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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. A. B.*, 2016 SSTADEI 470

Tribunal File Number: AD-16-470

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

A. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: August 25, 2016

DATE OF DECISION: September 9, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On February 25, 2016, the Tribunal's General Division found that:

- The imposition of a penalty was not justified under section 38 of the *Employment Insurance Act* (Act).

- The issuance of a notice of violation was not justified under section 7.1 of the Act.

[3] The Applicant filed an application for leave to appeal to the Appeal Division on March 24, 2016. Leave to appeal was granted on April 11, 2016.

TYPE OF HEARING

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

- The complexity of the issue or issues;
- 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] At the hearing, the Appellant was represented by Elena Kitova. The Respondent attended the hearing and was represented by Jean-Guy Ouellet.

THE LAW

[6] 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.

ISSUES

[7] The Tribunal must determine if the General Division erred in finding that the imposition of a penalty under section 38 of the Act and a notice of violation under section 7.1 of the Act was not justified.

SUBMISSIONS

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

- The General Division failed to apply the legal test and erred in its interpretation of the concept of "knowingly", which constitutes an error of law.
- The issue before the Tribunal was to determine whether the claimant had knowingly made false or misleading statements when he failed to report, on seven occasions, being outside of Canada. However, the General Division allowed the Claimant's appeal on the grounds that he did not have the intent to defraud.
- The General Division erred in its interpretation of the term "knowingly". "Knowingly" means that the Claimant knew that the information he was

providing to the Commission was false. Instead, the General Division focused on justifying the Claimant's actions, thereby committing an error of law.

- The General Division did not properly assess the evidence brought before it. It had the duty to consider the overall evidence rather than only that which was to the Respondent's advantage.

- The General Division overlooked the fact that when the Respondent had filed his claim for benefits, he was informed that he must report any absences from the country. He had received and accepted his rights and obligations He also received instructions on how to complete his reports.

- Before sending their reports, claimants are warned about making false or misleading statements. The Appellant would like to point out that the Respondent holds a Ph.D. However, on seven occasions, he answered "no" to a simple and unambiguous question: "Were you outside Canada between Monday and Friday during the period of this report?" The Respondent could not have failed to notice that he was providing the Appellant with incorrect information, unless he had [*translation*] "willful blindness".

- The Respondent's explanations are inconsistent and not plausible. He claimed that he had developed an automatic reflex, whereas he was on only his third report. Moreover, he had nonetheless responded "yes" to the question on availability for work. The Respondent had then stated that he believed he was entitled to benefits because he was seeking employment. This statement contradicts his previous statement. The General Division failed to address these contradictions.

- The General Division also failed to explain why it was disposing of the Appellant's argument that the Respondent could not refer to an automatic reflex or a lack of attention to explain why he failed to report his absence.

- A thorough analysis of the evidence on file leads to a single conclusion: the Respondent did not rebut the presumption that his false and misleading

statements were made knowingly. Therefore, a penalty was justified under the circumstances.

- The Appellant believes that it exercised its discretion judicially in imposing and setting the penalty amount and in issuing the Respondent a notice of violation. There were no mitigating circumstances that could change its decision with regard to the notice of violation.

[9] The Respondent submitted the following arguments to refute the Appellant’s appeal:

- The General Division had strictly followed the required steps in analysing this issue. After taking notice that the Respondent's answers were incorrect, it had clearly stated that he had to present explanations.

- In this respect, it erred in law with regard to the procedures that must be followed to determine if the Respondent had knowingly made false statements. It subsequently identified these answers and addressed the Appellant's arguments against these answers.

- Its analysis of the Appellant's abovementioned onus, namely that it must prove that the claimant is subjectively aware of the falseness of these statements, conforms to case law.

- It took into consideration various elements (possibility of working elsewhere, prevalence of looking for work outside the country given the type of employment being sought, travel justified by an active employment search, sincere belief of entitlement to benefits given his employment search, he would have been more attentive to the questions had his travels been for pleasure, the claimant was not very familiar with the system) that the Respondent had acted in good faith, that he is a man of integrity and he would not jeopardize his security clearance by staining his record with an offence.

- It is up to the General Division to assess the credibility of the evidence. In light of all the evidence presented, the Appellant's position seems to determine

knowledge on an objective basis. This approach has been rejected and is legally invalid.

- The Appellant submits that the General Division failed to state why it did not retain the Appellant's position, namely the rejection of the aforementioned automatic reflex. This claim clearly disregards the General Division's findings in paragraphs 57 and 58 of the decision.

- Furthermore, the Appeal Division's intervention is not justified with regard to the finding of mixed fact and law and he submits that the General Division's conclusion was reasonable and the issuance of which is acceptable and has been previously retained.

- As regards the notice of violation, the inconsistency between the acknowledgment of mitigating circumstances for setting the penalty amount and the statement to the effect that there are no mitigating circumstances for the notice of violation must underscored.

STANDARDS OF REVIEW

[10] The parties submit that the Federal Court of Appeal ruled that the applicable standard of review for questions of law is correctness and that the applicable standard of review for questions of mixed fact and law is reasonableness – *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] 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."

[12] 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.

[13] The Federal Court of Appeal concludes by emphasizing 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."

[14] 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.

[15] 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

[16] The Appellant submits that the General Division overlooked the fact that when the Respondent had filed his claim for benefits, he was informed that he must report any absences from the country. He had received and accepted his rights and obligations. He also received instructions on how to complete his reports. It argues that, before sending their reports, claimants are warned about making false or misleading statements. The Appellant would like to point out that the Respondent holds a Ph.D. However, on seven occasions, he answered "no" to a simple and unambiguous question: "Were you outside Canada between Monday and Friday during the period of this report?" The Respondent could not have failed to notice that he was providing the Appellant with incorrect information, unless he had [translation] "willful blindness".

