[TRANSLATION]

Citation: *M. V. v. Canada Employment Insurance Commission,* 2016 SSTADEI 403

Tribunal File Number: AD-16-376

BETWEEN:

M. V.

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: August 4, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On February 15, 2016, the Tribunal's General Division found that:

- The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the *Employment Insurance Regulations* (Regulations) was justified because the Appellant had failed to prove that she was unemployed.

[3] On February 29, 2016, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on March 11, 2016.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue under appeal.
- The parties' credibility was not a key issue.
- The cost-effectiveness and expediency of the hearing choice.
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant attended the hearing. The Respondent did not attend despite having been duly summoned.

ISSUE

[6] The Tribunal must determine if 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 because the Appellant had not proven that she was unemployed.

SUBMISSIONS

[7] The Appellant submitted the following arguments in support of her appeal:

> -The Respondent admitted its error when it granted her 44 weeks of benefits and that it had been aware of her situation on November 4, 2012.
>
> -She should not have to pay back the amount in question because she had acted in good faith and had disclosed her situation to the Respondent at the start of her claim for benefits.

[8] The Respondent submitted the following arguments against the Appellant's appeal:

> -The Federal Court of Appeal upheld the principle that claimants who have an alternating work-rest schedule are deemed to be employed during the periods of time off.
>
> -In keeping with its policy, when the Respondent discovers that it had made an error, it makes the necessary corrections as of the current date, except in certain situations, such as when benefits were paid in violation of an explicit provision of the Act.
>
> -This case deals with an error on the part of the Respondent. According to the Respondent's Reconsideration Policy, it should have retroactively revoked the decision as this was a violation of an explicit provision of the Act given that the Appellant did not meet the necessary conditions to establish a claim for benefits on November 4, 2012. The General Division's decision complies with the Act and case law.

THE LAW

[9] 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 Board of Referees erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The Board of Referees 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

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

[11] The Respondent submits that the applicable standard of review for questions of law is correctness and the 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 (A.G.) v. Jean*, 2015 FCA 242, indicates in 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."

[13] The Federal Court of Appeal further indicated 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.

[14] The Federal Court of Appeal concludes by underscoring that "[w]here 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 Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada* (A.G.), 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

[17] The Appellant argues that the Respondent had admitted its error after having granted her 44 weeks of benefits and that it was aware of her situation as of November 4, 2012. She maintains that she should not have to pay back the amount in question because she had acted in good faith and had disclosed her situation to the Respondent at the start of her claim for benefits.

[18] The Respondent is of the opinion that the General Division did not err in law or in fact on the question of unemployment.

[19] Leave to appeal was granted in this case because the Respondent's submissions before the General Division were inconsistent with regard to the use of its reconsideration authority under section 52 of the Act.

[20] Initially, the Respondent had admitted that it was aware of the Appellant's situation and that it could not reasonably have known that she was not entitled to benefits. In doing this, it could not in any way issue a retroactive decision on the file.

[21] In its subsequent submissions to the General Division, the Respondent stated that, according to its reconsideration policy, it should retroactively revoke the decision given that

it was a violation of an explicit provision of the Act and that the Appellant did not meet the necessary conditions to establish a claim for benefits on November 4, 2012.

[22] The Respondent maintains the above-mentioned argument before the Appeal Division.

[23] The Appellant had filed an initial claim for Employment Insurance benefits effective November 4, 2012. The employer, Corporation d'hébergement de Mont-Joli, issued a Record of Employment for the Appellant's claim dated November 5, 2012. On November 21, 2012, the employer noted that the Appellant had a 7-7 work schedule; she works for 7 days, and then is off for 7 days. She may be called into work during her days off (GD3-13).

[24] On April 12, 2013, the Respondent notified the Appellant that she was not entitled to Employment Insurance benefits as of November 4, 2012, because the periods in which she is off work are not part of her work schedule (GD3-17 and GD3-18). A notice of debt of 1284.00$ was then sent to the Appellant.

[25] The evidence before the General Division clearly shows that the Respondent had all the necessary information when in processed the file in November 2012 and that it had had the opportunity to take action with regard to the state of unemployment, but instead it did nothing and continued to pay the Appellant.

[26] There was an error on the Respondent's part if it had access to the all the information necessary to make a decision, but it did not consider it when it issued its final decision. The error could have been made during the claims-settling process or as a result of failing to record a decision in the computer system.

[27] This is definitely an error on the part of the Respondent.

[28] According to policy, an error made by the Respondent must be corrected as of the current date, save for certain exceptions. One of these exceptions concerns cases in which the Respondent's error leads to a decision that contravenes the scheme of the Act. The Respondent must therefore correct its error retroactively, even if this results in an

overpayment. The scheme of the Act refers to the elements essential to the establishment of a benefit period and to benefit payments.

[29] Does this error on the part of the Respondent result in a decision that contravenes the scheme of the Act?

[30] Unfortunately for the Appellant, this decision contravenes the scheme of the Act, and the Respondent should have retroactively revoked the decision given that the Appellant did not meet the essential conditions to establish a benefit period on November 4, 2012.

[31] Moreover, the Federal Court of Appeal case law also establishes that a claimant who receives an amount without being entitled to it, even as a result of a mistake by the Respondent, is not excused from repaying the amount: *Lazuno v. Canada (A.G.)*, 2005 FCA 324.

[32] For the above-stated reasons, the Tribunal has no choice but to dismiss the appeal.

CONCLUSION

[33] The Tribunal dismisses the appeal.

Pierre Lafontaine

Member, Appeal Division