last word.

[37] To explain the answers given to the investigator on record, the Appellant testified before the General Division that she [translation] "oversaw everything" only when she was full-time at the restaurant. She was available for work when she was not on site or when she was working reduced hours. She mentioned that she still had the last word on operational matters, only when she was there.

[38] It is evident from the General Division's decision that it did not give credibility to the Appellant's testimony because, by her own admission, she is a key person in the business.

[39] The General Division was not convinced that the Appellant could sporadically step away from the business, when there was no termination or reduction of operations. Before the General Division, the Appellant also did not dispute the schedule showing the hours worked by employees for each of the years in question.

[40] An abundant and uniform case law has clearly established that a Board of Referees (now the General Division) must attach more weight to the initial, spontaneous statements made by the persons concerned before the Respondent's decision is rendered, than to the subsequent statements that are offered in an attempt to justify or put a better face on the claimant's position when the Respondent renders an unfavourable decision.

[41] The case law has also consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it. The Tribunal must intervene only if it is obvious that the General Division's decision is unreasonable based on the facts brought before it to support its decision.

[42] The Tribunal finds no reason to intervene on the issue of credibility, as assessed by the General Division.

[43] It is worth recalling 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 jurisdiction is 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.

[44] In *Le Centre de valorisation des produits marins de Tourelle Inc*., A-547-01, Létourneau J.A. stated that the Tribunal's function 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."

[45] The Tribunal concludes that the General Division's decision on the issue of availability relies on the evidence brought before it and that it is a reasonable decision that was made in accordance with the legislative provisions and the case law.

[46] There is no reason for the Tribunal to intervene on the issue of availability.

CONCLUSION

[47] The appeal is allowed in part and the matter is referred to the General Division for a new hearing only on the issue of the unemployment status.

Pierre Lafontaine
Member, Appeal Division