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

Citation: *K. N. v. Canada Employment Insurance Commission,* 2016 SSTADEI 397

Tribunal File Number: AD-16-162

BETWEEN:

K. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 5, 2016

DATE OF DECISION: July 26, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 17, 2015, the General Division of the Tribunal determined that:

- With respect to the question of the overpayment on the grounds of self-employment, the appeal was to be allowed in part until July 31, 2008;

- The Appellant made representations knowingly pursuant to section 38 of the *Employment Insurance Act* (*Act*) and the Respondent exercised its discretion judicially when it decided to impose a warning.

[3] The Appellant requested leave to appeal to the Appeal Division on January 15, 2016. Permission to appeal was granted on February 1st, 2016.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issues under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present and represented at the hearing by his son M. N. The Respondent was represented by Elena Kitova.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (*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
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> (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.

ISSUE

[7] The Tribunal must decide if the General Division erred when it concluded that:

- The Appellant should be disentitled from employment insurance benefits from July 31, 2008 for failing to prove that he was unemployed pursuant to sections 9 and 11 of the *Act*.
- The Appellant made representations knowingly pursuant to section 38 of the *Act* and the Respondent exercised its discretion judicially when it decided to impose a warning.

ARGUMENTS

[8] The Appellant submits the following arguments in support of his appeal:

- The General Division stated that he did not actively look for employment after July 2008 due to the lack of evidence. However, he was still actively looking for

employment at the time and we've attached several more documents showing proof of scheduled interviews and multiple scheduled phone calls up until March 3, 2009;

- In addition, the General Division states that the search was very narrow making it impossible to look for a job. However, he was looking for a job as a technician or an engineer in the field of civil engineering, his field of work for over 26 years;

- Even if he did not complete the professional test in Quebec which would allow him to become a professional engineer, he was still able to do work as a civil engineer and have the work signed off by a professional engineer afterwards;

- Also, he has completed over a year of French courses, some which was completed when arriving to Canada and others which were done during the time he worked at Daniel Arbour. All of this shows that he worked on having the language issue solved and that he was looking into the wide domain of technical and civil engineering jobs in the civil engineering field. It was not a narrow search as stated by the General Division in its decision;

- The General Division claimed many times that he had re-invested over $50,000 of the company profits back into the company. However, most of these amounts were cost of goods sold. These amounts were paid for other vendors to deliver the service to the customers which they had already paid for;

- In addition, the General Division explains in depth and analyzes the company's financials incorrectly. First, the General Division goes in depth about the decision-making behind purchasing a vehicle in the company when the purchase of the vehicle was done on the 2nd day of September 2009 (document attached) which makes it irrelevant in this case;

- Secondly, the house was mortgaged and the accountant mentioned that we had every right to write off a part of the mortgage for the business as it was located in the same address, which should not be a problem;

- Finally, the $8,000 which was paid off to his son was claimed to have no value or basis at all, when in reality, there were over 500 attached emails demonstrating that his son was doing work inside the company. In addition, the $8,000 was paid during 2009 however only $1920 was paid in the period where employment insurance was still active in 2009;

- Also, as shown in the attached bank statement for the business, the company had only $6,730.67 in its bank account by the end of the month of March, when the employment insurance had expired. Finally, the CRA documents show a loss of $120.81 in 2008 (GD2-85) and a profit of $34,335.22 in 2009 (GD2-74). Only 3 months of profits were under employment insurance benefits. Also no salary or benefits was taken by him from the business account during all the relevant period;

- Finally, most of the points considered by the General Division give no consideration to the work and effort put in by his son which affected the state of the business and assumes that all of the work was done only by him which was not correct, as shown by the many emails which were given to the General Division. Therefore, he was always free to find a new job during the entire employment insurance period because the bulk of the work was still done by his son;

[9] The Respondent submits the following arguments against the appeal:

