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

Citation: *Canada Employment Insurance Commission v. A. D.,* 2016 SSTADEI 264

Tribunal File Number: AD-15-226

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

A. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division– Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 20, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on April 9, 2015. The GD allowed the Respondent's appeal where the Commission had determined that monies received were to be included in the "earnings" and the "entire income" of the Respondent in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (EI Regulations) and the *Employment Insurance* (EI Act).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on April 30, 2015. The Application was filed within the 30 day time limit.

[3] The grounds of appeal stated in the Application are that the GD erred in law and based its decision on erroneous findings of fact that it made in a perverse or capricious matter or without regard to the material before it, as follows:

a) The GD found that the amount received by the Respondent from "FSST" was a full and final settlement of a claim for worker's compensation;

b) The facts on the record show that the amount received was provided to compensate for wage loss;

c) The Federal Court of Appeal made it clear that when a victim of an employment injury receives an income replacement benefit for a limited period of time and his entitlement ceased, when he is able to do similar work, this income does not constitute a "permanent settlement workers' compensation payment" within the meaning of the EI Regulations;

d) The Respondent received income replacement benefits covering a limited period (from December 4, 2012 to December 14, 2013); and

e) The GD erred when it misinterpreted paragraph 35(2)(b) of the EI Regulations.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[5] The EI Regulations, at sections 35 and 36, state:

a) “income” means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy: ss.35(1);

b) the earnings to be taken into account … are the entire income of a claimant arising out of any employment, including … (*b*) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments: ss. 35(2);

c) That portion of the income of a claimant that is derived from any of the following sources does not constitute earnings for the purposes referred to in subsection (2): (*a*) disability pension or a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments: ss. 35(7);

d) the earnings of a claimant as determined under section 35 shall be allocated to weeks and shall be the earnings of the claimant for those weeks: ss. 36(1); and

e) The following payments shall be allocated to the weeks in respect of which the payments are paid or payable: (*d*) workers' compensation payments, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments: ss. 36(12)

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (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”.

[7] 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”.

[8] 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.

[9] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[10] The Tribunal notes that the Respondent was present and testified at the hearing before the GD, but the Applicant chose not to attend.

[11] The issues before the GD were whether the monies that the Respondent received from his FSST claim constituted "earnings" and "income" and whether the monies were a "lump sum or pension paid in full and final settlement of a claim for workers' compensation payments", pursuant to the EI Regulations and the EI Act.

[12] The GD found, at pages 11 to 17 of its decision, that:

> [40] The Tribunal agrees with the Commission that the sums received from the FSST were provided to compensate for wage loss because the Notice of Payment from the FSST provides that the monies were received on account of "Indemnité de remplacement de revenue" (GD3-15 to 17). The Appellant also did not appear to dispute this fact. He even advised in his testimony that some of the monies, which he received from the FSST had been reduced on account of his remuneration from some of the jobs, which he had attempted. Indeed this is consistent with the note at GD3-17 of the FSST Notice of Payment and the documents submitted by him at GD6.
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> [41] The Tribunal finds that, accordingly, the amounts appear at first blush to constitute earnings on the basis of the first part of paragraphs 35(2)(b) and 36(12)(d) of the Regulations, and the broad definition of income and earnings in the legislation and jurisprudence/case law (*McLaughlin* 2009 FCA 365).

…

[43] The Tribunal finds, however, that when the language of paragraphs 35(2)(b) and 36(12)(d) of the Regulations is examined more closely, and read together with paragraph 35(7)(a) it is clear that the monies, which the Appellant received from the FSST, are excluded from the definition of earnings and income in the Regulations because they amount to a "lump sum or pension paid in full and final settlement of a claim made for worker's compensation payments" as those terms are understood in accordance with the Act, Regulations, and jurisprudence/case law.

[44] The Tribunal finds that the language in paragraph 35(7)(a) is clear and that there is no ambiguity. The Regulations have been drafted with the intention of excluding the allocation of worker's compensation payments, which can be characterized as a "lump sum or pension paid in full and final settlement of a claim made for worker's compensation payments". That this is what is intended is reinforced by the wording of the second parts of subsection 35(2)(b) and 36(12)(d).

…

[49] The Tribunal finds that while its conclusion appears to be contrary to the philosophy of paragraph 35 of the Regulations and more specifically, the idea that the entire income of the Appellant must be considered for the purposes of deduction and allocation (*McLaughlin* 2009 FCA 365) and the principle of the avoidance of double compensation (*Walford,* A-263-78), the wording of the Regulations is clear and the Tribunal's conclusion must be in accordance with what the Regulations intended (*Rizzo and Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *John Doe* v. *Ontario (Finance),*
2004 SCC 36 and *Canadian National Railway Co.,* 2014 SCC 40; *Picard* 2014 FCA 46; *Abrahams v. Attorney General of Canada,* 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2 at page 10).

