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

[TRANSLATION]

Citation: *F. G. v. Canada Employment Insurance Commission*, 2016 SSTADEI 495

Tribunal File Number: AD-16-453

BETWEEN:

F. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 20, 2016

DATE OF DECISION: October 3, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing.

INTRODUCTION

[2] On February 16, 2016, the Tribunal's General Division found that:

> - The disentitlement imposed on the Appellant under sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the *Employment Insurance Regulations* (Regulations) was justified.

[3] On March 18, 2016, the Appellant filed an application for leave to appeal before the Appeal Division after receiving the General Division's decision on February 22, 2016. Leave to appeal was granted on April 1, 2016.

ISSUE

[4] The Tribunal must determine if the General Division erred when it found that the disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified.

THE LAW

[5] 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.

SUBMISSIONS

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

- The General Division erred in applying the provisions regarding the state of unemployment, particularly when it found that the time the Appellant spent searching for a job was time he was investing in his business.

- The General Division erred because a business in deficit cannot be a claimant's main source of income.

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

- The General Division did not err either in fact or in law and it properly exercised its jurisdiction.

- The General Division had to determine to what extent the Appellant was self-employed, and if it was to such a minor extent that he would not normally rely on it as his principal means of livelihood.

- To answer the question, the General Division looked at all the facts in the case and analysed them against the six factors in subsection 30(3) of the Regulations. By proceeding in this manner, it met all the legal criteria at issue in this case.

- The Appeal Division does not have the authority to retry a case or to substitute its discretionary power for that of the General Division. The Appeal Division's authority is limited by subsection 58(1) of the *Department of Employment and Social Development Act*;

- Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, and that this decision is unreasonable, the Tribunal must dismiss the appeal ;

STANDARDS OF REVIEW

[8] The Appellant made no submissions concerning the applicable standard of review.

[9] The Respondent submits that the applicable standard of review for questions of law is correctness and the standard of review for questions of mixed fact and law is reasonableness - *Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[10] 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 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.

[11] 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.

[12] 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."

[13] 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*, 2015 FCA 274.

[14] 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

[15] The Appellant argued that the General Division erred in applying the provisions regarding his state of unemployment, particularly when it found that the time the Appellant spent searching for a job was time he was spending on his business. He also submits that an unprofitable business could not be a claimant's main source of livelihood.

[16] The Respondent believes that the General Division had to determine to what extent the Appellant was self-employed, and if it was to such a minor extent, conclude that he would not normally rely on it as his principal means of livelihood.

[17] It stated that the General Division did not err in considering the overall facts in the case and in analysing the six factors is subsection 30(3) of the Regulations.

[18] When it dismissed the Appellant's appeal, the General Division concluded the following:

> [translation]
> [...] the Tribunal based its analysis on *Fatt* (A-406-94), which elaborates on the significance of the criteria found in *Jouan* (A-366-94). Based on the grounds presented in *Fatt* (A-406-94), time spent on a business is the most important factor to consider when rendering a decision in a similar case.

[19] The test for minor self-employment or engagement in business operations requires a determination of whether the extent of such employment or engagement, when viewed objectively, is so minor that the claimant would not normally rely on that level of engagement as a principal means of livelihood.

[20] The Tribunal is of the opinion that the General Division erred in law by granting disproportionate importance to the criterion of time spent on the business.

[21] More recent case law than the one on which the General Division relied has established that an overall analysis of the six criteria must be conducted, without giving precedence to one or more of the criteria, and that each file must be assessed on its merits - *Martens v. Canada (A.G.)*, 2008 FCA 240; *Canada (A.G.) v. Goulet*, 2012 FCA 62; *Inkell v. Canada (A.G.)*, 2012 FCA 290.

[22] The Tribunal believes that the Regulations must be considered in its entirety, given that a person could spend little time on their business but nevertheless make it their principal means of livelihood. In addition, a lack of sufficient income does not necessarily mean that a claimant is unemployed.

[23] It appears from the evidence submitted to the General Division that when it evaluating the six factors of subsection 30(3) of the Regulations, it mistook the Appellant's job search with the actual time he invested in his business.

[24] The Tribunal is of the opinion that the General Division had merely stated its findings on the facts relating to the factors listed in subsection 30(3) of the Regulations without making a clear finding on the use of the test set out in subsection 30(2).

[25] Specifically, the General Division did not clearly and objectively address the question of whether the extent of the Appellant's involvement in his business during the benefit period, determined in light of the factors set out in subsection 30(3) of the Regulations, was such that he could not have relied on it as his principal means of livelihood. This is an error of law.

[26] On these grounds, the appeal is allowed and the matter is referred back to the General Division for a new hearing.

CONCLUSION

[27] The appeal is allowed and the matter is referred back to the General Division (Employment Insurance Section) for a new hearing.

[28] The Tribunal orders that the file of the decision rendered by the General Division on February 16, 2016, be withdrawn.

Pierre Lafontaine
Member, Appeal Division