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

[TRANSLATION]

Citation: *R. T. v. Canada Employment Insurance Commission*, 2016 SSTADEI 490

Tribunal File Number: AD-15-1021

BETWEEN:

R. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 16, 2016

DATE OF DECISION: September 26, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On August 18, 2015, the Tribunal's General Division determined the following:

- A disentitlement should be imposed on the Appellant in accordance with section 9 and subsections 11(1) and 11(4) of the *Employment Insurance Act* (Act) regarding his unemployment status.

[3] On September 14, 2015, the Appellant filed an application for leave to appeal before the Appeal Division. Leave to appeal was granted on September 30, 2015.

TYPE OF HEARING

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

- The complexity of the issue or issues;
- The parties' credibility was not a key issue;
- The information on file, including the need for additional information;
- The need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant did not attend the hearing, but he was represented by Yves Gravel. The Respondent was represented at the hearing by Manon Richardson and Carole Vary.

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 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 determine if the General Division erred in finding that a disentitlement should be imposed in accordance with section 9 and subsections 11(1) and 11(4) of the Act.

SUBMISSIONS

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

- In order for subsection 11(4) of the Act to apply, there must be evidence to show that the claimant worked more than the usual number of hours that are normally worked in a week by persons employed in full time employment.

- By failing to determine if, based on the evidence he had submitted, the Appellant had [*translation*] "worked more that the number of hours that are usually worked in a week by a person employed full-time", the General Division had incorrectly applied the Act and therefore committed a decisive error of law.

- The evidence submitted to the General Division does not show that the Appellant [*translation*] "worked a full working week during each week that falls

wholly or partly in a period of leave if in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment".

- The evidence shows that the Appellant had worked the same number of hours as the other employees during each week of his employment.

- It was up to the Respondent to prove that the Appellant had worked more than what is shown in the evidence submitted to the General Division.

- The General Division could not have found that the Appellant was not unemployed on the grounds that he was [*translation*] "on periodic leave within the meaning of the CCQ collective agreement", without making a material error when it weighed the evidence before it.

- None of the evidence submitted to the General Division supports its conclusion that the Appellant received [*translation*] "the portion of his remuneration that was set aside for that period".

- Moreover, the application of subsection 11(3) of the Act, to which the General Division refers, requires that there be a [*translation*] "mutual agreement between an employer and the employee".

- None of the evidence submitted to the General Division suggests that there was such an agreement.

- Furthermore, the uncontested evidence by the Respondent clearly and unmistakeably establishes that the Appellant received no earnings during the periods at issue.

- The General Division's decision regarding the application of subsection 11(3) of the Act is inconsistent with the submitted evidence.

- The General Division acted beyond its jurisdiction when it decided that the Appellant was not unemployed pursuant to subsection 11(3) of the Act since that issue was not before it.

- The General Division failed to observe a principle of natural justice when it decided that the Appellant was not unemployed pursuant to subsection 11(3) without giving the parties an opportunity to share their points of view on the issue.

- The Appellant respectfully submits that the evidence submitted to the General Division should have caused it to conclude that subsection 11(3) did not apply to his case.

- The General Division erroneously applied *Lépine* (A-281-95) given that, once the claimant presents evidence that subsection 11(1) applies to the exception referred to in subsection 11(4), the onus is on the Respondent to present evidence supporting the provision's application in the claimant's situation.

- The Appellant submits that the mere finding that the Appellant was on periodic leave does not constitute sufficient reason to justify the application of subsection 11(4) of the Act.

- The General Division erred in law by relying on *Merrigan*, in which the Federal Court of Appeal does not decide on the issue of "compensation" set out in the English version of section 11 of the Act.

- Had the General Division addressed the issue, it would have concluded that the Appellant's leave period was not granted to him "to compensate for the extra time worked." In fact, the General Division acknowledges that the leave period was granted to the Appellant due to remoteness rather than to compensate him for hours, days, or weeks of work.

- Moreover, employees can continue to work beyond 28 days, which means that there is no link between the time worked during the 28-day work period and the

leave set out in the collective agreement; however, there is a clear link between the leave and remoteness.

- The case law that confirmed the principle according to which claimants who have a schedule that includes periods of work and leave are deemed to be employed during the leave periods that are part of this established schedule is erroneous because it lacks the element of "compensation".

- In *Kieley*, A-708-92, (even before the new provision was implemented), the Court took into account the fact that the leave's purpose was to compensate the "excessive number" of hours worked, and in *Canada (A.G.) v. Merrigan*, 2004 FCA 253, the Court specifically restricted the scope of its decision to paragraph 11(4)(*a*) of the Act.

- The context of the decision leads to the conclusion that a worker that is not on leave "due to the additional hours previously worked" is in a state of interruption and may benefit from "temporary income".

- This is the first time that the issue of the application of the English version of paragraph 11(4)(*a*) is addressed by a tribunal, and given that it was brought before the General Division, it must decide on the issue despite all the decisions previously rendered, including those of the FCA.