- The General Division's findings of fact and application of the law is based on a correct interpretation of sections 9, 11, 38 and 41.1 of the *Act* and section 30 of the *Employment Insurance Regulations* (*Regulations*) and is line with the existing jurisprudence;

- In light of the General Division's finding of fact in this case, its decision to uphold the Respondent's decision would appear to fall entirely within the parameters of the legislation and jurisprudence;

- The decision of the General Division contains no error in either the interpretation or application of the law;

- With respect to the imposition of the penalty and as outlined on pages 57 to 60 of its decision, the General Division reviewed the evidence and referenced jurisprudence to support its conclusion that the Appellant had knowingly made misrepresentations;

- The General Division appears to have had an appreciation of the evidence which was before it, and its conclusions do not appear to be either perverse or capricious. The Tribunal weighed all the evidence, arrived at reasonable findings of fact based on that evidence, and decided the case accordingly.

- There is nothing in the General Division decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

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

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen it 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 further indicated that:

> [n]ot 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 Court concluded that "[w]he[n] 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*".

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

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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

[17] The General Division accepted the Appellant's evidence that from March 30, 2008 to July 31, 2008, he was only self-employed to a minor extent during the time that he was in receipt of employment insurance benefits. However, the General Division concluded that he had failed to prove that he was only self-employed to a minor extent from August 1, 2008 and thereafter.

[18] The Appellant insists that the evidence before the General Division demonstrates that his son was the one operating the business. He pleads that he spent little time working for the business during the benefit period and that he only got seriously involved at the end of 2009 after the benefit period when he realized he could not find a job in his field of work.

[19] He argues that he did not invest 50,000$ in the company contrary to the conclusions of the General Division since most of these amounts were cost of goods sold. He submits

that the General Division misinterpreted the financial statements of the company and therefore made errors in its decision. Finally, he argues that the he did look for a job after July 31, 2008 and wants to introduce documents in appeal to support his position.

Evidence in appeal

[20] The Appellant wants to introduce evidence at the appeal level to support his position, more specifically, that he was looking for a job after July 31, 2008. Unfortunately, an appeal to the Appeal Division of the Tribunal is not a *de novo* hearing, where a party can represent evidence and hope for a new favorable outcome. As explained at the appeal hearing, the powers of the Appeal Division are limited by subsection 58(1) of the *Department of Employment and Social Development Act*. The Tribunal can only intervene if the General Division failed to observe a principle of natural justice, erred in law, 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.

[21] Furthermore, the evidence the Appellant wants to introduce in appeal was clearly available before the hearing of the General Division and should have been introduced at that time.

[22] The Tribunal will therefore only consider the evidence that was appropriately filed before the General Division in rendering the present decision.

Self-employment

[23] The test requires an objective consideration of whether the level of such self-employment or engagement, viewed in light of the factors set forth in subsection 30(3), would be sufficient to enable a person to normally rely upon that level of self-employment or engagement as a principal means of livelihood.

[24] The case law as established that no one factor is decisive and each case must be considered on its own merits (*Martens v. Canada (AG)*, 2008 FCA 240; *Canada (AG) v. Goulet*, 2012 FCA 62; *Inkell v. Canada (AG)*, 2012 FCA 290). The Tribunal is of the view that the text of the legislation must be considered in its totality considering that a person

could spend a limited amount of time at an employment or business activity but still follow it as a principal means of livelihood. Furthermore, the failure to generate sufficient income does not in itself make a claimant unemployed.

[25] Subsection 30(3) of the *Regulations* specifies that six factors have to be taken into account in determining whether a claimant's self-employment is of a minor extent. The circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are:

> (a) the time spent;
>
> (b) the nature and amount of the capital and resources invested;
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> (c) the financial success or failure of the employment or business;
>
> (d) the continuity of the employment or business;
>
> (e) the nature of the employment or business; and
>
> (f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[26] The General Division considered all the six factors in determining whether the Appellant was self-employment to a minor extent.

