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

Citation: *E. P. v. Canada Employment Insurance Commission,* 2016 SSTADEI 133

Tribunal File Number: AD-14-529

BETWEEN:

E. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON: February 25, 2016

DATE OF DECISION: March 9, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part and the file is returned to the General Division for a new hearing before a different Member only on the issues of penalty and notice of violation.

INTRODUCTION

[2] On April 3, 2014, the General Division of the Tribunal determined that:

- The allocation of earnings was calculated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (the "*Regulations*");

- A penalty was imposed in accordance with sections 38 of the *Employment Insurance Act* (the "*Act*") for making a misrepresentation by knowingly providing false information to the Commission;

- A notice of violation was issued in accordance with section 7.1 of the *Act*.

[3] The Appellant requested leave to appeal to the Appeal Division on October 9, 2014. Leave to appeal was granted on March 30, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.

- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] At the hearing, the Appellant was present and the Respondent was represented by Carol Robillard.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (the "*DESD Act"*) states that the only grounds of appeal are the following:

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.

ISSUES

[7] The Tribunal must decide if the General Division erred in fact and in law when it concluded that the allocation of earnings was performed in accordance with sections 35 and 36 of the *Regulations*, a penalty was imposed in accordance with sections 38 of the *Act* and a notice of violation was issued in accordance with section 7.1 of the *Act*.

ARGUMENTS

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

- The Member mentioned several times that she should have known to declare her earnings. She pleads that he kept re-phrasing the question and asking it over and over, until she realized that responding that she did not know was not the answer the Member wanted to hear, and that he would not stop his badgering until she said what he wanted to hear - namely that she knowingly misrepresented her earnings;

- She submits that this teleconference is not something she will ever forget, it was that persistently abusive. She may not have known if she would be paid but she ought to have known and so on - it went on and on. She essentially argues that the General Division failed to respect a principle of natural justice;

- She did not knowingly and purposely misrepresent her earnings. She made a truthful declaration at the time of filing the reports, according to her real and actual situation;

- She disputes the conclusion of the General Division on the issue of penalty since she had no subjective knowledge.

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

- It is not in dispute that the Appellant worked during her benefit period and had earnings from 502993 Ontario Limited and York Region District School Board between June 26, 2011 and December 3, 2011 (GD3-16 to GD3-19);

- The General Division's finding that the Appellant worked and had earnings from both employers and that the Respondent accurately allocated the earnings was reasonable and compatible with the evidence it accepted;

- Case law has held that once the Commission has shown from the evidence that the claimant has wrongfully answered very simple questions, the burden shifts to the claimant to explain why those incorrect answers were given;

- The Tribunal found that the Appellant knowingly misrepresented the facts that she was working, albeit on a casual basis, and would be receiving earnings for the days on which she worked;

- It is respectfully submitted that it was open to the General Division to make the findings of fact that it did; and that the Tribunal committed no error in dismissing the appeal on this issue because the decision was a reasonable one which conforms to the *Act*, as well as the established case law;

- The Respondent maintains that it exercised its discretion judicially under section 7.1(4) of the *Act* when it decided to issue a Notice of Violation;

- The Respondent recognizes that the General Division did not make a finding of fact on the issue of the notice of violation and asks the Appeal Division give the decision that the General Division should have given in accordance with subsection 59(1) of the *DESD Act*;

- There is nothing in the General Division's decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the applicable standard of review for a mixed question of fact and law is reasonableness - *Smith v. Alliance Pipeline Ltd*, 2011 SCC 7, *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[12] The grounds of appeal in section 58 of the *DESDA Act* are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in

subsection 115(2) of the *Act*. Therefore, the Federal Court of Appeal jurisprudence on the nature of the appeal regarding former EI Umpires is relevant and persuasive.

[13] The Tribunal is of the opinion that the degree of deference the Appeal Division accords to the General Division decisions should be consistent with the deference accorded to the decisions of former board of referees by the Employment Insurance Umpires. An appeal before the Appeal Division is not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) c. Merrigan*, 2004 CAF 253.

[14] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[15] There is no dispute that the Appellant worked during her benefit period and had earnings from 502993 Ontario Limited and York Region District School Board between June 26, 2011 and December 3, 2011 (GD3-16 to GD3-19). The General Division decision to maintain the decision of the Respondent to allocate the Appellant's earnings to a period while she was on claim complies with section 35 and 36 of the *Regulations* and is supported by the evidence in the file.

[16] The Applicant however argues in appeal that the teleconference before the General Division is something she will never forget since the Member was abusive and persistently said that she should have known to declare her earnings. She essentially argues that the General Division failed to respect a principle of natural justice.

[17] The Tribunal listened carefully to the recording of the hearing before the General Division and agrees with the Appellant that the General Division Member failed to respect a principle of natural justice. The Tribunal finds that the Member, although not

abusive as pleaded by the Appellant, acted more as an advocate for the Respondent than an impartial decision maker. He did in fact, during the hearing, persistently tried to convince the Appellant that she should have known to declare her earnings.

[18] It also appears from the decision of the General Division that it concluded, without considering the explanation of the Appellant, that she knowingly misrepresented the facts when she completed the reports. In doing so, the General Division seems to have applied an objective test. The Tribunal finds that the General Division did not ask itself if the Appellant had subjective knowledge that the representations made by her were false.

[19] To impose a penalty to the Appellant, the General Division had to conclude, on a balance of probabilities, that the Appellant subjectively knew that she was making false or misleading statements - *Canada c. Purcell*, A-694-94.

[20] In view of this conclusion on the issue of the penalty, the decision of the General Division on the issue of the notice of violation cannot stand.

[21] For all the above mentioned reasons, the file will be returned to the General Division for a new hearing before a different Member only on the issues of penalty and notice of violation.

CONCLUSION

[22] The appeal is allowed in part and the file is returned to the General Division for a new hearing before a different Member only on the issues of penalty and notice of violation.

Pierre Lafontaine
Member, Appeal Division