- The evidence submitted show that the leaves are not granted [*translation*] "because of the additional hours previously worked".

- In its decision, the General Division never considered that lack of evidence, and its decision is therefore based on erroneous findings of fact and was made without regard for the material submitted as evidence.

[9] The Respondent submitted the following arguments to counter the Appellant's appeal:

- Subsection 11(4) of the Act states that an insured person is deemed to have worked a full working week during each week that falls wholly or partly in a

period of leave if in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment, and the person is entitled to the period of leave under an employment agreement to compensate for the extra time worked.

- A claimant who comes under this subsection cannot be considered unemployed. The record shows that the Appellant's schedule was such that he worked long hours every day for 28 days and was then entitled to 10 days of leave to rest. These conditions are set out in his employment contract and that of all the employees.

- The Appellant maintains the employment relationship during each rest period. It therefore follows that the Appellant comes under subsection 11(4) of the Act, that he cannot be considered unemployed during the periods at issue, and that he cannot receive Employment Insurance benefits during these periods.

- The employer confirmed that the Appellant is subject to the collective agreement signed by the employers, the unions with the Commission de la Construction du Québec (CCQ) [Quebec's construction commission].

- Given the remote nature of the job site, workers at these sites receive periodic leave that allows them to go home. The Act views these periods as entire weeks of employment rather than weeks of unemployment because the employment relationship remains intact and the Appellant receives part of his remuneration that has been set aside for this period.

- The language issue must be seen within the context of modern rules of legislative interpretation, in which not only the text must be respected, but also the Act's context and purpose.

- The Appellant's argument is limited to paragraph 11(4)(*b*) of the Act, under which he can plead that he was unemployed during his periodic leave, but according to the English version only and not the French version.

- Although the expression "to compensate for the extra time worked" cannot be found verbatim in the French version of subsection 11(4) of the Act, the periodic leave that follows a period in which the claimant works "a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment" and that is granted after having worked 28 days is invariably granted in consideration of the great number of hours worked.

- Parliament's intent in establishing subsection 11(4) of the Act was to ensure that claimants that had worked more hours than a normal work week do not receive Employment Insurance benefits during a leave period as a result of a work schedule that requires they put in more hours of work than a normal work week.

- Therefore, if the period of leave derives from a formula of "28/10", as was confirmed by the employer, common sense would dictate that a person who has worked for 4 consecutive weeks, 60 hours a week, would not be unemployed during their leave period following these 4 weeks of work.

STANDARDS OF REVIEW

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

[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 proceeds to note 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 stating that when the Appeal Division 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 Social Security 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

Preamble

[16] The Appellant withdraws his appeal of the General Division's decision regarding the disentitlement imposed under subsection 36(1) of the Act because he lost an employment or was unable to resume employment due to an interruption of work resulting from a labour dispute at the factory, workshop, or any other location where he worked.

[17] Based on the Federal Court of Appeal Decision in *Jean* cited above, he also withdraws his appeal argument that the evidence submitted to the General Division does not show that the Appellant "worked a full working week during each week that falls wholly or partly in a period of leave if in each week the insured person regularly works a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment".

Introduction

[18] The Appellant worked for Alstom Power & Transport Canada Inc. from June 26, 2013, to December 21, 2013. During this period, he was on periodic leave during the weeks of July 28 to August 10, 2013, and from October 20 to November 2, 2013. The Appellant is

a crane operator and has been a member of the International Union of Operating Engineers, Local 905 for many years. He received a competency certificate as a crane operator journeyman on May 17, 1998.

[19] All employees working in the northern sites, such as Sarcelle, Romaine, and Eastmain, are subject to a collective agreement and to the "28/10" schedule: at least 28 days of work for 10 days of leave.

[20] The employer further stated that, normally, most employees request their leave after 28 days. If they prefer to keep working and if they're not sick or affected by the distance, they can stay.

[21] All employees work 60 hours per week. They work for 6 days, from Monday to Saturday, and Sunday if necessary or in case of an emergency. These conditions are the same for all the employment types (crane operator, mechanic, plumber, electrician, labourer, carpenter, etc.).

[22] Based on this information, a request for information was sent to the Appellant on November 18, 2014, because the Respondent had noticed that the Appellant was applying for Employment Insurance benefits for certain periods whereas he was still, according to the Respondent, employed at Alstom.

[23] On December 1, 2014, the Respondent received the Appellant's response regarding the weeks of May 27 to May 31, 2013, of July 29 to August 9, 2013, and of October 21 to November 1, 2013. The Appellant stated that he worked in James Bay as a construction worker. During the aforementioned periods, he worked as a crane operator for Alstom, where there was a staff rotation based on schedules that are not always the same. The Appellant stated that he was not paid for the periods indicated in the letter of November 18, 2014. During these periods, he declared himself to be available at all times. He also reported being available at Local 905 each time he wasn't working. The Appellant included with his response a copy of the letter from the union confirming his trade and membership in Local 905. He applied for Employment Insurance benefits because he did not work during the

periods indicated in his letter of November 18, 2014. He referred to Employment Insurance for all the indicated periods because he had no other income during these periods.

