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

Citation: *M. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 164

Tribunal File Number: AD-16-203

BETWEEN:

M. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 24, 2016

REASONS AND DECISION

INTRODUCTION

[1] On January 4, 2016, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision of the Canada Employment Insurance Commission (Commission). The Commission had allocated earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations) which resulted in an imposition of warnings pursuant to section 41.1 of the *Employment Insurance Act* (EI Act) for knowingly providing false or misleading information.

[2] The Applicant attended the GD hearing, which was held by videoconference. The Respondent did not attend. The GD determined that:

a) the funds received by the Applicant from her employer constitute earnings and must be allocated for the period in question pursuant to sections 35 and 36 of the EI Regulations;

b) these monies are considered earnings in accordance with section 35 of the EI Regulations and must be allocated in accordance with section 36 of the EI Regulations;

c) the Applicant made false statements on her reports that misled the Respondent, resulting in payment of benefits that she was not entitled to;

d) the Respondent acted judicially after considering all of the evidence;

e) the Applicant knew she was making false representations to the Respondent when completing her reports stating that she did not work and did not receive any wages or money while she was collecting benefits; and

f) The limitation period in section 52 of the EI Act has been complied with by the Commission.

[3] The GD decision was sent to the Applicant under cover of a letter dated January 5, 2016.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 25, 2016 within the 30 day appeal period.

[5] This matter was previously before the AD. The AD had allowed the Applicant's appeal of a Board of Referees decision, rendered in July 2013, with the consent of the Commission. A new hearing before the GD was ordered. The decision rendered by the GD is the subject of this Application.

ISSUE

[6] The AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[7] Pursuant to section 57 of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the DESD Act, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[9] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[10] Subsection 58(1) of 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;
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> (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.

[11] The Application states that the Applicant relies on and repeats her submissions made throughout the proceedings, including at the GD. The Applicant relies on paragraphs 58(1)(a), (b) and (c) of the DESD Act.

[12] The following summarizes the Applicant's submissions on the specific errors in the GD decision:

a) The proceedings by the Commission to impose penalties on her have not followed fundamental principles of natural justice and fairness;

b) In particular, the history of the proceedings and the delay of the Commission in its actions have been argued by her throughout the proceedings but have been met with a proverbial "shrug of the shoulders";

c) Reference is made to *Cardinal v. Kent Institution*, [1985] 2 SCR 643, for the legal test for a person who may be subject to a penalty;

d) Paragraph 26(b) of the GD decision is another example of a failure to consider the principles of natural justice and fairness;

e) In paragraph 29, the GD summarily dismissed the Applicant's arguments regarding limitation periods and delay of the Commission;

f) The GD provided no explanation, in paragraphs 32 and 33 of the decision, for why the GD did not accept the Applicant's explanation on her earnings; and

g) Any findings of fact in the GD decision are erroneous, perverse and capricious because of the Commission's delay.

[13] The issue before the GD was the allocation of earnings by the Commission after determining that the Applicant had worked and received wages for the period June 15, 2008

to August 23, 2008 which were not reported on her claim reports. This resulted in the Applicant having to pay back any benefits she should not have received and notice that she knowingly made false representations.

[14] The GD stated the correct law and jurisprudence when considering the issues of allocation, the making of false or misleading statements or representations, and the time limits within which the Respondent could reconsider the Applicant's EI claim.

[15] The GD noted that the Applicant testified at the GD hearing. The GD decision, at pages 5 to 8, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[16] The Applicant's submissions mostly re-argue the facts and arguments that she asserted before the GD. In particular, the GD noted at paragraph [16] that the Applicant stated that "she did not receive the March 22, 2011 letter and therefore the notice is 5 years after the alleged overpayment","she submitted that the delay in bringing this claim is a violation of procedural fairness and natural justice as the delay has seriously affected her ability to marshal documentation, evidence, records and [her] recollection of events in 2008" and "further submitted that the letter of January 28, 2013 does not provide enough detail or information for her to attempt to provide a full appeal."

[17] In essence, the Applicant argues that the Commission breached the principles of natural justice and fairness because of its delay in notifying her of the alleged overpayment, which delay affected her ability to respond to the allegations. All of the Applicant's reasons for appeal relate directly to this argument.

