



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *A. A. v. Canada Employment Insurance Commission*, 2016 SSTADEI 38

Date: January 25, 2016

File number: AD-13-430

APPEAL DIVISION

Between:

A. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

Decision by: Pierre Lafontaine, Member, Appeal Division

REASONS AND DECISION

DECISION

[1] The Tribunal grants leave to appeal before the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] In October 2013, the majority of the Board of Referees found that:

- The amounts that the appellants received from Air Canada constitute earnings under section 35 of the *Employment Insurance Regulations* (Regulations) and must therefore be allocated in accordance with subsection 36(9) of the Regulations.

[3] On October 16, 2013, the Applicant filed an application for leave to appeal before the Appeal Division.

ISSUE

[4] The Tribunal must determine whether the appeal has a reasonable chance of success.

THE LAW

[5] As stated in subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, “[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted” and the Appeal Division “must either grant or refuse leave to appeal”.

[6] Subsection 58(2) of the *Department of Employment and Social Development Act* states that “[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

ANALYSIS

[7] Given the Tribunal's obligation to conduct proceedings as informally and quickly as circumstances, fairness, and natural justice permit, obligation prescribed by subsection 3(1) of the *Social Security Tribunal Regulations*, the present decision will also apply to the files

listed in the Appendix to this decision since they essentially raise the same questions of fact and law.

[8] 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.

[9] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for the applicant to meet than the one that must be met on the hearing of the appeal on the merits. At the application for leave to appeal stage, the applicant does not have to prove his case.

[10] The Tribunal will grant leave to appeal if it is satisfied that any of the above grounds of appeal has a reasonable chance of success.

[11] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact, or jurisdiction to which the response might justify setting aside the decision under review.

[12] In light of the foregoing, does the Applicant's appeal have a reasonable chance of success?

[13] In his application for leave to appeal, the Applicant submits the following:

- The majority of the Board of Referees rendered a decision containing several errors of law, thus justifying the Tribunal's intervention.
- To demonstrate that payment from a former employer (Air Canada) should be considered as payment from subsequently terminated employment (Aveos), the majority of the Board referred to two sections of the *Employment Insurance Act* (Act) that are completely irrelevant to a case relating to the allocation of earnings.
- The majority of members nonetheless recognize that [*translation*] "(...) subsection 36(9) does not explicitly state an obligation to include payments from a previous employer", and further state that "(...) the term employer must therefore include the current employer as well as all previous employers for the same job".
- Section 2 of the Act cited by the Board of Referees is in no way related to the issue of determining if a payment from a former employer must be allocated when a subsequent employment is lost.
- In their majority decision, the two members also refer to another section of the Act to prove that there is no distinction between the previous employer (Air Canada) and the successor employer (Aveos).
- The majority of members could not refer to subsection 82.1 of the Act, which applies only to the specific issue of the collection of premiums in the event of a sale or transfer of a business.
- Although the majority of members had before them numerous facts proving that there had clearly been two completely distinct employers in this case, and that these elements had been proven by these same members, they nonetheless mistakenly failed to account for these fundamental pieces of evidence in their decision.

- The majority of members disregarded these essential facts that confirm that there are two separate employers in this file.
- Rather, they erred in finding that there is a continuum of employers between Air Canada and Aveos and, as a result, payments made by a previous employer (Air Canada) must be allocated at the end of employment with a successor employer (Aveos). This analysis constitutes a major factual error that justifies that the Appeal Division.

[14] The Tribunal finds that the issue between the parties stems from the interpretation of subsections 36(9) and 36(19) of the Regulations.

[15] Between 2007 and 2011, Air Canada sold a portion of its heavy maintenance operations to an entity that would eventually become Aveos. In 2012, Aveos shut its doors, and following an order from the Canada Industrial Relations Board (CIRB) and a decision by Umpire Martin Teplitsky, Air Canada eventually paid a sum to its former employees who had lost their jobs at Aveos.

[16] The Applicant stated before the Board of Referees that the wording of subsection 36(9) of the Regulations indicates that only payments from the last employer, and not those from a previous employer, may be allocated in accordance with this subsection. The payment can therefore not be allocated under paragraph 36(19)(b) of the Regulations.

[17] The Respondent stated before the Board of Referees that earnings, as defined in section 35, must be allocated in accordance with subsection 36(9) if these earnings are a result of lay-off or job loss. This means that only the reason for, rather than the source of the payment determines whether subsection 36(9) is applicable.

[18] In its decision, the majority of the Board of Referees granted the Applicant the benefit of the doubt by considering that the wording of subsection 36(9) of the Regulations excludes any payments not made by the last employer. The Board of Referees therefore found that the premium became payable following the termination of employment from Aveos and that subsection 36(9) of the Regulations should be applied.

[19] The dissenting member of the Board, however, found that [*translation*] "had Parliament intended for subsection 36(9) to apply to payments made for a former employer following the termination of employment of a successor employer, it would have stated this and would not have stated the following in subsection 36(9): 'separation and total earnings of the claimant from that employment'".

