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

[TRANSLATION]

Citation: *P. D. v. Canada Employment Insurance Commission,* 2016 SSTADEI 244

Tribunal File Number: AD-15-1153

BETWEEN:

P. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: April 28, 2016

DATE OF DECISION: May 2, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

I INTRODUCTION

[2] On September 29, 2015, the General Division of the Tribunal dismissed the Appellant's appeal on the following three questions at issue:

- The decision by the Respondent to reconsider the Appellant's claim for benefit pursuant to section 52 of the *Employment Insurance Act* (the *"Act"*), within 36 months after the benefits have been paid or would have been payable, or within 72 months if, in the opinion of the Commission, a false or misleading statement has been made;

- The Applicant's disentitlement, for an indefinite period, from receiving employment insurance benefits because he left his employment voluntarily without just cause, pursuant to sections 29 and 30 of the *Act*;

- Determination of earnings received by the Appellant pursuant to section 35 of the *Employment Insurance Regulations* (the *"Regulations"*) and the allocation of such earnings pursuant to section 36 of the *Regulations*.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on October 28, 2015. Leave to appeal was granted by the Appeal Division on November 10, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference for the following reasons:

- the complexity of the issue or issues;

- the fact that more than one party will be in attendance;

- the information in the file, including the nature of gaps or need for clarification in the information; and

- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] During the hearing, the Appellant was present and was represented by Guy Ruel, counsel. The Respondent was represented by Manon Richardson.

THE LAW

[6] Under 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 or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order 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 determine whether the General Division erred in finding that:

- The Respondent's decision to reconsider the Appellant’s claim for benefits under section 52 of the Act was well-founded;

- The Applicant’s disentitlement, for an indefinite period, from receiving employment insurance benefits because he left his employment voluntarily without just cause, pursuant to sections 29 and 30 of the *Act*, was well-founded;

- Allocation of the Appellant's earnings was justified on the basis of sections 35 and 36 of the *Regulations*.

ARGUMENT

[8] The Appellant's arguments in support of his appeal are as follows:

- The General Division erred in dismissing the Appellant's appeal on questions concerning the allocation of earnings because he had waived his appeals on these questions;

- The General Division should have taken note of the waivers and not have dismissed the appeals. In so doing, it acted beyond its jurisdiction;

- The General Division misinterpreted the legal test governing the application of section 52(1) of the *Act.* The General Division has a duty and an obligation to verify whether false or misleading statements were truly made or not;

- The General Division should have concluded, based on the evidence before it, that he had adequately informed the Respondent that he had voluntarily left an employment in 2010 and therefore, the Respondent could not conclude that such voluntary leaving had been concealed from it in 2010;

- Far from remaining silent on this matter, the Appellant clearly informed the Respondent that he had voluntarily left an employment in October 2010, that the employer in question could be reached at the phone number (418)- 864-7600 (the telephone number of the place of business of Transport Rush, based on the claimant's undisputed testimony) and that he had stopped working for this employer because the work was on-call;

- In its decision, the General Division does not explain why the claimant's statement that he had voluntarily left an employment in October 2010 with Transport Rush was set aside and ignored;

- The Respondent's reconsideration authority is governed and regulated by Parliament. Its right and duty to reconsider a decision it made in the past must be exercised in accordance with the *Act* by which it legally exists and which determines its purpose and powers. If no false or misleading statement was made, the Respondent has no power to reconsider a decision it made over 36 months ago. The *Act* is imperative and must be applied;

- The question at issue in this appeal is to determine whether a false or misleading statement was truly made or not, regardless of whether it was deliberate or not.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The General Division did not err in law or in fact and it properly exercised its jurisdiction. The Appellant was present with his representative and was able to give his version of the facts. The General Division made a decision within its jurisdiction, and the decision of the General Division is not patently unreasonable in light of the relevant evidence;

- Whether or not a false or misleading statement was made must be objectively based on the facts, and there is no need to determine the intention of its maker;

- In this case, the Appellant stated that he had stopped working, but for a reason other than a layoff or on-call work. He did not report that he had left his on-call employment. The Appellant did not stop working because his on-call employer no longer had any work for him or because he was not being called to work, but rather he had left his employment voluntarily, and it was his decision to no longer work on call. The Appellant should have answered "yes" to the question given that he voluntarily left his employment and had not stopped working because the work was on-call and the employer no longer had any work for him;

- If the Appellant had answered "yes" to the question as he should have, an investigation would have immediately been launched to determine the reasons for his voluntary departure and payments would have stopped, but since he answered "no," he received payment because the Commission had no reason to

believe he had left his employment voluntarily. Deliberately or not, he made a false statement by answering “no” to the question;

- The Federal Court of Appeal confirmed the longstanding principle that the Commission may reconsider a claim for benefits after the 36-month time period without having to prove that a false statement had been made knowingly. In this regard, the Court added that the Commission should be reasonably satisfied that a false or misleading statement or representation has been made in connection with a claim for benefits. The Commission does not have to prove that a false statement was made knowingly.

