



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 516

Tribunal File Number: AD-16-806

BETWEEN:

L. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: October 18, 2016

DATE OF DECISION: October 20, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 2, 2016, the General Division of the Tribunal determined that the allocation of earnings was performed 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 June 13, 2016. Leave to appeal was granted on July 19, 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 the Respondent was represented by Louise Laviolette.

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:

- That she was prevented from attending the hearing before the General Division because of her daughter's illness. She would like to present her case since she is a single mother with no extra income to pay the outstanding debt;
- She was instructed by a woman that the pension she had received would more likely not be classified as income but that the request was put into the file and a decision was to be made;
- That if you refer to the records she has provided as her financial situation, it is very clear that her income and outgoing payments of mortgage, loan, condo fees, insurance, house hold bills, credit cards along with gas, groceries and other monetary payments are barely enough to be able to afford all these living expenses.

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

- The monies in question constitute earnings to be allocated in accordance with sections 35 and 36 of the Regulations;
- However, given that the Appellant has raised an issue of natural justice and that the Appeal Division allowed the appeal on that basis, the Respondent does not object that in the interest of procedural fairness, the matter be returned to the General Division for redetermination, pursuant to subsection 59(1) of the DESD Act;
- Should the Appellant still have an amount owing following the decision on this appeal, the Respondent suggests that the Appellant contact the Canada Revenue Agency's Debt Management Call Centre at 1-866-864-5823 to negotiate a suitable repayment arrangement.

STANDARD OF REVIEW

[10] The parties made no representations regarding 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 further indicates 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 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 as described in Jean was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[15] In accordance with the above instructions, 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] Both parties agreed at the appeal hearing that the Appellant did not have an opportunity to present her case before the General Division and that a principle of natural justice was not respected, notably the right to be heard.

[17] However, the Appellant requested that the Tribunal render a decision immediately rather than send it back to the General Division for a new hearing. The Respondent did not oppose this request and declared that it was ready to proceed. Considering that the facts of the case are not contested, the Tribunal agreed to proceed in the proposed matter.

[18] The Appellant argues that she was upfront and honest with the Respondent in regards to the monies she received from her employer. She was instructed by a woman that the pension she had received would likely not be classified as income but that the request was put into the file and a decision was to be made. She pleads that the resulting overpayment has placed her in financial hardship.

[19] The Respondent is of the position that both severance and pension are considered earnings, and therefore are to be allocated from the week of separation based on the Appellant’s normal weekly earnings.

[20] When it dismissed the appeal, the General Division concluded the following:

[26] The Tribunal finds that the pension and severance monies were properly allocated beginning with the date of separation from employment, pursuant to subsection 36(9) of the *Regulations*.

[27] The Federal Court of Appeal reaffirmed the principle that amounts paid because of the severance of the employment relationship constitute earnings within the meaning of section 35 of the *Regulations* and must be allocated in accordance with subsection 36(9) of the *Regulations*.

Canada (AG) v. Boucher Dancause, 2010 FCA 270;

Canada (AG) v. Cantin, 2008 FCA 192

[28] The Federal Court of Appeal has long held that a settlement payment made in respect of an action for wrongful dismissal is "income arising out of employment" unless the claimant can demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss.

Canada (AG) v. Radigan, A-567-99

[21] As per the conclusions of the General Division, and although the Appellant was very transparent concerning the monies received from her employer, it is well established in the jurisprudence of the Federal Court of Appeal that monies received by a claimant by reason of a separation from employment constitute earnings pursuant to section 35 of the *Regulations* and must be allocated from the termination of employment pursuant to subsection 36(9) of the *Regulations*.

[22] Therefore, after review of the appeal file, the decision of the General Division and the arguments of the parties, the appeal must be dismissed.

[23] If the Appellant wishes to apply for a write-off of her debt, she should follow the procedure proposed by the Respondent during the appeal hearing.

CONCLUSION

[24] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division