[20] In support of his application for leave to appeal, the Applicant essentially submits that the Board of Referees erred in fact and in law when it applied subsection 36(9) rather than paragraph 36(19)(b) of the Regulations, that it based its decision on two sections of the Act that are in no way relevant to a case relating to the allocation of earnings, and that it overlooked facts based on evidence.

[21] After reviewing the appeal file, the decision of the majority and minority of the Board of Referees, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The interpretation and application of subsection 36(9) of the Regulations by the majority of the Board of Referees raises several questions of fact and law, the answer to which may lead to the setting aside of the decision under review.

CONCLUSION

[22] The Tribunal grants leave to appeal before the Appeal Division of the Social Security Tribunal.

Pierre Lafontaine
Member, Appeal Division

APPENDIX – Appeals of Claimants Represented by MAC Montréal

Name	File
A. A.	AD-13-430
J. A.	AD-13-513
P. A.	AD-13-515
G. A.	AD-13-518
M. A.	AD-13-520
A. A.	AD-13-521
S. A.	AD-13-523
D. B.	AD-13-526
P. B.	AD-13-527
S. B.	AD-13-593
B. B.	AD-13-595
D. B.	AD-13-596
É. B.	AD-13-600
C. B.	AD-13-598
P. B.	AD-13-601
P. B.	AD-13-603
D. B.	AD-13-594
C. B.	AD-13-588
D. B.	AD-13-592
R. B.	AD-13-606
A. B.	AD-13-580
P. B.	AD-13-607
G. B.	AD-13-605
B. B.	AD-13-608
C. B.	AD-13-609
Y. B.	AD-13-597
F. B.	AD-13-589
R. B.	AD-13-462
J. B.	AD-13-463
V. B.	AD-13-457
P. B.	AD-13-458
S. B.	AD-13-459
M. B.	AD-13-452
F. B.	AD-13-453
N. B.	AD-13-454
E. B.	AD-13-455
D. C.	AD-13-456

F. C. AD-13-446

Name	File
B. C.	AD-13-500
C. C.	AD-13-501
C. C.	AD-13-502
P. C.	AD-13-493
J. C.	AD-13-494
A. C.	AD-13-491
I. C.	AD-13-495
P. C.	AD-13-497
M. C.	AD-13-482
J. C.	AD-13-485
S. C.	AD-13-488
E. C.	AD-13-490
F. C.	AD-13-465
J. C.	AD-13-466
D. D.	AD-13-467
W. D.	AD-13-604
R. D.	AD-13-464
J. D.	AD-13-460
M. D.	AD-13-461
M. D.	AD-13-507
L. D.	AD-13-506
A. D.	AD-13-509
S. D.	AD-13-510
M. D.	AD-13-434
A. D.	AD-13-435
S. D.	AD-13-436
M. D.	AD-13-437
G. D.	AD-13-431
M. D.	AD-13-602
E. D.	AD-13-432
S. D.	AD-13-433
F. D.	AD-13-451
M. D.	AD-13-441
P. D.	AD-13-442
J. E.	AD-13-443
M. F.	AD-13-444
J. F.	AD-13-445
M. G.	AD-13-439

B. G. AD-13-438

Name	File
C. G.	AD-13-440
M. G.	AD-13-447
A. G.	AD-13-448
J. G.	AD-13-449
E. G.	AD-13-450
H. G.	AD-13-562
É. G.	AD-13-563
A. G.	AD-13-565
B. G.	AD-13-567
J. G.	AD-13-552
D. G.	AD-13-599
R. G.	AD-13-555
R. H.	AD-13-557
D. H.	AD-13-559
A. H.	AD-13-561
P. H.	AD-13-590
M. H.	AD-13-564
A. H.	AD-13-566
J. H.	AD-13-568
J. H.	AD-13-585
F. H.	AD-13-586
D. J.	AD-13-587
F. K.	AD-13-584
R. K.	AD-13-582
B. L.	AD-13-576
H. L.	AD-13-575
F. L.	AD-13-573
T. L.	AD-13-572
S. L.	AD-13-528
J. L.	AD-13-548
A. L.	AD-13-546
J. L.	AD-13-531
G. L.	AD-13-529
A. L.	AD-13-532
P. L.	AD-13-533
A. L.	AD-13-535
M. L.	AD-13-536
M. M.	AD-13-538

R. M. AD-13-544

Name	File
J. M.	AD-13-530
M. M.	AD-13-534
B. N.	AD-13-537
M. N.	AD-13-539
B. N.	AD-13-540
G. O.	AD-13-541
L. P.	AD-13-542
M. P.	AD-13-543
P. P.	AD-13-545
R. P.	AD-13-547
P. P.	AD-13-549
L. Q.	AD-13-550
E. R.	AD-13-551
R. R.	AD-13-591
E. S.	AD-13-553
B. S.	AD-13-583
P. S.	AD-13-554
J. S.	AD-13-556
G. S.	AD-13-558
C. T.	AD-13-560
P. T.	AD-13-569
D. T.	AD-13-581
S. T.	AD-13-571
R. T.	AD-13-574
P. V.	AD-13-577
N. V.	AD-13-578
M. V.	AD-13-579
M. W.	AD-13-570