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

[TRANSLATION]

Citation: *A. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 361

Tribunal File Number: AD-15-1319

BETWEEN:

A. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Pierre Lafontaine

DATE OF HEARING: July 7, 2016

DATE OF DECISION: July 11, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing by a new member on each issue.

INTRODUCTION

[2] On November 11, 2015, the Tribunal's General Division found that:

- the Respondent could reconsider the Appellant's claims for benefits under subsection 52(5) of the *Employment Insurance Act* ("the Act");

- the Appellant's place of residence within the meaning of section 17 of the *Employment Insurance Regulations* ("the Regulations") during the relevant benefit periods was Quebec City;

- subject to the calculations that must be redone in file number GE-15-139, the applicable regional rate of unemployment, benefit rate and maximum number of weeks during which benefits could be paid were determined in accordance with the statutory provisions in force at the time the Appellant's benefit periods were established.

[3] The Appellant filed an application for leave to appeal before the Appeal Division on December 8, 2015. Leave to appeal was granted on January 12, 2016.

ISSUES

[4] The Tribunal must decide whether the General Division erred in finding that:

- the Respondent could reconsider the Appellant's claims for benefits under subsection 52(5) of the Act;

- the Appellant's place of residence within the meaning of section 17 of the Regulations was Quebec City;

- subject to the calculations that had to be redone in file number GE-15-139, the applicable regional rate of unemployment, benefit rate and maximum number of weeks during which benefits were payable were determined in accordance with the statutory provisions in force at the time the Appellant's benefit periods were established.

THE LAW

[5] Under subsection 58(1) of the *Department of Employment and Social Development Act* ("the DESD Act"), the following are the only grounds of appeal:

(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.

STANDARDS OF REVIEW

[6] The Appellant submits that the Appeal Division's powers are limited by subsection 58(1) of the DESD Act, as determined by the Federal Court of Appeal in *Canada (AG) v. Jean*, 2015 FCA 242.

[7] The Respondent contends that the applicable standard of review for questions of law is correctness and that the standard of review for questions of mixed fact and law is that of reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50).

[8] The Tribunal finds that the Federal Court of Appeal held at paragraph 19 of its decision in *Jean* 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."

[9] The Federal Court of Appeal continued:

> 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.

[10] The Federal Court of Appeal concluded as follows, "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."

[11] The mandate of the Tribunal's Appeal Division described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (AG)*, 2015 FCA 274.

[12] Accordingly, unless the General Division has failed to observe a principle of natural justice, erred in law or based its decision based 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

[13] This decision concerns file numbers AD-15-1319, AD-15-1320, AD-15-1321, AD-15-1322, AD-15-1323, AD-15-1324 and AD-15-1325.

[14] The Applicant claims that the General Division committed a serious obstruction to natural justice by preventing a witness favourable to his case from testifying, an obstruction all the more serious because the General Division held a negative view of his credibility.

[15] The Tribunal notes from the General Division's decision that it found that the Appellant's testimony did not have "the necessary credibility to contradict the documentary evidence" pertaining to his usual place of residence within the meaning of section 17 of the Regulations. That finding of the General Division even further demonstrates how important

it was for the General Division to hear the Appellant's witness, who was waiting outside the hearing room. Counsel for the Appellant believed in good faith that that testimony was not required as the General Division had indicated to him that it was not necessary to hear him.

[16] The General Division also based its decision in part on the fact that the Appellant did not have an accent similar to that of the people who live in the Gaspésie region. In the General Division's view, that would tend "to suggest that he had lived outside that region long enough to have lost his accent." However, the appellant never had the opportunity to respond to that finding by the General Division.

[17] The concept of "natural justice" includes the right of a claimant to a fair hearing. So fundamentally important is this right that there must not exist even the appearance of prejudice to the right of any claimant to make a full presentation before an unbiased General Division. The law requires not only that justice be done, but that it manifestly and undoubtedly be seen to be done. The mere suspicion that a claimant has been denied his right is justification in itself for an order returning the matter to the Tribunal's General Division.

[18] A fair hearing presupposes adequate notice of the hearing, the opportunity to be heard, the right to know what is alleged against a party and the opportunity to answer those allegations.

[19] The Appellant was obviously unable to show that he had the necessary credibility by being corroborated by a witness before the General Division rendered its decision. He was also unable to respond to the General Division on the question of his lack of accent. He was clearly denied his right to a fair hearing.

[20] Case law tells us that, if there is the slightest doubt that a principle of natural justice was not respected, the Tribunal is justified in returning the file for a new hearing.

[21] Furthermore, in its decision, the General Division disregarded the appellant's evidence that his regular residence was in the Gaspésie region because he had owned a house situated at X X in that region for 15 years and that his furniture was located there. In support of his position, the Appellant submitted a notice of assessment showing the address

and his name as the owner together with supporting photographs. The General Division appears to have been confused by a recreational trailer that was situated on the same lot.

[22] When faced with contradictory evidence, the General Division cannot disregard it. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for its decision (*Bellefleur v. Canada (AG)*, 2008 FCA 13, and *Parks v. Canada (AG)*, A-321-97).

[23] The General Division failed to do so in this case and that constitutes an error of law.

[24] Since the General Division is the trier of fact and in a better position to decide the matter of credibility, the Tribunal refers the matter back to the General Division (Employment Insurance Section) for a new hearing by a new member on each of the issues.

CONCLUSION

[25] The appeal is allowed and the matter referred back to the General Division (Employment Insurance Section) for a new hearing by a new member on each of the issues.

[26] The Tribunal orders that the General Division's decision dated November 11, 2015, be removed from the file.

Pierre Lafontaine
Member, Appeal Division