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

Citation: *Canada Employment Insurance Commission v. T. M.*, 2016 SSTADEI 98

Appeal No. AD-15-271

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

T. M.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division –Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:: Mark BORER

DATE OF DECISION: February 23, 2016

DECISION Appeal allowed

Canada

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

INTRODUCTION

[2] On May 4, 2015, a General Division member "dismissed with modification" the Respondent's appeal against the previous determination of the Commission.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On December 17, 2015, a teleconference hearing was held. Both the Commission and the Respondent attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

> (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, whether or not the error appears on the face of the record; or
>
> (c) the General Division 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.

ANALYSIS

[6] This case revolves around whether or not the Respondent received earnings that should be allocated. The Commission determined that the settlement moneys in question were earnings but after a hearing the General Division determined that they were not (although it did not disturb the allocation of certain vacation and bonus payments).

[7] The Commission now appeals against that decision, arguing that the General Division erred in law by failing to consider and apply the correct test to determine whether or not the moneys in question were earnings.

[8] The Respondent supports the General Division decision and asks that the appeal be dismissed.

[9] Unfortunately, the General Division did indeed make a number of errors in its decision.

[10] First, the General Division erred in fact when it found that the settlement agreement between the Respondent and the Employer said that the moneys paid were to compensate for the relinquished right of reinstatement.

[11] It may be that the General Division mistook the mere offer of settlement found at Exhibit GD3-30 (which does indeed use those words) for the actual agreed upon settlement found at Exhibit GD3-34 (which does not), but as this finding was integral to the ultimate conclusion reached by the General Division it constitutes a reviewable and material error. I note that in the final settlement the Employer maintains its denial of any legal liability to the Respondent, and that the Respondent and the Commission agreed before me that the document found at Exhibit GD3-34 is the actual settlement.

[12] Second, although the General Division appears to have understood the law surrounding the allocation of earnings, it did not apply it properly. At paragraph 23 of its decision, the General Division correctly set out the test established by the Federal Court of Appeal to determine whether or not settlement moneys are being paid in compensation for the renouncement of the right to reinstatement and therefore should not be allocated

[13] Sadly, the General Division then failed to apply this test to the facts at hand, and appeared to accept without question and without analysis the language used in the settlement "agreement" (actually simply an offer, as noted above). This too is a reviewable and material error.

[14] Third, the General Division stated that "the [Respondent] is to be paid benefits for the period when the legal settlement monies were allocated to her claim".

[15] The issue before the General Division was whether or not the moneys in question needed to be allocated, and how that allocation should be done (if at all). It was not for the General Division to determine whether benefits were payable, as that was not the issue before it. By not confining itself to the issue before it, it committed a reviewable and material error of jurisdiction.

[16] Finally, even though the General Division was agreeing with the Respondent when she appealed on the basis that her settlement moneys did not have to be allocated, the General Division said that "[t]he appeal is dismissed with modification".

[17] It is difficult to understand what this means. What is being modified, the appeal or the initial Commission determination? And what is the modification? This outcome makes no sense and is extremely confusing to the parties. An unrepresented litigant (or even a represented one) could easily be forgiven for thinking that their appeal had been unsuccessful, when in fact the General Division actually meant the opposite.

[18] The usual less confusing phrase is to say that "[t]he appeal is allowed in part" and to then explain exactly what part has been allowed. This allows the parties to better understand the decision, and for the Commission to carry it out in the manner intended by the General Division.

[19] This decision cannot stand. The proper remedy is a new General Division hearing so that the evidence can be properly assessed and the law applied appropriately.

CONCLUSION

[20] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

Mark Borer

Member, Appeal Division