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

[TRANSLATION]

Citation: *D. G. v. Canada Employment Insurance Commission*, 2016 SSTADEI 278

Tribunal File Number: AD-15-1129

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON: May 10, 2016

DATE OF DECISION: May 27, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Tribunal is allowing the appeal in part. The Respondent's decision is upheld, effective as of October 26, 2014, in order to nullify the overpayment in this case.

INTRODUCTION

[2] On September 8, 2015, the General Division of the Tribunal determined that a disentitlement should be imposed on the Appellant pursuant to sections 9, 11(1) and 11(4) of the *Employment Insurance Act* ("the *Act*") in relation to her unemployment status.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on October 14, 2015 after the General Division's decision was communicated to her on September 17, 2015. Leave to appeal was granted on October 29, 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 the parties' credibility was not one of the main issues;
- the information in the file, including the 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] At the hearing, the Appellant was absent but was represented by Edouard Côté, counsel. The Respondent did not attend the hearing.

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.

ISSUE

[7] The Tribunal had to decide whether the General Division erred in finding that a disentitlement should be imposed on the Appellant pursuant to sections 9, 11(1) and 11(4) of the *Employment Insurance Act* ("the *Act*") in relation to her unemployment status.

ARGUMENT

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

- The General Division erred in law in its interpretation of subsection 11(4) of the *Act.*

- The General Division had to examine whether the evidence showed that the Appellant had worked a number of hours, days or shifts during her working week that exceeded the standard specified in section 11(4) of the *Act*;

- Given that the Respondent presented no evidence of this standard, the General Division erroneously decided to create one based on the decision in *Canada (PG) v. Buchanan*, 2003 FCA 51;

- *Buchanan* did not apply to this case since the facts underlying that decision were completely different than the facts at issue.

- Furthermore, the *Act* is a federal statute and cannot be interpreted using provincial statutes. Provincial statutes that establish normal work weeks differ from province to province. These differences in provincial statutes would prevent a uniform application of the *Act*.

- Furthermore, the Federal Court of Appeal, in *Canada (AG) v. Jean*, 2015 FCA 242, determined that reference to provincial legislation is not a determining criterion;

- Herein, the application of a provincial standard to an interpretation of section 11 (4) of the *Act* is an error in law that warrants intervention by the Appeal Division;

- Section 11(4) of the *Act* states that an insured person who normally works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment and who is entitled to a period of leave under an employment agreement, is deemed to have worked a full working week during each week that falls wholly or partly in a period of leave;

- The first condition is related to the employment itself, while the second concerns an express right under an employment agreement. According to the "Digest of Benefit Entitlement Principles," produced in this case, entitlement means having good reasons to request or require an advantage. Therefore, we cannot assume that an agreement exists providing for a period of leave or days off following an intensive work period. The claimant's file must contain evidence of such an agreement;

- The requirement of such evidence was acknowledged in *Buchanan* and in *Canada (AG) v. Merrigan*, 2004 FCA 253, produced in this case. Therefore, the material in the Respondent's file never contained evidence of an agreement

between the Appellant and her employer providing for a period of leave or days off after an intensive week of work;

- Furthermore, the Respondent never proved through its investigation that the Applicant had worked a greater number of hours than are normally worked in a week by persons employed full-time in the same field.

- In its decision, the General Division never took account of the fact that such evidence was missing, and its decision is therefore based on erroneous findings of fact was made without regard for the material entered into evidence.

[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 properly exercised its jurisdiction;

- The Appeal Division is not empowered to retry a case or to substitute its discretion for that of the General Division; The Appeal Division's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act;*

- The body of evidence in this case shows that an agreement existed between the parties. The Respondent relies on the fact that the employer had established a work schedule that was accepted by the Appellant on a weekly basis. In this case, the uncontested evidence shows that the Appellant worked seven days (56.5 hours) and received the following seven days off;

- As the General Division found, the Appellant had worked a greater number of hours, days or work shifts than normally worked in a week by persons with full-time employment;

- As well, the Federal Court of Appeal has determined that a situation in which employees work on a rotating basis, relieving each other in turn, does not create a situation of unemployment during the time off;

- Pursuant to subsection 11(4) of the *Act*, the Appellant could not be considered unemployed during the weeks of leave provided in her schedule;

- The decisions rendered in this case should not be imposed retroactively, and no overpayment should have been generated. When the Appellant filed her claims for benefit, the Respondent was in possession of certain items of information concerning her work schedule, and this information should have been taken into account to determine the Appellant's entitlement to benefit;

- The Respondent is asking the Appeal Division to uphold its decision effective from October 26, 2014 only, to nullify the overpayment generated in this case.

