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

Citation: *J. M. v. Canada Employment Insurance Commission,* 2016 SSTADEI 461

Tribunal File Number: AD-16-302

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: August 25, 2016

DATE OF DECISION: September 6, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 11th, 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 is presumed to have requested leave to appeal to the Appeal Division on February 16, 2016. Leave to appeal was granted on April 1st, 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] At the hearing, the Appellant was present and represented by S. M. The Respondent was represented by Carol Robillard.

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

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 *Regulations*.

ARGUMENTS

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

- His pension should not be considered earnings under the *Regulations*;
- The pension is contributed to solely by the members of the union and not by employers as the contribution comes from the wage package negotiated with the employers' bargaining representative and the amount of the contribution is determined by the union in consultation with its members;
- At no time have employers contributed any amount to the pension fund. They merely withhold the appropriate amounts from the negotiated wage package and disperse them according to the Collective Agreement and the majority decision of the members of UA Local 740;
- The initial position of the Respondent was that his pension was contributed to by the employers. He submits that he has clearly demonstrated that this is not the case;

- He believes that the decision *MacNeil v. Canada (CEIC)*, 2009 FCA 306 is not applicable to his circumstances as it appears that employers did make contributions to Mr. MacNeils's Pension Plan whereas they did not make any contributions to his Pension Plan.

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

- The General Division is correct in fact and in law and there is no evidence of a breach of natural justice;

- To be considered earnings pursuant to subsection 35(2) of the *Regulations*, the income must be arising out of employment;

- The facts of this case are analogous to the Federal Court of Appeal decision in *MacNeil v. Canada (CEIC)*, 2009 FCA 306 relied upon by the General Division to deny the Appellant's appeal;

- Similar to that matter, the pension in this case was negotiated by the union whereby the Appellant's earnings would be partially put into a Pension Fund by the employer;

- In this matter, article 25.03 of the Collective Labour Agreement states: Pension: For all new work bid after the ratification and signing of this Agreement, the employers will contribute to the Journeymen employee's Pension Fund the sum of four dollars and fifty cents ($4.50) for each hour earned by employee on commercial work and five dollars ($5.00) for each hour earned by employees on industrial work (GD3-41). As of May 1, 2015, the industrial benefit package negotiated and supported by the membership through voting allocated $6.50 to the Pension Fund (AD1-7);

- Similar to the *MacNeil* case, the evidence in this matter shows the employer has a contractual obligation to contribute a specific amount to the Pension Fund for every hour worked by the Appellant. This provision provides no discretion or control on the part of the Appellant or the union as to whether or not the

stipulated amounts actually go into the Pension Fund. The specific contractual obligation demonstrates that contributions made by the employer into the Pension Fund on the Appellant's behalf vary directly with the amount of work that he does;

- Consequently, this contractual obligation provides a clear causal connection between the Appellant's employment and the Pension Fund out of which he receives the monthly payments in issue;

- As such, in the matter at hand, the pension constitutes earnings for the purpose of paragraph 35(2)(e) of the *Regulations* as it arises out of employment, and was correctly allocated pursuant to subsection 36(14) of the *Regulations*.

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] In the present application, the resolution of this issue depends on whether the pension to which the Appellant is entitled under the Pension Plan is a retirement pension arising out of his employment, as contemplated by the definition of pension in subsection 35(1) of the *Regulations*.

[18] The Appellant argues that his pension should not be considered earnings under the *Regulations*. He pleads that the pension is contributed to solely by the members of the union and not by employers as the contribution comes from the wage package negotiated with the employers' bargaining representative and the amount of the contribution is determined by the union in consultation with its members.

[19] The Appellant submits that at no time have employers contributed any amount to the pension fund. They merely withhold the appropriate amounts from the negotiated wage package and disperse them according to the Collective Agreement and the majority decision of the members of UA Local 740. It is therefore a private pension plan voluntarily established by him from his own earnings.

[20] The Respondent submits that the evidence before the General Division shows that the employer has a contractual obligation to contribute a specific amount to the Pension

Fund for every hour worked by the Appellant. The Respondent pleads that this provision provides no discretion or control on the part of the Appellant or the union as to whether or not the stipulated amounts actually go into the Pension Fund.

[21] The Respondent pleads that the specific contractual obligation demonstrates that contributions made by the employer into the Pension Fund on the Appellant's behalf vary directly with the amount of work that he does. Consequently, this contractual obligation provides a clear causal connection between the Appellant's employment and the Pension Fund out of which he receives the monthly payments in issue.

[22] When the General Division dismissed the appeal of the Appellant, it relied on the Federal Court of Appeal decision in *MacNeil v. Canada (CEIC)*, 2009 FCA 306 which it considered to be a similar case to the present one.

[23] The Appellant submits that the General Division erred when it applied the principles of *MacNeil* to his case as it appears that employers did make contributions to Mr. MacNeils's Pension Plan whereas his employers did not make any contributions to his Pension Plan. The Tribunal disagrees with this interpretation of the *MacNeil* case by the Appellant and finds that the facts in the present case are very similar if not identical to the ones in *MacNeil*.

[24] In *MacNeil*, a letter from a representative of the Union was provided (similar to the one in the present case filed as exhibit GD3-20) indicating that the policy from 1979 up to the filing of benefits dealing with *MacNeil* was that contributions to the Union pension were made in wage packages and it was up to the Union to disperse the moneys as they saw fit. The Union put money in a pension package and administered the pension in the same way from 1979 up to the present time 2008 until an appeal from *MacNeil* was received. The Union administered the plan consistently over the years and there was only one. Should the Pension Plan be discontinued, the prospective contributions that would otherwise have been made to the Pension Plan were to be added to the employees' hourly wages and then become part of the wage package.

[25] In applying *MacNeil*, the General Division found that the Pension plan was not a private plan but one that arose out of employment and had to be allocated.

[26] The Tribunal finds that the evidence before the General Division shows that the Pension Fund is for all of the workers and it arises out of the Appellant's working arrangements within the union with his co-workers. Furthermore, the money which comes from the Appellant's hourly wages is placed into a fund. That is a general pension fund and is not held separately under each worker's name. He is not entitled to a return of his contributions. The money is locked in. It is therefore not similar to a RRSP or any other private pension fund.

[27] For the above mentioned reasons, the General Division came to the right conclusion that the pension money in this case constituted earnings pursuant to section 35 of the *Regulations* and that as per section 36 of the *Regulations*, these earnings had to be allocated.

[28] 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, the Tribunal must dismiss the appeal.

[29] 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

[30] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division