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

Citation: *N. H. v. Canada Employment Insurance Commission,* 2016 SSTADEI 232

Tribunal File Number: AD-15-1127

BETWEEN:

N. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: April 25, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] On consent, the appeal is allowed.

INTRODUCTION

[2] On September 14, 2015, the General Division dismissed the Appellant's appeal against the previous determination of the Commission.

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

[4] This appeal was decided on the record.

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 involves an allocation of earnings and the assessment of a non-monetary penalty (sometimes referred to as a "warning letter").

[7] The Appellant submits, as he did before the General Division, that he did not receive any earnings from the Employer. He asks that his appeal be allowed.

[8] The Commission, for their part, concedes that the General Division member failed to offer any explanation for his conclusion that the Appellant received earnings which must be allocated. Although they do not concede on the merits, they ask that a new hearing be ordered so that the Appellant can make his case fully and a proper decision can be issued.

[9] In his decision, the member cited the *Employment Insurance Act* (the Act) and concluded that the "calculation is correct based upon the information from the financial worksheet which was submitted". He then found that "the Commission exercised its discretion in a judicial manner in setting [the penalty]" and dismissed the appeal.

[10] Unfortunately, I cannot but conclude that the member erred in the manner conceded by the Commission. The General Division member failed to make factual findings on the issue of the alleged earnings, failed to address the Appellant's evidence that he never received any earnings, and failed to properly assess whether a false statement had been made knowingly as he was required to do before upholding the levying of a penalty.

[11] Quoting verbatim from the Act at great length is no substitute for analysis.

[12] To be clear, I make no findings on the merit of the underlying case. It may well be that the Commission is correct, and the Appellant received the alleged earnings and deserved a non-monetary penalty for failing to report this.

[13] However, regardless of the truth (or lack thereof) of the Appellant's assertions, it is not clear to me on what basis the member concluded as he did. This is a breach of the principles of natural justice which I am obligated to intervene to correct. The Appellant was (and is) entitled to have his submissions considered and the law determined and applied correctly.

[14] Finally, I note that the General Division member stated (at paragraph 31) that "the Commission has removed the allocation of earnings attributed to [the Employer]".

[15] Reviewing the file, the member appears to have come to this conclusion based upon the Commission submissions to the General Division (found at GD4 - 5). I note, however, that the Commission also stated that “the adjustments have yet to be applied”.

[16] I have no doubt that the Commission did not apply these “adjustments” because to do so while the matter was still under appeal would be contrary to *Canada (Attorney General) v. Wakelin*, A-748-98. The Court clearly stated in that decision that it was too late for the Commission to amend the decision under appeal once an appeal had been launched.

[17] There is no doubt that the Commission’s submissions to the General Division were ambiguous. Were they saying that the alleged earnings should not be allocated because of the operation of the Act and associated regulations? Were they saying that the alleged earnings should not be allocated because the Appellant never received any? Or were they simply saying (as I suspect) that because the earnings were less than the weekly allowable income allocating them would not result in an overpayment?

[18] No matter the answer, it was incumbent upon the General Division member to resolve the appeal by stating the law, making findings of fact, and applying the law to the facts.

[19] As he failed to do so, his decision cannot stand.

CONCLUSION

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

Mark Borer

Member, Appeal Division