- The case law informs us that an Umpire (now the Appeal Division) must not substitute his or her opinion for that of a Board of Referees (now the General Division), unless the Board’s decision appears to have been made in a perverse or capricious manner or without regard for the material before it.

- The role of the Appeal Division is limited to deciding whether the view of facts taken by the General Division was reasonably open to it on the record;

- The decision of the General Division is consistent with the relevant legislation and the case law, and is reasonably consistent with the facts on file. The General Division relied on all the evidence brought before it and explained its findings in coherent and consistent reasoning.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of review.

[11] The Respondent submits that the standard of review applicable to questions of law is correctness and the standard of review applicable to questions of mixed fact and law is reasonableness (*Pathmanathan v. Canada (AG)*, 2015 FCA 50).

[12] The Tribunal notes that in *Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal states at paragraph 19 of its decision that when the Appeal Division acts as an

administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.

[13] The Federal Court of Appeal proceeded to note that not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards," for the Federal Court and the Federal Court of Appeal.

[14] The Federal Court of Appeal concluded by stating that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*.

[15] The mandate of the Appeal Division of the Social Security Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[16] Unless the General Division failed to observe a principle of natural justice, erred in law or 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, the Tribunal must dismiss the appeal.

ANALYSIS

Allocation of earnings

[17] The General Division determined that the Appellant's earnings had been allocated in accordance with sections 35 and 36 of the *Regulations*.

[18] The Appellant argued at the appeal hearing that the General Division should have taken note of his waiver in this matter, instead of rendering a decision. However, he does not dispute the General Division's finding on this issue.

Voluntary Leaving

[19] The Appellant's counsel specified before the General Division that the voluntary leaving of employment related to the question of the reconsideration time period, but that the Appellant's voluntary leaving employment was without just cause within the meaning of the *Act*. He told the General Division that he had no material to present in this regard.

[20] The Appellant explained that he had voluntarily left his employment with his employer because he could no longer work on call and because he wanted to find another employment with a normal work schedule.

[21] On the basis of the evidence and considering all of the circumstances, the General Division found that the Appellant did not have just cause to leave his employment pursuant to sections 29 and 30 of the *Act*.

[22] The Tribunal's intervention is unwarranted.

Reconsideration

[23] The General Division found that the Respondent was justified in reconsidering the Appellant's claim for benefits under section 52 of the *Act*.

[24] The Appellant's counsel underscored before the General Division and the Appeal Division the absence of false or misleading statements by the Appellant concerning his voluntary leaving of employments whereby the Respondent could have extended the reconsideration period to seventy-two (72) months.

[25] The Appellant claims that he clearly informed the Respondent that he had voluntarily left an employment, that the employer in question could be reached by telephone at its place of business, and that he had ceased working for this employer because the work was performed on call.

[26] In this case, the Appellant answered "no" to the following questions:

> [Translation]
> We need to know why you stopped working for this employer. Did you stop working for a reason other than a lay-off or work on-call?

[27] The Appellant left an employment that was on-call, which apparently accounts for the confusion in his answer. It is true that the circumstances of an on-call worker render the question somewhat ambiguous. However, contrary to the Appellant's position, the Respondent was not provided with clear information about his voluntary leaving employment. The Appellant quite simply answered the question asked incorrectly. In fact, the Appellant had not stopped working because his on-call employer no longer had work for him and or because he was not being called, but had left his employment voluntarily and decided of his own volition to no longer work on call. Therefore, the reason was a reason other than a lay off or on-call work.

[28] The Federal Court of Appeal determined in *Langelier* (A-140-01), *Lemay* (A-172-01) and *Dussault* (A-646-02) that, to be granted the extended time to reconsider set out in subsection 52(5) of the Act, the Commission does not have to establish that the claimant in question made false or misleading statements but must instead simply show that it could reasonably find that a false or misleading statement was made in connection with a benefit claim.

[29] At the reconsideration stage, the Respondent therefore did not have to show that the Appellant had indeed made a false or misleading statement. As the General Division aptly underscored, the Respondent simply had to consider that a false or misleading statement had been made.

[30] In the circumstances of this case, could the Respondent reasonably find that the Respondent had made a false or misleading statement or representation?

[31] In this case, the Respondent determined that the Appellant had incorrectly reported or omitted to report information concerning his earnings with three employers. The information obtained from the employers and the Appellant shows that he did not report his earnings at the time he worked, but only at the time he was paid. The Appellant admitted that the amounts received differed from the amounts reported.

[32] Furthermore, during an interview in July 2014, the Appellant reported that he was working on-call, and that the employer could not provide him with full-time employment.

He said that he therefore left his employment because of a shortage of work. The officer told him at the time that an employment is left voluntarily when the claimant rather than the employer ends the employment.

[33] By applying the lessons learned from the Federal Court of Appeal to this case, the Tribunal considers based on the evidence that the Respondent could reasonably have found that the Appellant had made a false or misleading statement and could therefore extend the period for reconsidering the claim to 72 months.

[34] The Tribunal's intervention is unwarranted.

CONCLUSION

[35] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division

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