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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. Y. G.,* 2016 SSTADEI 61

Tribunal File Number: AD-13-1149

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

Y. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 28, 2016

DATE OF DECISION: February 4, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the Board of Referees decision dated June 5, 2013, is rescinded, and the Respondent's appeal before the Board of Referees is dismissed.

INTRODUCTION

[2] On June 5, 2013, a Board of Referees found that:

> - There was no need to have earnings allocated under sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On June 21, 2013, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted by the Appeal Division on January 14, 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 would probably not be a main issue;
- The cost-effectiveness and expediency of the hearing choice;
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] Lisa Morency represented the Appellant at the hearing. The Respondent attended the hearing and was represented by Maxime Doyon.

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 Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The Board of Referees erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) 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.

ISSUE

[7] The Tribunal must decide whether the Board of Referees erred in fact and in law in determining that there was no reason to allocate the Respondent's earnings under sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- Subsection 52(5) of the *Employment Insurance Act* (Act) allows the Appellant up to 72 months to reconsider a claim if it believes that "a false or misleading statement or representation has been made in connection with a claim". It is relevant to note that the legislation did not use the term "knowingly", used in section 38 of the Act when penalty is at issue.

- In this case, the Board of Referees, after having determined that the payment made to the Respondent by his two employers constituted earnings, found that [*translation*] "when filling out his claim, the Claimant mistakenly failed to report his earnings. The payment he received constituted earnings and must be allocated

to the weeks in which the services were rendered. The Respondent received benefits to which he was not entitled and which he must unfortunately reimburse."

- However, the Board found that the Appellant had missed the deadline for reconsideration, as the notice was issued on November 15, 2012 for the alleged acts of October 2008 to September 2009.

- The Board of Referees therefore erred in law by stating on the one hand that the Respondent had made an inaccurate statement, and on the other hand, deciding that the Appellant could not go back between 36 and 72 months to reconsider the Respondent's claim.

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

- The Board of Referees considered the relevant facts, namely that [*translation*] "when filling out his claim, the Claimant mistakenly failed to correctly report his earnings" (Board of Referees decision, page 5). The Board of Referees then correctly justifies its decision by citing decision A-607-87 (Board of Referees decision, page 6) to determine that the Appellant's proceedings were made past the deadline.

- Thus, it seems from its decision that the Board of Referees interpreted section 52 of the Act and correctly decided that the misstatements at issue are not false within the meaning of subsection 52(5) of the Act and do not allow the Appellant to use the exception that provides for the 72-month extension. Moreover, section 52 of the Act was submitted in the 2013 reconsideration file submitted by the Appellant.

- The Board of Referees chose to use this wording: "when filling out his claim, the Claimant mistakenly failed to correctly report his earnings" (Board of Referees decision, page 5). The Board of Referees did not find that the statements were false or misleading within the meaning of section 52(5) of the Act and thus determined that the Appellant could not apply the exception stated

in subsection 52(5) of the Act that would allow it to derogate from the time limits normally set for reconsideration.

STANDARDS OF REVIEW

[10] The Appellant submits that that a misinterpretation of a legal provision constitutes an error of law subject to the proper standard - *Canada (A.G.) v. Hallée,* 2008 FCA 159.

[11] The Respondent submits that application of the facts to the law involves a question of mixed fact and law, rather than a question of just law. This issue is submitted to the standard of review of reasonableness - *Canada (A.G). v. Hallée*, 2008 FCA 159.

[12] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness and that the standard of review applicable to questions of mixed fact and law is reasonableness *Martens v. Canada (A.G.)*, 2008 FCA 240, *Canada (A.G.) v. Hallée*, 2008 FCA 159.

ANALYSIS

Introduction

[13] The Respondent is not disputing the Appellant's allocation of earnings.

[14] The parties submit to the Tribunal that the only issue before the Appeal Division is that of the reconsideration period.

Reconsideration

[15] The Board of Referees found that the Respondent did not make any false or misleading statements and that the Appellant could not make use of the 72-month timeframe set out in section 52 of the Act to reconsider the Respondent's file.

[16] The Respondent's attorney stated to the Board of Referees as well as to the Appeal Division that the Respondent did not make any false or misleading statements that would have allowed the Appellant to extend the reconsideration period to 72 (seventy-two) months.

[17] However, in *Langelier* (A-140-01), *Lemay* (A-172-01), and *Dussault* (A-646-02), the Federal Court of Appeal determined that, in order for the appellant to extend the period in which it can reconsider a claim under section 52(5) of the Act, the appellant does not have to establish that the respondent did in fact make false or misleading statements; rather, the appellant must show only that it could reasonably consider that a false or misleading statement was made in connection with a benefit claim.

[18] Therefore, at the reconsideration stage, the Appellant was not compelled to establish that the Respondent had in fact made a false or misleading statement. The Appellant had merely to suspect that a false or misleading statement had been made.

[19] In the circumstances of this case, could the Appellant reasonably believe that the Respondent made a false or misleading statement or representation?

[20] In this case, the Appellant found that the Respondent had failed to provide information regarding some earnings from two employers. Based on information provided by the Appellant, there were three or four-week periods in which earnings were not reported. The Respondent had acknowledged that the payments received from the two employers were correct and did not match the amounts reported.

[21] In an interview, the Respondent stated that he had possibly failed to report a period of employment with an employer.

[22] In applying the teachings of the Federal Court of Appeal to this case, the Tribunal considers, on the basis of the evidence, that the Appellant could reasonably find that the Respondent had made a false or misleading statement or representation and therefore could be granted a period of 72 months to reconsider the Respondent's benefit claim.

CONCLUSION

[23] The appeal is allowed, the Board of Referees decision dated June 5, 2013, is rescinded and the Respondent's appeal before the Board of Referees is dismissed.

Pierre Lafontaine
Member, Appeal Division