Unemployment Status

[24] In light of the facts of this case, the Tribunal is of the opinion that the General Division did not err in finding that a disentitlement should be imposed on the Appellant in accordance with section 9 and subsections 11(1) and 11(4) of the Act.

[25] The Federal Court of Appeal has on several occasions confirmed the principle according to which claimants who have a schedule that includes periods of work and of leave are deemed to be employed during the leave periods that are part of this established schedule (***Canada (A.G.) v. Jean, 2015 FCA 242; Canada (A.G.) v. Merrigan*, 2004 FCA 253; *Canada (A.G.) v. Duguay*, A-75-95**).

[26] It has been well-established that the Appellant was subject to a collective agreement (pages GD3-40 to 41) and to a "28/10" schedule, that is, 28 days of work for 10 days of leave. All employees work 60 hours per week. They work 6 days, from Monday to Saturday, and Sunday if need be. The Appellant himself acknowledged that he worked on a rotating basis, filling in for one another.

[27] He confirms this fact in his application for leave to appeal to the General Division (Exhibit GD2-4), in which he states that:

> [*Translation*]
> I'm a seasonal worker and a crane operator by trade. The company is the one that sets the leaves in order to rotate staff. Staff takes leave at different times to give each seasonal worker the chance to work and worked in the region [...]

[28] Also included in his response to the Respondent's request for information (Exhibit GD3-9):

> [*Translation*]
> I was working as a construction worker in a remote area of James Bay. During the indicated periods, I was working for Alstom as a crane operator and we rotated staff based on often different schedules.

[29] Also during his testimony before the General Division:

> [*Translation*]
> No, it's like I told you, in my case, no, cause like I said, you gotta go by the rotation cause if you don't, that wouldn't work for the other guy, the other guy who's on vacation, he wouldn't want to stay home for 20 days and then spend 10 days up at work.

[30] The evidence before the General Division therefore clearly shows that the Appellant had never ceased being employed with his employer. The work schedule was set by the employer and had been accepted by the Appellant and his work colleagues. It also seems clear to the Tribunal that the weeks off in question were set out in the collective agreement as weeks of leave within the meaning of subsection 11(4) of the Act. The Appellant himself also referred to the days off as vacation time in his testimony before the General Division.

[31] The Appellant argued on appeal that the case law that confirmed the principle according to which claimants who have a schedule that includes periods of work and of leave are deemed to be employed during the leave periods that are part of this established schedule is erroneous because it is missing the "compensation" element set out in the English version of subsection 11(4) of the Act.

[32] The Appellant argues that, had the General Division considered the issue, it would have found that the Appellant's period of leave was not granted to him "to compensate for the extra time worked", in accordance with the English version of subsection 11(4) of the Act. In fact, according to the Appellant, the General Division acknowledges that the leave period was granted to the Appellant due to remoteness rather than to compensate him for hours, days, or weeks of work.

[33] The Tribunal is of the opinion that, although the expression "to compensate for the extra time worked" cannot be found verbatim in the French version of subsection 11(4) of the Act, the periodic leave that follows a period in which the claimant works "a greater number of hours, days or shifts than are normally worked in a week by persons employed in full-time employment" and that is granted after having worked 28 days is invariably granted in consideration of the great number of hours worked.

[34] The Federal Court of Appeal also notes in *Kieley*, cited above, that the work schedule may vary from one case to another, but that, fundamentally, the aim is to compensate the excessive number of hours and days that employees are required to work, or, according to the English version, "to make up for an excessive number of working hours and consecutive working days".

[35] Recently, the Federal Court of Appeal, in *Jean, supra*, also reproduced the two English and French versions of section 11 of the Act in its decision and notes that the compensation factor is not necessary given that whether or not a claimant receives income during their leave is of little importance since there is no interruption of employment and the employment relationship is maintained.

[36] It seems clear to the Tribunal that the evidence before the General Division shows that the periodic leave was granted to the Appellant as compensation for the excessive number of hours and consecutive days of work he was required to perform, or "to make up for an excessive number of working hours and consecutive days working days". A person who works 60 hours a week for 4 consecutive weeks is not unemployed during the leave period that follows these weeks of work.

[37] Parliament's intent in establishing subsection 11(4) of the Act was to ensure that claimants that had worked more hours than a normal work week do not receive Employment Insurance benefits during a leave period as a result of a work schedule that requires they put in more hours of work than a normal work week.

[38] The Tribunal cannot accept the interpretation suggested by the Appellant because it would mean that, pursuant to only the English version of paragraph 11(4)(*b*) of the Act, he would be unemployed during his leave period, but not according to the French version. This interpretation defies the common sense of the two versions and goes against case law that has been well-established by the Federal Court of Appeal.

[39] In light of the evidence on file, The General Division was correct in finding that allowing the Appellant to receive Employment Insurance benefits would go directly against the spirit of the Act and the intent of the legislation.

CONCLUSION

[40] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division