Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *M. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 30

Appeal No. AD-15-209

BETWEEN:

M. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: Pierre Lafontaine

DATE OF HEARING: January 14, 2016

DATE OF DECISION: January 22, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division for a new hearing on each issue.

INTRODUCTION

[2] On March 25, 2015, the Tribunals' General Division found that:

- The Appellant had voluntarily left her employment without just cause under sections 29 and 30 of the *Employment Insurance Act* (Act);

- The Appellant's earnings had been allocated in accordance with the provisions of sections 35 and 36 of the *Employment Insurance Regulations* (Regulations);

- Imposing a penalty under section 38 of the Act was justified;

- Issuing a notice of violation under section 7.1 of the Act was justified.

[3] The Appellant requested leave to appeal before the Appeal Division on April 24, 2015. Leave to appeal was granted on June 12, 2015.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the information on file, including the need for additional information;
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant attended the hearing and was represented by Mr. Jean-Guy Ouellet. The Respondent was represented by Julie Meilleur.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

(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 if the General Division erred in fact or in law when it found that:

- The Appellant voluntarily left her employment without just cause under sections 29 and 30 of the Act;
- The Appellant's earnings were allocated in accordance with sections 35 and 36 of the Regulations;
- Imposing a penalty under section 38 of the Act was justified;
- Issuing a notice of violation under section 7.1 of the Act was justified.

SUBMISSIONS

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

- The General Division member's decision breached the rules of natural justice by proceeding by way of a telephone hearing in spite of completely contradictory elements appearing on the face of the record;

- The General Division member's very decision is itself contradictory, and their findings are at odds with the statement affirming that [translation] "the Tribunal does not doubt the sincerity of the Appellant", who denies working for the alleged employer;

- The General Division member's decision does not comply with decision requirements because it fails to clearly set out the reasons why the member did not consider the evidence submitted by the Appellant that demonstrates the alleged employer's possible lack of credibility;

- The General Division member's decision exceeds their jurisdiction and errs in law given that the very existence of the employment is at issue and it is for the Canada Revenue Agency to decide on this issue;

- The General Division member's decision errs in fact and in law in finding that the Respondent was discharged its burden of proving that the Appellant voluntarily left employment that she denies having held;

- The General Division member erred in fact and in law when, in view of the evidence on file, they decided to uphold the penalty and notice of violation and proves to be capricious in the circumstances given the claimant's testimony that she never worked for the alleged employer;

- The General Division member's decision is unfounded in fact and in law because it does not reflect the burden of upholding the penalty and notice of violation, particularly in light of their findings regarding the Appellant's sincerity.

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

- The General Division did not err in fact or in law and properly exercised its jurisdiction;

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Appeal Division's authority 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, and that this decision is unreasonable, the Tribunal must dismiss the appeal;

- In this case, there were many pieces of conflicting information submitted and the Respondent believes that the Tribunal carefully appraised the submitted evidence in order to assess the parties' credibility;

- The General Division stated that it had accepted the employer's version as the likeliest because the employer had submitted concrete and substantial evidence, such as records of employment and paystubs. As such, the General Division provided a reasonable explanation for why it had granted the employer a greater degree of credibility;

- The evidence on file shows that the Appellant worked at 9255-8576 Québec Inc. from February 19 to March 4, 2012, and that she did not report her earnings or her voluntary leaving;

- Because she did not provide a reason for her voluntary leaving, the Appellant failed to prove that she had just cause for leaving her employment within the meaning of sections 29 and 30 of the Act, and that leaving was the only reasonable alternative in her case;

- Furthermore, money received as wages constitutes earnings within the meaning of paragraph 35(2)(*a*) of the Regulations. Under the provisions of subsection 36(4) of the Regulations, earnings received as wages must be allocated to the period in which the services were rendered;

- The Appellant did not provide any reasonable explanation to refute the presumption that false or misleading statements were knowingly made and therefore maintains that the penalty was justified under the circumstances;

- The Respondent exercised its discretionary authority in a judicial manner by issuing the Appellant a notice of violation. After taking into account all relevant circumstances, a notice of violation issued in accordance with section 7.1 of the Act was warranted;

- Given that the issue in this case does not concern the insurability of the employment, in accordance with section 90 of the Act, no request for ruling should be sent to the Canada Revenue Agency.

STANDARDS OF REVIEW

[10] Both parties submit that the applicable standard of review for a decision of the General Division and of the Appeal Division on questions of law is correctness, and that the applicable standard of review for questions of mixed fact and law is reasonableness - *Martens v. Canada (A.G.*), 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

[11] Although the term "appeal" is used in section 113 of the Act (formerly section 115 of the Act) to describe the procedure introduced before the Appeal Division, the Appeal Division's authority is essentially identical to that previously granted to the Umpires and that which is granted to the Federal Court of Appeal by section 28 of the *Federal Courts Act*. The proceeding is therefore not an appeal in the usual sense of the word, but rather a circumscribed review - *Canada (AG) v. Merrigan*, 2004 FCA 253.

[12] The Tribunal is of the opinion that the Appeal Division should provide a degree of deference to the General Division's decisions that is consistent with the degree of deference

provided to the decisions of the former Board of Referees being appealed before the Employment Insurance Umpire.