[17] In light of the Appellant's arguments, the Tribunal finds it appropriate to reproduce the following findings of the General Division:

> [Translation]
> [43] In order to be subject to a penalty under paragraph 38(1)(*a*), it is not enough for the representation to be false or misleading; it must also be knowingly made (*Mootoo*, A-43802).
>
> [44] In *Canada (A.G.) v. Gates* (1995) and *Canada (A.G) v. Purcell*, (1996), the Court made clear that the knowledge of the applicant concerning the falsity of the offending statement had to be decided on a subjective basis. It is up to the trier of fact to assess the claimant's knowledge.
>
> [45] If, in the end, the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of subsection 33(1) of the Regulations. *Canada (A.G.) v. Purcell* (1996).
>
> [46] Did the Appellant make false or misleading representations within the meaning of the Act when he completed his Employment Insurance reports?
>
> [47] False representations were indeed made. However, within the meaning of *Gates* and *Purcell*, it must now be determined if the Appellant had objectively known that he was providing false statements.
>
> [48] Once it appears from the evidence that a claimant has wrongly answered a on a report card, the burden shifts to the claimant to explain why the incorrect answers were given.
>
> [49] That is what the Appellant did at the hearing.
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> [50] I refer particularly to the fact that the Appellant holds dual citizenship; Canadian and Tunisian. As such, he has retained the opportunity to work in that country as he does not require a work permit. He can therefore leave at a moment's notice to answer the call of a possible employer in the Middle East.
>
> [51] He is a professional progressing in a global market. I assume that for him, applying for a position overseas is far more likely, if not downright predictable, than it would be for the average person.
>
> [52] I recall that his trips overseas were in search of employment. The evidence on file is clear and the Commission has acknowledged this.
>
> [53] I noted that that he sincerely believed he was entitled to his benefits while overseas because he was actively seeking employment.

> [54] I believe him sincere in his statement that he may have possibly had a heightened awareness of the question on travelling outside Canada had he been travelling for leisure.
>
> [55] I bear in mind that the Appellant is not a frequent Employment Insurance client or claimant. He is not familiar with the Act or Regulations. The Appellant has convinced me that he had acted in good faith.
>
> [56] I furthermore recall from his testimony that he is a man of integrity. He has proven this in his line of work by passing the necessary security screenings in order to receive the required clearance. I find it beyond doubtful that the Appellant would deliberately choose to jeopardize his reputation by committing an offence.
>
> [57] I don't accept the Commission's argument that, based on the fact that he had been duly notified when he filed his claim for benefits, the Appellant cannot point to an automatic reflex or lack of awareness that he was making a false statement to explain why he failed to report his absence from the country on seven occasions.
>
> [58] Based on the preceding, I hold a contrary opinion.
>
> [59] Case law states that it is up to the trier of fact to assess the claimant’s knowledge. I considered the Appellant's testimony and find him credible when he states that he had never intended to deliberately defraud Employment Insurance by making false statements.
>
> [60] The Tribunal finds that the Appellant did not did not knowingly make false representations. Therefore, the penalty imposed under section 38 of the Act is not justified, as is the consequent notice of violation issued under section 7.1.

[18] The Appellant criticizes the General Division of having erred in applying the legal test, and in particular, of having erred in its interpretation of the concept of "knowingly", which constitutes an error of law.

[19] However, the Tribunal does not share this view.

[20] The General Division correctly found that the burden was on the Appellant to prove that the Respondent had made a false or misleading representation, but that once it appears from the evidence that the respondent had wrongly answered a very simple question or questions on a report card, the burden shifts to the Respondent to explain why the incorrect answers were given. This is precisely what he did at the hearing before the General Division.

[21] The General Division correctly applied the cases of the Federal Court of Appeal, *Canada (A.G.) v. Gates* (1995) A-600-94 ; and *Canada (A.G) v. Purcell*, (1996) A-694-94, in which it was made clear that the knowledge of the Respondent concerning the falsity of the offending statement had to be decided on a subjective basis, and that it is up to the General Division, the trier of fact, to assess the Respondent's knowledge.

[22] The General Division took into account the various objective elements to decide on the Respondent's subjective knowledge. It granted the Respondent's testimony trust and credibility. The requirement with regard to the fact that the Respondent ought to have known, on a subjective level, that his statement was false was not respected - *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206. In light of this conclusion, the issue of the notice of violation should be dealt with similarly.

[23] The Appellant maintains that the Respondent, who holds a doctorate, could not have overlooked the fact that he was providing false information to the Appellant because, on seven occasions, he had answered "no" to a simple and unambiguous question: "Were you outside Canada between Monday and Friday during the period of this report?"

[24] The Tribunal believes that such an approach is erroneous because it applies an objective test. It implies that each time a claimant answers incorrectly to a simple and unambiguous question, they do so knowingly. It furthermore disregards the principles in *Gates* and *Purcell*, which stated that the knowledge of a claimant concerning the falsity of a statement had to be decided on a subjective basis.

[25] The Tribunal is of the opinion that the General Division had considered the Appellant's arguments and that its decision was made based on the evidence submitted before it, and that this decision complies with both legislation and jurisprudence.

[26] Moreover, for quite some time, case law has consistently stated, that unless there are obvious particular circumstances, the issue of credibility must be left to the discretion of the General Division, which is better placed to decide on it. The Tribunal does not find any reason to intervene in this case on the issue of credibility as assessed by the General Division.

CONCLUSION

[27] The appeal is dismissed.

Pierre Lafontaine,
Member, Appeal Division