…

[54] In the context of examining section 35 and 36 of the Regulations and the broad definition of income and earnings in the legislation and jurisprudence, there is no question that an ancillary purpose of this part of the Regulations is the avoidance of double compensation (*Walford,* A-263-78). There are several parts of the Act and Regulations, however, where the legislator has carved out exceptions for one reason or another, or which support policy rationales on an exceptional basis and which run contrary to other principles and purposes in the Act. (See for example, section 55(1) of the Regulations, which provide clear exceptions to the general prohibition of being outside of Canada in section 37(b) of the Act (*Elyoumni* 2013 FCA 151; *Picard* 2014 FCA 46).

[55] While the Tribunal is unaware of the policy rationale for the exclusion in paragraph 35(7)(a) of the Regulations, one plausible explanation is that when

> compensation can be characterized as a "full and final settlement" it would further the objective of administrative efficiency and of making benefits available quickly because it could be characterized and compartmentalized quickly and then excluded from allocation with a certain degree of finality (*Abrahams v. Attorney General of Canada*, 1983 CanLII 17 (SCC), [1983] 1 S.C.R. 2; *Picard* 2014 FCA 46).
>
> [56] While the rationale for the exclusion is not obvious, what is clear is that these kind of payments were intended to be excluded even where they could otherwise be characterized as income or earnings. The Tribunal notes parenthetically, that its interpretation and application of the Regulations appears to be consistent with the Digest of Benefit Entitlement Principles, at Chapter 5.4.0. (the "Digest", which is not binding on the Tribunal and which guides the Commission (*Picard* 2014 FCA 46)). The following excerpt implies that most payments made by worker's compensation boards are "earnings", only full and final settlements of these payments are excluded specifically, and, that "moneys" paid by worker's compensation boards as full and final settlements that are designed to compensate a claimant for loss of income are excluded from earnings:
>
> > "Although only full and final settlement workers' compensation payments are specifically excluded from earnings for benefit purposes, not all payments made by workers' compensation boards are earnings. Earnings for benefit purposes are only those moneys which are earned by labour, or which resemble moneys earned by labour. Moneys paid by workers' compensation boards that are designed to compensate a claimant for loss of income due to the incapacity and are not made in full and final settlement clearly fall into this category."

[13] The GD also found that the payment in this case was made in a lump sum and as full and final settlement of a claim made for worker's compensation payments. Therefore, the GD concluded that the monies received by the Respondent were excluded from the definition of earnings and income in the EI Regulations.

[14] On the basis of these findings, the GD allowed the Respondent's appeal.

[15] While the GD referred *Côté v. Canada (AG)*, [1986] F.C.J. No. 447, a Federal Court of Appeal case which the Commission relied upon for the proposition that the Commission has the power to determine that sickness benefits or disability benefits constitute earnings, it found that the Commission's determination as to what constitutes earnings has to be made in accordance with the EI Act and the EI Regulations.

[16] The GD decision also referred to CUB74258, which was relied upon by the Commission, and distinguished it from the current matter.

[17] The GD distinguished other Federal Court of Appeal cases and CUB decisions relating to subsections 35(7) and 36(12) of the EI Regulations where the workers' compensation payments were subject to periodic review or other bases.

[18] The Application refers to Federal Court of Appeal jurisprudence which held that when a victim of an employment injury received an income replacement benefit for a limited period of time and his entitlement ceased, when he is able to do similar work, this income does not constitute a "permanent settlement workers' compensation payment" within the meaning of the EI Act.

[19] The Applicant argues that the Respondent received an income replacement benefit for a limited time and he was able to do similar work after a time, therefore, the income he received does not constitute a "permanent settlement workers' compensation payment", contrary to the conclusion of the GD. Therefore, the GD decision was contrary to binding case law.

[20] The Applicant also submits that there is no evidence to support that the monies were paid upon the Respondent signing a release. There was no dispute that the monies paid were to compensate for wage loss. Therefore, the Applicant argues that the monies could not have been a "permanent settlement workers' compensation payment".

[21] In *Canada (A.G.) v. Vernon* (1995), 189 N.R. 308 (FCA), the Federal Court of Appeal noted that the definition of earnings in the EI Regulations is very general, simply saying that it comprises the entire income of a claimant arising out of employment. Income, in turn, is defined as any pecuniary or non-pecuniary receipt from an employer or any other person. Given the generality of the wording, the specific meaning of earnings must be derived from case law.

[22] The jurisprudence relating to subsections 35(7) and 36(12) of the EI Regulations must also be considered.

[23] In the circumstances, whether the GD erred in law or erred in fact and law in making its decision warrants further review.

[24] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the

enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[25] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[26] The Application is granted.

[27] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[28] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division