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

ANALYSIS

[14] The issues in question are disqualification for voluntary leaving, instigating a claim for $12,090.00; a penalty of $2,970.00, imposed for failing to report earnings from February 19 to March 4, 2012; and a notice of violation.

Voluntary Leaving and Earnings

[15] According to her appeal letter before the General Division, the Appellant stated that she did not work for the employer responsible for the decisions being appealed (GD 2-4-5). However, based on the record of employment, pay stubs, and statements submitted by the employer at issue (GD 3-31 to GD 3-36, and GD 3-82), the Respondent believes that the Appellant did in fact work for this employer.

[16] In its analysis, the General Division takes into account the contradictory nature of the information on file. (General Division decision, par.22).

[17] As regards the issue of voluntary leaving, the General Division concluded that:

> [TRANSLATION]
> [24] In this case, the Commission found the employer's version as more credible based on the evidence submitted. The Tribunal assessed the versions presented and also considers the employer's version as the most probable. The Tribunal does not doubt the Appellant's honesty; however, the employer has submitted concrete and significant evidence, namely the Record of Employment and pay stub. The evidence establishes that the Appellant received wages from 9255-8576 Québec Inc. for the periods specified by the employer (Exhibit GD 3- 42 and GD 4-11). (Emphasis added by the undersigned)

[18] As regards earnings, the General Division found that:

> [TRANSLATION]
> The Tribunal found that the wages the Appellant received constitute earnings within the meaning of subsection 35(2) of the Regulations given that she received them as payment for hours worked at 9255-8576 Québec Inc. The Tribunal finds that these earnings were correctly allocated in accordance with subsections 36(4) and 36(9) of the Regulations.

[19] The Tribunal finds that the General Division's findings on the issue of voluntary leaving and earnings to be contradictory, or at the very least inconsistent and ambiguous.

[20] The General Division states in its decision that it did not doubt the Appellant's sincerity (as defined by the Larousse dictionary), which clearly implies that the General Division found her testimony to be true and genuine.

[21] If the Appellant's testimony was sincere, the General Division could not have subsequently concluded that she had worked for the employer at issue, much less find that she received earnings from this employment, given that she has consistently denied ever having this employment.

[22] Furthermore, the General Division granted greater weight to the employer's evidence, particularly the Record of Employment and the pay stub, yet it did not explain why it granted the Appellant's evidence less significance.

[23] The Appellant based its arguments on her former employer's vindictiveness, on her previous employer's refusal to cooperate with her claim application, on the fact that she had to complain to the Commission des normes du travail to have these rights respected by her previous employer, on the integrity of the aforementioned businesses at issue being investigated by journalists, and on the obvious connection between her previous employer and the disputed employer well before, as well as after, the events at issue. She also submits as evidence a possible inconsistency with regard to the address stated on the Record of Employment that, based on the documents found, she could not link to the aforementioned businesses or to the alleged employer.

[24] When the General Division 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, it must explain the reasons for the decision - *Bellefleur v. Canada (A.G.)*, 2008 FCA 13; *Parks v. Canada (A.G.)*, A-321-97.

[25] For these reasons, the Tribunal finds the General Division's findings regarding the issues of voluntary leaving and earnings to be capricious and unreasonable.

Penalty and Notice of Violation

[26] When the General Division dismissed the Appellant's penalty appeal, it found the following:

> [TRANSLATION]
> [34] The reasons given by the Appellant are that she never worked for 9255-8576 Québec Inc. and that she was under the impression that the amounts she received represented wages owed to her by Clinique Image. The Tribunal sympathises with the Appellant's particular situation; however, based on the reasons given, the Tribunal cannot find that false statements were not knowingly made. It is baffling that the Appellant could have cashed cheques without knowing from which company they were issued. Moreover, the Appellant was not able to explain why she failed to report these wages to the Commission.

[27] The reasons the Appellant gave to explain her inaccurate responses are that she has never worked for the business being appealed and that she thought the wages she was paid represented wages owed to her by her previous employer and not by the employer at issue. Upon reading the decision, the Tribunal finds that the General Division did not consider whether or not the Appelant's explanations were reasonable. In fact, the General Division, simply failed to explain why [translation] "based on the reasons given, the Tribunal cannot find that false statements were not knowingly made."

[28] Mere suspicion of a claimant's testimony does not constitute sufficient grounds to find that they had knowingly made false or misleading statements. The maker of the false statement must know it to be false - *Canada (A.G.) v. Gates*, A-600-94.

[29] Furthermore, the General Division's finding that the Appellant subjectively knew that she was making a false statement is difficult to reconcile with the General Division's acknowledgment of the Appellant's sincerity.

[30] Given the Tribunal's decision on the penalty, the General Division's decision regarding the notice of violation cannot be upheld.

CONCLUSION

[31] The appeal is allowed and the matter is referred back to the General Division for a new hearing on each issue.

[32] With regard to the disputed employment's insurability under the Act, the Tribunal recommends that the Respondent refer this matter to the Canada Revenue Agency.

Pierre Lafontaine
Member, Appeal Division