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

[TRANSLATION]

Citation: *M. T. v. Canada Employment Insurance Commission,* 2016 SSTADEI 85

Tribunal File Number: AD-15-352

BETWEEN:

M. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON January 28, 2016

DATE OF DECISION: February 12, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 14, 2015, the Tribunal's General Division found that:

- The Appellant did not have an interruption of earnings under subsection 14(1) of the *Employment Insurance Regulations* (Regulations).

- The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* (Act) and subsection 30 of the Regulations was justified because the Appellant had failed to prove that he was unemployed.

[3] The Appellant requested leave to appeal to the Appeal Division on June 15, 2015. Leave to appeal was granted by the Appeal Division on July 3, 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 file, including the need for additional information.

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

[5] The Appellant attended the hearing and was represented by Sylvain Bergeron. The Respondent was represented by Manon Richardson.

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 whether the General Division erred in fact and in law by concluding the following:

- The Appellant did not experience an interruption of earnings under subsection 14(1) of the Regulations.
- Imposing a disentitlement under sections 9 and 11 of the Act and section 30 of the Regulations was justified because the Appellant had failed to prove his unemployment.

SUBMISSIONS

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

- The General Division contradicts section 9.001, which defines what constitutes reasonable and customary efforts for obtaining suitable employment. It presents a criterion not included in the section and that contradicts the jurisprudence that reiterates that legal texts do not stipulate the presentation of the Record of Employment.

- The General Division analyzes over several pages the six questions used to determine the insurability of an employment. This goes against the laws stating that the criteria to be used in determining self-employment are covered by three sections of the Quebec Civil Code (2085, 2098 and 2099). An employment contract and a business contract are two separate contracts.

- Case law states that a distinction must be made between the time a claimant is an employee or a business owner.

- The General Division states that there is a non-arm's length relationship yet did not include in its analysis the criteria it used to determine this relationship and included only the Appellant's past work experience, which is not an established criterion.

- Given that the General Division erred in fact and in law, the Appeal Division is justified in intervening in order to issue the decision that should have been issued.

[9] The Respondent submitted the following arguments to counter the Appellant’s appeal:

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

- The evidence on file shows that the Appellant did not experience an interruption of earnings within the meaning of the Act given that he benefitted from the use of the company truck and a cellphone.

- There are numerous Federal Court of Appeal decisions regarding the issue of interruption of earnings. An interruption of earnings occurs when a claimant is laid off or separated from their employment and they do not work or do not receive any earnings from this employment for a period of at least seven consecutive days.

- In CUB 61718B, the Umpire stated that the use of a company truck and cellphone constitute a benefit not unlike earnings. He confirmed the Board of Referees' decision to the effect that the Claimant did not experience an interruption of earnings within the meaning of the Act.

- The General Division did not have to issue a decision based on the Quebec Civil Code; its decision must be based solely on the *Employment Insurance Act.* The issue of availability does not impact the issue of interruption of earnings.

- The Respondent assessed the possibility of writing off the overpayment, but the Appellant does not meet the terms of subparagraph 56(2)(*b*)(*iii*) given that the Appellant had received benefits less than 12 month prior.

STANDARDS OF REVIEW

[10] The parties made no submissions regarding the standard of judicial review applicable to the General Division's decision.

[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 (A.G.) 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 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

Unemployment Status

[14] In an interview on March 26, 2014, the Appellant stated that he held a 40% stake in two companies. He works as a store manager in X and he has been selling pools, hot tubs, gazebos, and chemicals for around 20 years. He does everything in the company. He stated that he is partners with his two brothers. He signs the cheques, makes the deposits, and deals with the bills for the company Piscines Pro in X. He pays himself a weekly wage and makes around $30,000 per year. He stated that, as regards the business in X, there are around 15 employees during the peak season, which consists of May, June, and July, and 9 employees during the off season while he receives benefits.

[15] The buildings in X belong to the company. The company runs print and radio ads. He stated that the company had in the beginning and for a long time taken loans from financial institutions. The loans are backed by the company buildings and the inventory. The company has a $400,000 line of credit.

[16] He stated that during peak season, he works a good 50 hours per week. When he's unemployed, he states that he devotes no more than 10 hours per week. He is the one that hires the staff in X. He looks after the company's day-to day operation and does the purchasing with his brother.

[17] On August 7, 2014, the Respondent informed the Appellant that he could not receive Employment Insurance benefits as of December 9, 2013, because he was operating a business and could not be considered to be unemployed.

[18] On February 4, 2015, the Canada Revenue Agency (CRA) issued a decision regarding the insurability of the Appellant's employment at Crystal Loisirs Inc. His employment was deemed insurable for the period of March 3, 2014, to December 20, 2014. This decision was not appealed.