GD Decision re: History of the Proceedings and Delay

[18] The Applicant alleges that the GD treated her arguments on delay with a "shrug of the shoulders" and a recitation of the legislation.

[19] The Applicant filed an initial claim for benefits in April 2008. The claim was established effective April 6, 2008, and she was paid benefits. In March 2011, the Respondent wrote to the Applicant concerning her undeclared earnings in the work weeks beginning June

15, 2008 to August 17, 2008 (ending August 23, 2008). In January 2013, the Respondent advised that the allocation of earnings had been adjusted, that the Applicant would have to pay back benefits that she should not have received and that she had knowingly made 5 false representations but a monetary penalty was not being imposed. The Applicant filed an appeal, making the submissions summarized in paragraph [16] above.

[20] The Respondent issued the reconsideration decision of January 28, 2013 within 72 months after the benefits were paid. The reconsideration decision was issued within 54 months of the period in question.

[21] Subsections 52(1) and (5) of the EI Act only require that the decision be issued within the stated time period and, unlike other provisions of the EI Act, these time limitations do not reference receipt by the claimant. Therefore, it is not relevant when and whether the Applicant received the March 2011 letter. In any event, there is no dispute that she received the reconsideration decision of January 2013 and that it was issued within 72 months of the benefits having been paid to the Applicant.

[22] Therefore, the Applicant is arguing that the Commission could not reconsider the claim despite the fact that it met the requirements of section 52 of the EI Act and that it should not be permitted to because its conduct breaches the principals of natural justice and fairness.

[23] I would add that pursuant to section 47 of the EI Act, the Respondent has 72 months from the day on which the liability arose to recover the debt and the 72 months stops running if an appeal is filed (as is the case here). The Applicant's Notice of Appeal of the reconsideration decision is dated February 2013.

[24] The GD decision on this issue noted:

> [25] The Appellant submitted that:
>
> > a) The Respondent failed to pursue this matter in a timely fashion. As such, due to this delay, the Appellant has been denied the right to make a proper answer, a fundamental right that is entrenched in our legal system as procedural fairness and natural justice.

b) There are limitation periods established by various legislation for this very reason – it is not fair or reasonable to expect a person to be able to make a proper defense, keep records or recall events after a reasonable amount of time – usually two years.

c) It is unfair to expect the Appellant to be able to counter the Respondent's arguments on the substantive law and case law raised, as she does not possesses the same resources, record keeping system, including the use of technology that the Respondent has at its disposal. This is a direct and reasonable result of the Respondent's delay in pursuing this matter.

d) It is in the public interest for leave to be granted as the Respondent should not deny leave to appeal when legitimate and serious issues of procedural fairness and natural justice are raised.

…

[35] Section 52(5) of the Act reads as follows:
If, in the opinion of the Respondent, a false or misleading statement or representation has been made in connection with a claim, the Respondent has 72 months within which to reconsider the claim.

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

[37] If Parliament intended for an extension of the recovery period by way of section 94, it would have said so. The Act constitutes a complete code establishing penalties, overpayments and the recovery thereof. The Respondent has seventy-two months to recover the debt from the day of notification of the debt to the insured person. The seventy-two month prescription period englobes all methods of recovery including the section 94 certificate. Otherwise, subsection 35(4) is meaningless if it can be extended merely by filing a certificate. The complete code has been described as follows by the Federal Court of Appeal in A-637-86 v. Canada (Employment and Immigration Commission) [1989] 3 F.C. 88 at p. 110:

[38] The Appellant submits that there are limitation periods established by various legislation and it is not fair or reasonable to expect a person to be able to make a proper defense, keep records or recall events after a reasonable amount of time usually two years.

[39] In the Unemployment Insurance Act, 1971, Parliament legislated fully on the right to recover unemployment insurance benefit overpayments and the prescription

> of resulting debts to the Crown, of which the Respondent is an agent. The relevant provisions of the Act are a complete code in themselves, and when the Respondent relies on them they govern the establishment and recovery of its debts, to the exclusion of the common law rules.
>
> [40] The Tribunal finds that there is no merit to the appellant's allegation. In accordance with subsection 52(1) of the Act, the Respondent may reconsider any claim for benefits within thirty-six months from the date that benefits were, or should have, been paid. Where the Respondent is of the opinion that an appellant has made a false and misleading statement in relation to his or her claim for benefits, the time limit of thirty- six months for reconsideration is extended to seventy-two months. There is no question that this limitation period has been complied with by the Commission in the present case.

