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

Citation: *P. T. v. Canada Employment Insurance Commission*, 2016 SSTADEI 474

Tribunal File Number: AD-16-668

BETWEEN:

P. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 8, 2016

DATE OF DECISION: September 14, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On April 11, 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 May 9, 2016. Leave to appeal was granted on May 20, 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 as 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 the Respondent was represented by Warren Dinham.

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 calculated in accordance with sections 35 and 36 of the *Regulations*.

ARGUMENTS

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

- That despite having the available information, the Respondent delayed calculating the allocation of earnings;

- The Respondent misinformed the Employer about how it should be reporting the monies in the Records of Employment. It was therefore amended three times, proving that there was miscommunication between the Respondent and the Employer;

- By the time it was corrected, there was an enormous backlog and he wasn't notified until a year later of the mistake. He submits that the three Records of Employment that were amended all have his severances showing on them. The Respondent was therefore well aware from the start of his severance;

- It's obvious that an error was made between the Respondent and the Employer. He truly believes that between the two parties, he was well represented and that the two groups were looking out after his best interest.

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

- With respect to paragraph 58(1)(*b*) of the *DESD Act*, the Tribunal did not err in making its findings that the monies received by the Appellant were earnings as per section 35 of the *Regulations* and as such were correctly allocated pursuant to section 36 of the *Regulations*;

- The Tribunal was correct in its findings that the claim was reviewed within the allowable 36 month window pursuant to section 52 of the *Employment Insurance Act*;

- The Tribunal has no jurisdiction on write-off issues;

- In this particular case, based on the evidence before it, the Tribunal correctly determined that the monies paid by the Employer to the Appellant upon termination were earnings to be allocated pursuant to sections 35 and 36 of the *Regulations*;

- As such, in light of the Tribunal's findings of fact in this case, its decision to uphold the allocation of earnings would appear to fall entirely within the parameters of the above mentioned legislation and jurisprudence.

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 facts of the present case are not in dispute.

[18] An initial claim for Employment Insurance benefits was established effective May 11, 2014. On May 16, 2014, the Employer issued a Record of Employment indicating that the Appellant had been employed with the Sobeys West Inc. from September 2, 2009 to May 8, 2014 after which he was laid off due to a shortage of work.

[19] The Record of Employment also indicated that, upon termination, the Appellant had been paid the following amounts: vacation pay $7,518.22, other $178.50, severance pay $20,400.00 and sick leave credits $3,060.00. On June 10, 2014, the Employer issued an amended Record of Employment indicating that vacation pay in the amount of $7,518.22 had been paid to the Appellant. The Employer also indicated that the severance pay had been rolled into an RRSP and the sick credits where not-insurable;

[20] Based on the information provided by the Employer in the amended Record of Employment, the Respondent notified the Appellant on June 11, 2014 that the vacation pay in the amount of $7,518.00 was considered as earnings and would be applied against his claim from May 4, 2014 to the week of June 22, 2014. Subsequently on June 20, 2014, the Employer issued a subsequent Record of Employment advising that the Appellant had received the following amounts: vacation Pay $7,518.22, severance pay $20,400.00, retiring allowance (sick credits) $3,060.00 and other $178.50.

[21] On June 19, 2015, the Appellant provided a statement to the Respondent to the effect that he was relying on his Employer and the Respondent to exchange all relevant information related to his EI claim.

[22] The Respondent determined that monies consisting of vacation pay, severance pay and retiring allowance, totaling $30,978.22 constituted earnings pursuant to sections 35 and 36 of the *Regulations* and was to be applied against his Employment Insurance claim. This decision resulted to the establishment of an overpayment in the amount of $11,308.00, which was communicated to the Appellant on June 21, 2015. [23] When it dismissed the appeal, the General Division concluded that:

> "[63] The Tribunal finds that the monies received as vacation, severance, sick benefit credit, and accumulated time off payout payments were monies arising from employment pursuant to Regulations 35.
>
> [64] The Tribunal finds that the monies were correctly allocated in accordance with Regulations 36.

> [65] The Tribunal finds that the Commission reviewed the Appellant's claim well within the allowable 36 months in accordance with section 52 of the [*Employment Insurance] Act*.
>
> [66] The Tribunal does not have the jurisdiction to waive the Appellant's overpayment."

[24] Unfortunately for the Appellant, he has not convinced the Tribunal that the General Division committed any errors of jurisdiction or law or any erroneous findings of fact which it may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[25] The Appellant takes the position in appeal that he should not be held accountable for the mistakes of the Respondent and the Employer. He pleads that the Respondent was well aware from the start of his severance package and delayed a year later the allocation of earnings causing him great prejudice. He submits that all this occurred without any bad faith on his part and he is now faced with an enormous debt through no fault of his own.

[26] Although the Tribunal sympathizes with the position of the Appellant, the Federal Court of Appeal as determined that a claimant who receives money for which he is not entitled to, even following an error by the Respondent, is not excused from having to repay it - *Lanuzo v. Canada (AG)*, 2005 FCA 324.

[27] If the Appellant wants to request a write-off of his debt pursuant to section 56 of the *Employment Insurance Act*, a formal request should be made directly to the Respondent so that a decision is rendered on that issue.

CONCLUSION

[28] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division