STANDARDS OF REVIEW

[10] The Appellant made no submissions concerning the applicable standard of judicial review. The Respondent submits that the standard of review applicable to questions of law is correctness, and that applicable to mixed questions of fact and law is reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50).

[11] The Tribunal notes that the Federal Court of Appeal, in *Canada (AG) v. Jean*, 2015 FCA 242, 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."

[12] The Federal Court of Appeal goes on to underscore 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."

[13] The Federal Court of Appeal concluded by underscoring that "where it 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*."

[14] 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 (AG)*, 2015 FCA 274.

[15] Therefore, 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

Introduction

[16] Given that the events are identical in each of the Appellant's files, numbered AD-15-1129, AD-15-1130 and AD-15-1131, a single decision will apply *mutatis mutandis* to all.

Facts

[17] On filing her application, the Appellant stated that she had worked for the employer "Pavillon l'Héritage" and that the reason for her separation from employment concerned a shortage of work. She also stated that she would not return to work for this employer (Exhibits GD3-5 and GD3-6).

[18] The Employer provided a record of employment indicating a period of employment from April 11, 2011 to March 31, 2012, with "K" marked as the reason for the record of employment. The record of employment was issued at the employee's request (Exhibit GD3-70). According to the employer, the Appellant and another employee were the only ones to have a schedule that included seven days of work followed by seven days off (Exhibit GD3-66).

[19] The Appellant stated that at the start of her employment, everything was new to her. There was one full-time employee and another part-time employee, but because the part-time employee had few hours and it was difficult to have someone work part-time only, the employer suggested a 7/7 schedule, which she has worked ever since (Exhibit GD3-68). She also stated that when she filed her claim for benefit at the office with the help of an officer, she reported that she worked seven followed by seven days off, and was told that it was all right (Exhibit GD3-85).

Unemployment Status

[20] Given the facts of the case, the Tribunal considers that the General Division did not err in finding it appropriate to impose a disentitlement on the Appellant pursuant to sections 9, 11(1) and 11(4) of the *Act*.

[21] The Federal Court of Appeal has repeatedly affirmed the principle that claimants who have a schedule rotating between periods of work and periods of leave are deemed to be employed during the periods of leave included in such recognized schedules (*Canada (AG) v. Jean*, 2015 FCA 242, *Canada (AG) v. Merrigan*, 2004 FCA 253; *Canada (AG) v. Duguay*, A-75-95).

[22] It is established that the Appellant regularly worked for seven days (56.5 hours) and then received a week off. According to the employer, she and another employee worked [translation] “on a rotating basis,” one taking over from the other. Accordingly, her employment with her employer was ongoing.

[23] It seems obvious to the Tribunal that the weeks off in question were provided under the employment agreement as weeks off within the meaning of subsection 11(4) of the *Act*. The work schedule was established by the employer and accepted by the Appellant. Therefore, the evidence before the General Division clearly shows that the weeks off were not weeks of unemployment.

[24] In *Jean*, the Federal Court of Appeal reiterated that Employment Insurance is “a social insurance plan to compensate unemployed workers for loss of income from their

employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market."

[25] Given the facts on record, allowing the Appellant to receive benefits would clearly contradict the spirit of the *Act* and Parliament's intention.

[26] Accordingly, the Tribunal cannot allow this ground of appeal.

Request for Reconsideration

[27] The Respondent therefore recommends to the Appeal Division that it dismiss the Appellant's appeal with a change to have the disentitlement take effect on October 26, 2014, which would consequently nullify the Appellant's overpayment.

[28] The Respondent acknowledged during the appeal that the decisions made in this case should not be imposed retroactively, and that no overpayment should have been generated. When the Appellant filed her claims for benefit, the Respondent was in possession of certain items of information concerning her work schedule, and these should have been taken into account in determining the Appellant's entitlement to benefit.

[29] The Tribunal notes that the Respondent's position on appeal concerning its discretionary authority pursuant to section 52 of the Act differs from the position submitted to the General Division.

[30] Considering the Respondent's position on appeal, and after reconsidering the case, the Tribunal is allowing the appeal in order to change the disentitlement date.

CONCLUSION

[31] The Tribunal partly allows the appeal. The Respondent's decision is upheld effective as of October 26, 2014 in order to nullify the overpayment in this case.

Pierre Lafontaine

Member, Appeal Division