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

Citation: *L. D. v. Canada Employment Insurance Commission*, 2016 SSTADEI 430

Tribunal File Number: AD-16-310

BETWEEN:

L. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 21, 2016

DATE OF DECISION: August 23, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file is returned to the General Division (Employment Insurance section) for a new hearing by a different Member.

INTRODUCTION

[2] On February 1st, 2016, the General Division of the Tribunal determined that the allocation of earnings was calculated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (*Regulations*).

[3] The Appellant requested leave to appeal to the Appeal Division on February 15, 2016. Leave to appeal was granted on March 7, 2016.

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- 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 absent but represented by Raymond Evans. The Respondent was represented by Elena Kitova.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development 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
>
> (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 allocation of earnings was performed in accordance with sections 35 and 36 of the *Regulation*s.

ARGUMENTS

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

- The parties agree that the Appellant receives a pension income as defined by section 35 of the *Regulations* in the amount of $107.00 per week for the period of her claim to December 31, 2014 and in the amount of $109.00 per week for the period of her claim in 2015;
- Pilot Project No. 18 is a Working While on Claim project to encourage claimants to "Work More While Receiving Benefits". Section 77.95 of the *Regulations* was made to give effect to Project 18 and therefore applies to income from working;
- Subsection 77.95(3) of the *Regulations* states; "For the purpose of Pilot Project No. 18, section 19 of the *Employment Insurance Act* (*Act*) is adapted by adding"

subsection (2.1) after subsection (2). It did not in any way alter nor suspend the provisions of subsection (2) and, therefore, both subsections would appear to be in force during the period of the Appellant's claim;

- If subsection (2.1) is only applicable for the purpose of Project No. 18, then it is only intended to apply to income derived from Working While on Claim;

- As her income is not derived from Working While on Claim, paragraph 19(2)(b) should be used in determining if there is any reduction to her benefits;

- As the Appellant's pension income is less than the 25% of her benefits as determined under paragraph 19(2)(b), then no overpayment of benefits has been made to her and no repayment is due;

- The only basis for calculating an overpayment of benefits is provided for under subsection 19(3) of the *Act*, which subsection only provides for calculation under subsection (2) of section 19 with no reference to subsection (2.1). The calculation of overpayment of benefits claimed due by the Appellant was made using the formula from subsection (2.1) which is not provided for under subsection 19(3) of the *Act* nor under the *Regulations*;

- There is no legislative authority for the creation of subsection 19(2.1) as adapted by subsection 77.95(3) of the *Regulations*. This constitutes an unauthorized amendment to the *Act*.

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

- There was no breach of a principal of natural justice in the present case. The General Division acted within its jurisdiction and made a decision that does not disclose any error in fact or law;

- The General Division properly assessed the evidence before it and applied the appropriate legislative provisions to determine that the pension income from *CPP* constitutes earnings pursuant to paragraph 35(2)(e) of the *Regulations* and must be allocated pursuant to subsection 36(14) of the *Regulations*;

- The Appellant's main argument is that she should have the option of Pilot Project no.17 (section 77.94 of the *Regulations*) rather than of Pilot Project no.18 (section 77.95 of the *Regulations*), as both sections were in force at the time of her claim. While it is true that pursuant to section 77.96 of the *Regulations*, a claimant may indeed have the option to elect to have subsection 77.94(3), instead of subsection 77.95(3), apply to his earnings, the Appellant does not however meet the requirements of Pilot Project no.17;

- More precisely, the Appellant was not on claim any week from August 7, 2011 to August 4, 2012 in which earnings were declared or allocated. As a result, she is unable to match the eligibility criteria for section 77.96 of the *Regulations*;

- The General Division correctly relied on section 77.95 of the *Regulations* to uphold the allocation made by the Respondent; Also, despite what the Appellant states, the General Division did consider this argument and addressed it in paragraph [34] in its decision;

- The decision of the General Division is well founded in fact and in law and supported by case law. The Federal Court of Appeal re-affirmed the principle that pension moneys arising out of any employment are earnings for benefit purposes unless the claimant has accumulated enough hours of insurable employment since they started receiving their pension to re-qualify for a new claim for employment insurance benefits.

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 fact and law is reasonableness and for questions of law, is correctness – *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

[17] The Appellant pleads that section 77.95(3) of the *Regulations* states; "For the purpose of Pilot Project No. 18, Section 19 of the *Act* is adapted by adding" subsection (2.1) after subsection (2). She submits that it did not in any way alter nor suspend the provisions of subsection 19(2) and, therefore, both subsections would appear to be in force during the period of the Appellant's claim.

[18] She states that if subsection 19(2.1) is only applicable for the purpose of Project No. 18, then it is only intended to apply to income derived from Working While on Claim. The Appellant claims that since her income is not derived from Working While on Claim, paragraph 19(2)(b) should be used in determining if there is any reduction to her benefits. As her pension income is less than the 25% of her benefits as determined under paragraph 19(2)(b), then no overpayment of benefits has been made to her and no repayment is due.

[19] The Appellant submitted these arguments to the General Division in its appeal application and during the hearing. These arguments raised the following questions before the General Division:

- Should any reduction to the Appellant's benefits be determined using subsection 19(2) of the *Act* or subsection 19(2.1) as adapted by subsection 77.95 (3) of the *Regulations*, as both sections were in force at the time of her claim ?

- Is Pilot Project No. 18 and section 77.95 of the *Regulations* applicable to income from non-working sources while on claim or should subsection 19(2) as legislated apply to income from sources other than working?

- If it is determined that the Appellant's reduction of benefits is correctly calculated under subsection 19(2.1), then is paragraph 19(3)(a)(ii) the correct and only legislated means to calculate any overpayment ?

[20] After reviewing the decision of the General Division, the Tribunal finds that the interesting arguments raised by the Appellant where not addressed by the General Division. There are no answers given by the General Division to the above mentioned questions.

[21] The decision of the General Division appears to be a reproduction of the arguments of the Respondent before the General Division, arguments that also did not address the specific points raised by the Appellant.

[22] The Tribunal as repeated on many occasions that the General Division must justify its determinations. When it is faced with contradictory arguments, it cannot ignore them. It must dispose of them in its decision. In the present case, the General Division failed to do so and this constitutes an error in law.

[23] Furthermore, it is not for the Appeal Division to address issues that should have been first addressed by the General Division after appropriate pleadings by both parties. The Tribunal is of the view that the present record before the Appeal Division is simply insufficient to decide the arguments raised by the Appellant.

[24] The Appellant further raises in appeal that the Respondent had no legislative authority for the creation of subsection 19(2.1) as adapted by section 77.95(3) of the *Regulations*. She pleads that this constitutes an unauthorized and prohibited amendment to the *Act*. This argument will also need to be addressed by the General Division.

[25] For the above mentioned reasons, the appeal is allowed and the file is returned to the General Division (Employment Insurance section) for a new hearing by a different Member.

CONCLUSION

[26] The appeal is allowed and the file is returned to the General Division (Employment Insurance section) for a new hearing by a different member.

Pierre Lafontaine
Member, Appeal Division