[25] The GD did not ignore the Applicant's submissions in relation to the rationale for limitation periods or the delay in the Commission's reconsideration of her claim for EI benefits. It considered her arguments, referred to the applicable legislative provisions and jurisprudence, and concluded that there was no merit to her allegations.

[26] The GD decision appears to have placed paragraphs [38] and [39] in the wrong order, as paragraph [39] is the quote that was referred to in paragraph [37]. If so, this is not a reviewable error under subsection 58(1) of the DESD Act, as it is not an error of fact, law or jurisdiction.

[27] Paragraph 39 of the GD decision quoted the Federal Court of Appeal in *Brière v. Canada (Employment and Immigration Commission)*, [1985] 3 FC 88 at page 110, paragraph 36:

> [36] This argument cannot be upheld. In the *Unemployment Insurance Act*, 1971, Parliament legislated fully on the right to recover unemployment insurance benefit overpayments and the prescription of resulting debts to the Crown, of which the Commission is an agent. The relevant provisions of the Act are a complete code in themselves, and when the Commission relies on them they govern the establishment and recovery of its debts, to the exclusion of the common law rules. Because there is nothing in the Act to indicate that the common law rules can be relied on in addition to the prescriptions contained in the Act, it appears from the terms of the second paragraph of section 38 of the Federal Court Act, R.S.C. 1970 (2nd supp.), c. 10, that the provisions of the Civil Code of Lower Canada could not apply to the case at bar in relation to prescription of actions by the Crown.

[28] One of the issues in the *Brière* case related to whether the Commission correctly proceeded under former section 57 of the *Unemployment Insurance Act* (UI Act)

(reconsideration) rather than former section 102 of the UI Act (rescind or amend). Former section 102 of the UI Act prescribed no time limits while former section 57 included specific constraints and formalities. The Federal Court of Appeal concluded at paragraph 13 of its decision that since former section 102 of the UI Act could not create "a certain, liquid and payable obligation to repay", the Commission had correctly relied upon former section 57 of the UI Act to create the obligation to repay.

[29] Subsection 52(5) of the EI Act is almost identical to former subsection 57(6) of the UI Act. Section 111 of the EI Act and section 66 of the DESD Act are similar to former section 102 of the UI Act. Although the provisions are not identical, the reasoning of the Federal Court of Appeal still applies today: the Commission must rely on section 52 of the EI Act to create an obligation to repay.

[30] In the current matter, the Commission proceeded by way of reconsideration, pursuant to section 52 of the EI Act, and the GD found that it had done so within the provisions and the time limitations of the EI Act.

[31] The GD's reliance on the *Brière* case was not an error, as the reasoning of the Court is applicable to the current provisions of the EI Act and DESD Act.

[32] The Tribunal cannot disregard the provisions of the EI Act, as the Applicant argues, or change the time periods that the Legislature has set. Changes to the EI Act cannot be requested by way of an appeal to the Tribunal. The Tribunal does not have jurisdiction to make legislative changes.

[33] Therefore, while the Applicant argues that the GD gave little or no consideration to her arguments about natural justice, it is neither an error of law nor a breach of natural justice to cite the legislative provisions, refer to and apply relevant jurisprudence and conclude that the Commission had met the time limitations.

Cardinal v. Kent Institution

[34] The Application refers to *Cardinal v. Kent Institution*, [1985] 2 SCR 643, and argues that the legal test for a person who may be subject to a penalty is outlined in that case. The Applicant suggests that that the GD failed to consider her written submissions on this case.

[35] However, the *Cardinal* matter relates to a judicial review in the context of a challenge to continued confinement in segregation in a prison. The appellants were allegedly involved in a hostage-taking at a prison, and they were transferred to another institution and placed in segregation. The appellants challenged their continued confinement in segregation by applications for *habeas corpus* with *certiorari* in aid. A majority of the British Columbia Court of Appeal held that the continued segregation of the appellants had not been rendered unlawful by a breach of the duty of procedural fairness. The Supreme Court of Canada allowed the appeal finding that the appellants had not been afforded a fair hearing on the question of continued segregation and, therefore, had a right on *habeas corpus* to be released from segregation into the general population of the penitentiary.

