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

Citation: *B. T. v. Canada Employment Insurance Commission,* 2016 SSTADEI 200

Tribunal File Number: AD-16-192

BETWEEN:

B. T.

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: April 12, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 14, 2015, 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 Applicant had been paid benefits (starting in 2010). The Commission determined, in 2014, that monies received in 2010 were wages, and they were subsequently allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations). The Appellant requested reconsideration. In January 2015, the Commission maintained its initial allocation decision, but reduced the overpayment by $33.00 because the Appellant had been underpaid in the weeks beginning May 2, 2010, June 6, 2010, and October 17, 2010.

[2] The Applicant attended the GD hearing, which was held by teleconference. The Respondent did not attend.

[3] The GD determined that:

a) The monies earned are earnings as defined in the *Employment Insurance Act* (EI Act), and the amount of the monies received was not in dispute;

b) The vacation and severance monies were correctly allocated to the week of the Applicant's lay-off;

c) Self-employment monies are to be allocated to the week in which the transaction giving rise to earnings occurred;

d) The Commission's comprehensive allocation calculation tables are correct;

e) The Applicant was in agreement with the weekly earnings; her disagreement related to the week to which those earnings are/were allocated;

f) The Commission correctly allocated the self-employment earnings to the week that the contract transaction was completed;

g) Employment earnings were allocated to the week in which they were paid, which was correct;

h) The period of time for the Commission to review the Applicant's claim was lengthy, but it is unrefuted that she incorrectly reported her earnings; and

i) The delay falls within the 72 month period set out in subsection 52(4) of the EI Act.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 20, 2016. The Application stated that she received the GD decision on December 22, 2015.

[5] The Tribunal requested that the Respondent file submissions on whether leave should be granted or refused and in respect of the Applicant's arguments related to GD3-51 and her overpayment calculation of $238, in the context of the Application.

ISSUES

[6] Whether the Application was filed within the 30-day time limit. [7] If it was not, whether an extension of time should be granted.

[8] Then the AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[9] 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.

[10] 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."

[11] 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."

[12] 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;

(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.

Was the Application Filed within 30 days?

[13] The Application was filed on January 20, 2016. The GD decision was sent to the Applicant under cover of a letter dated December 15, 2015 and, according to the Application, was received by the Applicant on December 22, 2015.

[14] Thirty (30) days from December 22, 2015 is January 21, 2016. Therefore, the 30-day appeal period ended on January 21, 2016.

[15] The Application was filed on January 20, 2016, within the 30-day time limit. An extension of time is not required.

Leave to Appeal

[16] The Application states that the Applicant relies on an error of law and erroneous findings of fact.

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

a) The GD misconstrued evidence, specifically the memo at GD3-51;

b) The wording "contract being completed" in the memo can be misinterpreted;

c) The GD's interpretation is biased and ignored her interpretation and evidence;

d) A Commission agent told her to declare commission earnings in the week that they were deposited to her bank account;

e) She did what she was told; and

f) Based on declaring commission earnings in the week that they were deposited to her bank account, the overpayment amount is $238 and she agrees to pay this amount.

[18] The Applicant's appeal, therefore, only relates to the commission (self-employment) earnings and the week when they should have been allocated.

[19] The Respondent's submissions are that the GD decision reviewed the evidence and rendered a decision in accordance with the evidence and the established jurisprudence.

[20] The GD decision addressed the issue on appeal in its decision at pages 15 and 16. The GD decision noted:

> [69] The Tribunal reviewed the Commission's statement of which the Appellant refers to as an erroneous is as follows: "Advised claimant this is declared as work/wages in the week of transaction—contract being completed." This statement was dated on May 26, 2010.
>
> [70] The Tribunal finds that the Appellant's perception of when a contract is complete is not in keeping with what the Commission's agent told her. Hence the Tribunal finds that the Commission's statement was correct and true, and certainly not erroneous.
>
> [71] The Tribunal accepts the Commission's comprehensive allocation calculation tables as fact.
>
> [72] The Tribunal finds that the Appellant was in total agreement with the weekly earnings on May 21, 2013. While she may not have known the extent of the overpayment as of that date, the "commission" earnings were correctly allocated to the week that the contract transaction was completed.
>
> [73] The Tribunal finds that the numerous recalculations submitted at reconsideration and during the appeal process are not new financial information. The integrity investigation reviewed all her financial statements, and collaboratively determined her weekly "commission" and allocated the self-employed earnings to the period where the transaction was completed (signing of the contract).

> [74] The Tribunal acknowledges the Appellant's confusion and difficulty in accurately reporting the "commission" based monies. However the Tribunal finds the Appellant has not proven that the weekly allocation of "commission" earnings was incorrect. The Tribunal finds that the commission earnings were correctly allocated in accordance with Regulations 36.

[21] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of allocation of commission monies, at pages 3 to 6 and 12 to 16.

[22] The GD noted that the Applicant testified at the GD hearing. The GD decision, at pages 6 to 11, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[23] The Applicant's submissions in support of the Application mostly re-argue the facts and arguments that she asserted before the GD.

[24] In particular, the GD noted:

a) at paragraph [42], the Applicant's submissions regarding commission monies;

b) at paragraph [67], that the Applicant "vehemently maintains that she was advised, by an agent of the Commission, to declare her earnings when the pay was actually deposited in her bank account" and "she submits as proof GD3-52 [sic] in which the Commission gave her incorrect information … submitted that the contract, is only completed when payment is deposited in her bank account … argued that she simply cannot be held accountable for the errors in her reports because she followed the Commission's advice"; and

c) at paragraphs [69] to [70], that it reviewed the Commission's statement (GD3-51) which the Applicant argues was erroneous, namely "declared as work/wages in the week of transaction - contract being completed" and found that the Applicant's "perception of when a contract is complete is not in keeping with what the Commission's agent told her" and that the Commission's statement was correct and true, and certainly not erroneous.

[25] The Applicant's arguments summarized paragraph [17], above, repeat evidence and submissions made before the GD. While she submitted that the GD ignored her interpretation and evidence about the Commission's statement (GD3-51), it is clear that the GD did take note of her evidence and arguments on the interpretation of the wording "contract being completed". The GD did not agree with the Applicant's interpretation, after reviewing all the evidence, but the GD did consider the Applicant's evidence and submissions.

[26] 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.

[27] It is not my role, as a Member of the Appeal Division of the Tribunal on an application for leave to appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine whether the appeal has a reasonable chance of success on the basis of the Applicant's specified grounds and reasons for appeal. Here, they are an error of law pursuant to paragraph 58(1)(b) of the DESD Act and an erroneous finding of fact based on the evidence that was before the GD which finding of fact, pursuant to paragraph 58(1)(c) of the DESD Act, was made in a perverse or capricious manner or without regard for the material before it.

[28] 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.

[29] 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.

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

CONCLUSION

[31] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division