[19] Before the Tribunal, the Appellant's counsel argued essentially that the Respondent could not apply section 30 of the Regulations and decide that the Appellant was operating a business when the CRA had decided that, during the period in question, he was an employee and that his employment for Crystal Loisirs Inc. was insurable under paragraph 5(1)(*a*) of the Act.

[20] The Tribunal must follow the teachings of the Federal Court of Appeal in *Canada v. D'Astoli*, 1997 CanLII 5609 (FCA), which has already specifically answered the question that was raised in this appeal.

[21] In that case, the Federal Court of Appeal instructed that the Respondent must perform two different consecutive operations when assessing a claimant's Employment Insurance claim.

[22] 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.

[23] Once the first step regarding the claimant’s insurability has been performed, 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).

[24] 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. Subsection 30(2) of the Regulations provides that when 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 having worked a full working week.

[25] 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 these two factors would be subject to separate rules that must not be combined since the insurability process is separate from the entitlement process.

[26] There is no question that insurability must be decided by the CRA according to the terms of section 90 of the Act, and by the Tax Court of Canada if there is an appeal, and must refer to the qualifying period, whereas entitlement must be decided by the Respondent and by the General Division in case of an appeal, and must refer to the benefit period.

[27] The Tribunal therefore finds that the Respondent cannot be bound by the CRA's insurability decision in deciding entitlement to benefits and the Respondent can apply section 30 of the Regulations and conclude that the Appellant was operating a business during his benefit period.

Interruption of Earnings

[28] The Appellant's second argument was that the General Division erred in finding that the Appellant had not experienced an interruption of earnings under subsection 14(1) of the Regulations and that because of that, he does not meet the conditions required to establish a benefits claim, in accordance with subsection 7(2) of the Act.

[29] Specifically, the General Division erred in finding that the Appellant had continued to receive earnings from his business within the meaning of paragraph 35(10)(*d*) through his use of the company truck and cellphone.

[30] Subsection 14(1) of the Regulations states the following:

> a. Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

[31] Subsections (2) and (10) of section 35 of the Regulations state:

> b. Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, is the entire income of a claimant arising out of any employment, including:
>
> (10) For the purposes of subsection (2), "income" includes:
>
> (d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

[32] In an interview held on April 8, 2014, the Appellant stated that he was using a vehicle registered under the company's name and that the company had paid for since the opening of the business for him and for the company. He also stated that he used a cellphone registered under the company's name and for which the company pays for personal and business purposes. He stated that he still has his cellphone so that his employees could reach him or to respond to clients, and that he also uses his cellphone for personal purposes (GD3-27-28).

[33] In an interview held on May 20, 2014, the Appellant stated that he often used the truck for travel. He stated that he used his car only when work was very busy, namely during peak season. Since the truck is being used for deliveries from May to July, he stated that he therefore uses his car to travel during that period. Otherwise, he always uses the truck for personal travel (GD3-29).

[34] In an interview on March 26, 2014, the Appellant had stated that during the peak season, he would put in 50 hours a week. And, when he's unemployed, he states that he puts in no more than 10 hours per week (GD3-22).

[35] He reiterated this fact on September 26, 2014, when he told the review officer that he "works at least 10 hours a week when he's on unemployment. His work schedule is always changing. He usually goes into the store and works two hours a day. However, there are days when he doesn't go in at all. He is in charge of the business' day-to-day operations" (GD3-35).

[36] As a result , the Tribunal has no doubt that the Appellant's use of a truck and cellphone provided by his employer constitutes benefits he receives from this employer and are therefore considered income and insurable earnings within the meaning of the Act and the Regulations.

[37] As decided by the General Division, the use of the company truck and cellphone prevents an interruption of earnings as required by the Regulations. In fact, use of the truck implies a connection to the work the Appellant carried out for the employer.

[38] The Appellant argued that the General Division had dismissed his testimony at the hearing. Rather, the General Division's decision shows that it clearly did not give credibility to the Appellant's testimony regarding the issue of using the truck and the late cellphone payment given that the Appellant's testimony before the General Division contradicted his own initial statements.

Tribunal's Role and Jurisdiction

[39] The Tribunal does not have the authority to retry a case or to substitute his or her discretion for that of the General Division. The Tribunal's powers are 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.

[40] In *Le Centre de valorisation des produits marins de Tourelle Inc*., A-547-01, Justice Létourneau 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".

[41] The Tribunal finds that the General Division's decision was made based on the evidence submitted before it, and that this was a reasonable decision that complies with both legislation and jurisprudence.

[42] There is nothing to justify the Tribunal's intervention on the issues in question.

CONCLUSION

[43] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division