[27] The General Division considered that the Appellant spent anywhere from 5 hours to 15 hours on the business in any given week during the time that he was in receipt of employment insurance benefits. It concluded that working between 5 and 15 hours a week was not a substantial amount of time spent on the business.

[28] The General Division found that notwithstanding that the Appellant did not incur any debt for the business by way of loan or other credit facility, that a significant amount of business revenues were reinvested in the business and that a large portion of this reinvestment was done during 2008 and 2009 when the new equipment was purchased to make the website perform better. As concluded by the General Division, the documents and evidence supplied by the Appellant show that the decision to push the business to a higher level was made at the very latest by the Appellant by July 31, 2008.

[29] The Appellant vigorously argued that the General Division erroneously concluded under this factor that he personally invested 50,000.00$ in the business. This is not what the General Division concluded. It rather states that the documents prove that substantial amounts were reinvested in the business through purchases and expenses. This is in agreement with the position of the Appellant that he used the proceeds from the sales and subscriptions to buy hardware to service the customers who paid for the service. The arguments raised by the Appellant regarding the car purchase, home tax deduction and salary paid to his son do not affect the conclusion of the General Division that important resources were invested in the business.

[30] The General Division considered that the business was successful considering its expansion in 2007, 2008 and 2009 and the substantial amounts reinvested in the business.

[31] It considered that the business was likely to continue its operations in view of its expansion and success.

[32] The General Division also found that the business's customer base and sales were significantly different than what the Appellant was doing in his previous employment.

[33] Finally, the General Division determined that the Appellant had not made job searching enough of a priority after July 31, 2008, period that coincided with the business expansion, and that his job search was too restrictive and that the Appellant did not demonstrate a sufficient intention or will to obtain alternative employment.

[34] After considering all the six factors, the General Division came to the following conclusion:

> [297] As such, when all of the factors are considered and weighed together, (including the common timing of the increase in the nature of the resources and the decline in the intention and willingness factor), the Appellant should be considered as having been self-employed to a minor extent to the period prior to July 31, 2008 and to more than a minor extent thereafter.
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> [298] In other words, the Tribunal concludes that it was objectively determinable at the outset that the Appellant would normally have relied on the Business as a principal means of livelihood from at least August 1, 2008.

(…)

> [300] The Tribunal finds, accordingly, that the Appellant has been unable to prove, after July 31, 2008, that he should "not be regarded as [having worked] a full working week" during the period in question (*Martens*).
>
> [301] Put another way, when all six factors are viewed objectively, the only reasonable conclusion is that after July 31, 2008, the Appellant relied on his level of engagement in the Business as a principal means of livelihood (*Martens*).

[35] While the time engaged in an activity is a valuable element for determining "minor in extent", it is not the sole one, nor does the Tribunal think one can say that it is always the overriding one. Based upon the evidence, the application of the objective test contained in subsection 30(2) to the circumstances of the Appellant, determined in accordance with subsection 30(3), revealed that at least four of the relevant factors point to the conclusion that the Appellant's engagement in his business was not minor in extent after July 31, 2008.

Penalty

[36] The Appellant did not really argue this point in appeal.

[37] The General Division found that the Appellant did not provide a reasonable and credible explanation for the misrepresentations regarding self-employment and it found that the Respondent had proven on a balance of probabilities that the Appellant had the requisite degree of subjective knowledge at the time that the misrepresentations were made.

[38] The Tribunal finds no reason to intervene on the issue of penalty.

Jurisdiction

[39] The Tribunal does not have the authority to retry a case or to substitute his or her discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the *DESD Act*. Unless the General Division failed to observe a principle of natural justice, erred in law, 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 or its decision was unreasonable, the Tribunal must dismiss the appeal.

[40] The Tribunal finds that the decision of the General Division was based on the evidence before it and that it complies with the law and the decided cases.

CONCLUSION

[41] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division