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

Citation: *Canada Employment Insurance Commission v. A. S.,* 2016 SSTADEI 302

Tribunal File Number: AD-13-1181

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON May 12, 2016

DATE OF DECISION: June 14, 2016

Canada

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

INTRODUCTION

[2] On March 27, 2013, a panel of the board of referees (the Board) allowed the Respondent's appeal against the previous determination of the Commission.

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

[4] On May 12, 2016, a teleconference hearing was held. The Commission attended and made submissions, but the Respondent did not. As a Canada Post signature card indicated that the Respondent personally signed for the notice of hearing, I was satisfied that she received proper notice and proceeded in her absence.

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 [or the Board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division [or the Board] erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division [or the Board] 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 is case regarding the determination of self-employed earnings.

[7] The Commission submits that the Board erred by failing to state and apply the correct law. Specifically, they argue that the determination of the Canada Revenue Agency (the CRA) as to the amount of the Respondent's self-employment earnings is definitive. They note that had the Respondent provided any statement or document from the CRA to support the existence of additional self-employed earnings, they would have accepted that evidence as true. They ask that I allow their appeal, give the decision that the Board should have given, and find that the Respondent did not have sufficient self-employment income to qualify for benefits.

[8] The Respondent did not appear at the hearing, and made no submissions to the Tribunal in response to this appeal.

[9] The sole fact in dispute in this case is whether or not the Respondent had $6,000 in self-employment yearly earnings. If so, she is entitled to benefits. If not, she is not entitled.

[10] The Board, after citing s. 152.07 and 152.08 of the *Employment Insurance Act* (the Act), accepted the uncontested (but purely self-reported) evidence of the Respondent that she had $6,027 of self-employment income. On that basis, they allowed her appeal.

[11] Unfortunately, the Board neglected to mention ss. 152.01(2) of the Act, which sets out how to calculate the correct amount. This subsection states, among other things, that:

> For the purpose of this Part, the amount of the self-employed earnings of a self-employed person for a year is:
>
> …
>
> (i) an amount equal to
>
> (A) their income for the year, computed under the *Income Tax Act*, from their businesses… minus,
>
> (B) all losses, computed under the *Income Tax Act*, sustained by the self-employed person in the year in carrying on the businesses they are engaged in…

[12] By not stating or applying this portion of the Act, the Board erred in law, and I am obligated to intervene to correct this error.

[13] If this were a claim based upon employment income (rather than self-employment income) then the Commission or the Respondent could have referred the matter to the CRA, according to s. 90 of the Act, for a binding determination.

[14] But this claim involves self-employment income, and no such provision exists in the Act for this type of income. Instead, as noted above, Parliament has established that income must be "computed under the *Income Tax Act*".

[15] As it stands, I have no method by which to do this. Neither party presented evidence to the Board which would allow me to calculate the Respondent's income according to ss. 152.01(2).

[16] For this reason, having found that the Board erred in its decision, I have no recourse but to return this matter for a new hearing. I would **strongly** urge the parties to present evidence regarding the Respondent's self-employed earnings with appropriate reference to the *Income Tax Act* as required by ss. 152.01(2).

CONCLUSION

[17] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

Mark Borer

Member, Appeal Division