



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

[TRANSLATION]

Citation: *S. S. v. Canada Employment Insurance Commission*, 2016 SSTA DEI 68

Tribunal File Number: AD-15-68

BETWEEN:

S. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 26, 2016

DATE OF DECISION: February 5, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing solely on the issue relating to the allocation of earnings.

INTRODUCTION

[2] On January 19, 2015, the Tribunal's General Division found that:

- The Appellant's earnings were allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).
- The imposition of a penalty was justified under section 38 of the *Employment Insurance Act* (Act).
- The issuance of a notice of violation was justified under section 7.1 of the Act.

[3] On February 13, 2015, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on June 9, 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 prevailing issue;
- The information on record, including the type of information that is missing, and the need for clarification;

- The need to proceed as informally and quickly as possible in accordance with the criteria in the Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[5] The Appellant attended the hearing and the Respondent was represented by Luce Nepveu.

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.

ISSUE

[7] The following is the only issue submitted by the Appellant to the Tribunal:

- Were the earnings allocated in accordance with sections 35 and 36 of the Regulations?

SUBMISSIONS

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

- The General Division rendered a decision based on an incomplete file.
- Nowhere does the General Division's file include the detail of the calculations of the payments received versus the payments that should have been received.

- In order to defend his case, he had asked the General Division during the hearing for details of the calculations, which the Member did not provide.
- Without a complete file, the General Division could not render a fair decision.
- He received the requested information after the General Division's decision and following his appeal to the Appeal Division.

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

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction.
- Section 35 of the Regulations defines "income" as "any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy". The Appellant does not deny having worked or having been paid.
- When a claimant receives earnings, these earnings must be allocated in accordance with section 36 of the Regulations. The earnings that must be taken into account at the end of the benefit period is the claimant's entire income resulting from any and all employment.
- The Appellant admitted to having worked and to receiving income, which caused an overpayment.
- The General Division analyzed the evidence and unanimously found that the Appellant had knowingly made false statements. The Tribunal determined that a penalty was justified and that the Respondent had exercised its discretionary authority fairly, as regards both the penalty and the notice of violation.
- The role of the General Division is limited to deciding whether the interpretation of the facts by the majority of the General Division was reasonably consistent with the evidence in the file.

- The Federal Court of Appeal has clearly stated that an Umpire must not substitute their opinion for that of a Board of Referees, unless the decision appears to have been made in a perverse or capricious manner or without regard for the material before it.
- The Appellant attended the hearing (via teleconference) and was able to present his version of the facts. The General Division rendered a decision within its jurisdiction, and the General Division's decision is clearly not unreasonable in light of the relevant evidence.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits that the Federal Court of Appeal has determined that the standard of review applicable to a decision of a Board of Referees and an Umpire regarding questions of law is the standard of correctness - *Martens v. Canada (A.G.)*, and that the standard of review applicable to questions of mixed fact and law is reasonableness - *Canada (A.G.) v. Hallée*, 2008 FCA 159.

[12] 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 (A.G.) v. Merrigan*, 2004 FCA 253.

[13] 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.

[14] The Federal Court of Appeal determined that that the applicable standard of review for a decision of a Board of Referees (now the General Division) and an Umpire (now 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.

ANALYSIS

[15] The Appellant submits that the General Division rendered a decision based on an incomplete file. He argues that nowhere does the General Division's file include the details of the calculations of the payments received versus the payments that should have been received.

[16] He states that during his hearing before the General Division, he had pointed out the absence of this information from the file and the need to obtain details of the calculations so that he could defend his case. The Member did not follow up on his request. He feels that, without a complete file, the General Division could not render a fair decision in his case.

[17] The Respondent acknowledges that the information in the General Division's file was not detailed enough to respond to the Appellant's questionings. It submits that it is attempting to rectify the situation in order to avoid a recurrence in the present file.

[18] It is important to remind the General Division that a fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party, and the opportunity to respond to those allegations.

[19] Clearly, the Appellant was unable to obtain the requested information needed to effectively defend his case and was thus denied his right to a fair hearing.

[20] The Tribunal finds that it would have been preferable for the General Division to adjourn the case in order to give the Appellant a chance to understand the Respondent's calculation details so that he could submit his evidence that the Respondent had miscalculated the earnings to be allocated.

[21] Case law tells us that if there is the slightest doubt that a principle of natural justice was not respected, the Tribunal is justified in returning the file for a new hearing.

[22] In light of both the summary representations and the calculation of the allocated earnings, the Tribunal finds it preferable to return the file to the General Division for a new hearing solely on the issue of the allocation of earnings.

CONCLUSION

[23] The appeal is allowed in part and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing solely on the issue relating to the allocation of earnings.

Pierre Lafontaine

Member, Appeal Division