[36] The *Cardinal* case is not applicable or relevant to this appeal for the proposition that the Applicant asserts. This case is often referred to for the general principle of law that an administrative decision that affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness.

[37] The GD did not commit a reviewable error in failing to consider the *Cardinal* case in the Applicant's appeal since it was not relevant. It did consider the Applicant's argument that she had been denied procedural fairness and natural justice because of the delay of the Commission in reconsidering her claim.

Subparagraph 26(b) of the GD decision

[38] Subparagraph 26(b) of the GD decision reads:

> [26] The Respondent submitted that;
> …
> b) In the case in hand, the Appellant argues that it was unfair that it took up to almost five years before the Respondent dealt with this issue. It is submitted that section 52(5)

> of the Act allows the Respondent to reconsider a claim up to 72 months after benefits have been paid, if, in the opinion of the Respondent, a false or misleading statement or representation was made in relation to that claim. The Respondent does not have to prove that such false or misleading declaration was made knowingly in order to invoke section 52(5) of the Act (Langelier, A-140-01; Lemay, A-172-01). In light of this, the Respondent maintains that based on the evidence, it has been shown that false or misleading statements were made by the Appellant when she failed to declare her earnings during the period from June 15, 2008 to August 23, 2008. The Board of Referees found that even though the Appellant may not consider it fair that the Respondent took so long to deal with this issue, section 52(5) of the Act provided the authority to extend the time period to review this claim. It is the Respondent's position that the Board's findings were reasonable and compatible with the evidence.

[39] The Applicant argues that, by this paragraph, the GD "further failed to observe a principle of natural justice, as it appears to a reasonable person, that the General Division may have been making submissions and the case against the appellant for the Minister".

[40] Above paragraph 25 of the GD decision is the title "Submissions" and the beginning of paragraph 26 commences with "The Respondent submitted that". It is clear that subparagraph 26(b) is a summary of one of the submissions of the Commission. It is not the GD making the case against the Applicant for the Commission.

[41] Paragraph 25 commences with "The Appellant submitted that". The GD summarized the submissions of both the Applicant and the Commission. There was no breach of natural justice in so doing.

Paragraphs 32 and 33 of the GD Decision

[42] The Applicant argues that the GD provided no explanation, in paragraphs 32 and 33 of the decision, for why the GD did not accept her explanation on her earnings.

[43] Paragraphs 32 to 34 of the GD decision read as follows:

> [32] The Appellant stated to the Tribunal that she does not possesses the same resources, record keeping system, including the use of technology that the Respondent has at its disposal and therefore cannot access any other documentation to demonstrate that she did not receive wages or earn money during the period in question.

> [33] The Tribunal finds on the balance of probabilities and the evidence submitted that the Appellant did earn wages from Global R & D Consulting Group Inc. from June 15, 2008 to August 17, 2008 (AD2-17, 18, 19, 20) and she failed to report those earnings on her reports (AD2-32 to 37).
>
> [34] The Tribunal finds on the evidence submitted that the Appellant completed her reports declaring that she did not earn wages during the period in question (AD2-32 to
> 37) while she was in receipt of wages from her employer (AD2-17, 18, 19, 20) thereby making 5 false or misleading statements or representations.

[44] The GD decision did provide an explanation on its findings about the Applicant's earnings. It preferred the evidence submitted and in the record (referenced in paragraphs [33] and [34]) that she failed to report earnings on her reports to her assertion that she did not have earnings in that period.

[45] The GD's finding of fact was not made in a perverse or capricious manner or without regard for the material before it. The GD considered the evidence on the file in addition to the Applicant's testimony at the hearing.

[46] The GD is the trier of fact and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

Breach of Natural Justice and Duty of Fairness

[47] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22.

[48] I have reviewed the appeal file in detail, and it is clear that the GD had the documentary file (which included the Appellant's application, questionnaires and other statements and documents related to the review conducted by the Commission). The GD also summarized, in its written decision, the Appellant's testimony about the history of the proceedings and the challenges which resulted.

[49] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard.

[50] I have considered the allegations in the Application and conclude that the material in it does not demonstrate conduct by the GD that derogates from the standard.

[51] If leave to appeal is granted, then the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[52] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[53] I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[54] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division