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

[TRANSLATION]

Citation: *S. D. v. Canada Employment Insurance Commission,* 2016 SSTADEI 400

Tribunal File Number: AD-16-210

BETWEEN:

S. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON July 19, 2016

DATE OF DECISION: July 28, 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 solely on the period from December 2014 until the end of the benefit period.

INTRODUCTION

[2] On December 15, 2015, the Tribunal's General Division found as follows:

- The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* ("the *Act*") and section 30 of the *Employment Insurance Regulations* ("the *Regulations*") was justified because the Appellant did not prove that he was unemployed starting in December 2014.

[3] The Appellant filed an application for leave to appeal before the Appeal Division on January 27, 2016, after receiving the General Division's decision on December 29, 2015. Leave to appeal was granted on February 15, 2016.

ISSUE

[4] The Tribunal must determine whether the General Division erred in finding that the disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified in part because the appellant did not prove that he was unemployed starting in December 2014.

THE LAW

[5] Under subsection 58(1) of the Department of Employment and Social Development 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 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.

STANDARDS OF REVIEW

[6] The Appellant made no submissions concerning the applicable standard of review.

[7] The Respondent submits 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 notes that in *Canada (A.G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal states in paragraph 19 of its decision: “When 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.”

[9] The Federal Court of Appeal then continues:

> 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 concludes as follows: “Where it hears appeals pursuant to subjection 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 or erred in law in making 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] The Appellant is appealing from the General Division's decision respecting the second benefit period (as identified by the General division), from December 2, 2014, to the end of his benefit period.

[14] The Appellant argues that the General Division did not allow him to elaborate on that second period and even refused to admit certain evidence respecting it as it did not believe it had to consider that period in issue. He contends that the General Division disregarded the gist of his testimony to the effect that he had worked sporadically as a unionized CCQ employee during the second period and that he had also looked for work during that period, as a result of which he had worked as a paid day labourer with Les Entreprises Fab-Tech.

[15] He contends that the General Division should have admitted all the evidence submitted by the Appellant and his representative, be it verbal or written in a document, analyzed it and, if necessary, explained why it was denied.

[16] The Respondent is of the view that the General Division should have considered the Appellant's evidence for the entire period and that it is not opposed to a review of the file before the General Division for the period from December 2014 until the end of the benefit period.

[17] For the General Division, the analysis of the period in question was to be conducted in two parts: first, the period from July 2014 to December 1, 2014, and, second, the period from December 2, 2014, to the end of the benefit period.

[18] For the period from July to December 1, 2014, the General Division found that the Appellant had rebutted the presumption that he had worked a full work week. The Respondent did not appeal from that part of the General Division's decision.

[19] However, the General Division found that the appellant had worked for his business starting on December 2, 2014, and that, from that moment on, he no longer rebutted the presumption that he had worked a full work week.

[20] Having regard to the arguments advanced by the Appellant, the Tribunal has listened to the recording of the hearing before the General Division and is of the view that the General Division did not allow the Appellant to elaborate and present his evidence for that second period. It is true that the file the Respondent submitted to the General Division is far from clear and comprehensible and that it was not clear from the file that that period was in issue. However, the General Division rendered a decision unfavourable to the Appellant in respect of the second period without really affording him the opportunity to defend himself.

[21] It is important to note that 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.

[22] The Appellant was clearly unable to answer the allegations concerning the second period and was therefore denied his right to a fair hearing.

[23] Furthermore, the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner when it found as follows:

> [Translation]
>
> The Tribunal finds, as the Claimant states that he did not look for work but rather for contracts for his business, that, starting on December 2, 2014, it was no longer reasonable to determine that the Claimant had the intention and willingness to seek and immediately accept alternate employment in view of the circumstances.

[24] That finding of fact in support of the General Division's decision is erroneous because the Appellant testified at the hearing that he was always looking for employment

(including contracts) and that he eventually even had to resign himself to accepting a lower-paying job with Les Entreprises Fab-tech Inc.

[25] It is true that the Appellant's testimony at the hearing contradicted his previous statements noted in the appeal file, statements that the Appellant moreover contests. However, 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).

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

[27] The Tribunal is also of the view that the General Division erred in fact and in law with respect to the second period because it did not consider the six factors set forth in subsection 30(3) of the Regulations but appears to have limited itself to the factor of the Appellant's intention and willingness to seek and immediately accept alternate employment. It also did not consider the question of whether the extent of the Appellant's involvement in the employment or activity during the benefit period, determined in light of the factors set out in subsection 30(3) of the Regulations, was such that he could not have relied on it as his principal means of livelihood.

[28] For these reasons, the appeal is allowed and the matter is referred back to the General Division for a new hearing for the period from December 2014 until the end of the benefit period.

CONCLUSION

[29] The Tribunal allows the appeal and refers the matter back to the General Division (Employment Insurance Section) for a new hearing by a new member on the issue of the period from December 2014 until the end of the benefit.

Pierre Lafontaine

Member, Appeal Division