



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. S. G.*, 2016 SSTADEI 519

Tribunal File Number: AD-16-881

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

S. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: October 20, 2016

DATE OF DECISION: October 21, 2016

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file is sent back to the General Division for a new hearing.

INTRODUCTION

[2] On June 13, 2016, the General Division of the Tribunal determined that the Respondent had sufficient hours to qualify for regular benefits pursuant to section 7 of the *Employment Insurance Act (Act)*.

[3] The Appellant requested leave to appeal to the Appeal Division on June 30, 2016. Permission to appeal was granted on July 8, 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 represented by Carol Robillard. The Respondent was present and represented by Mihad Fahmy.

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 exceeded its jurisdiction and if the General Division erred in fact and in law when it concluded that the Respondent had sufficient hours of insured employment to qualify for employment insurance benefits pursuant to section 7 of the *Act*.

ARGUMENTS

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

- The General Division exceeded its jurisdiction in determining the Respondent's hours of insurable employment. In accordance with subsection 64(3) of the *DESD Act* (previously section 122 of the *Act*), jurisdiction to make decisions on insurability and the quantum of insured hours and earnings rests with the *Canada Revenue Agency (CRA)*;
- The proper avenue for the General Division would have been to refer the matter back to the Appellant under section 82 of the *Employment Insurance Regulations (Regulations)* for investigation and report;

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

- The Appellant was well aware that the Respondent was seeking a decision from the General Division regarding the calculation of her hours of insurable

employment. The Appellant did not participate in the hearing, held by teleconference on June 13, 2016. It is the Respondent's submission that the appropriate time for the Appellant to raise a jurisdictional objection was at the commencement of the June 13th hearing.

- In the General Decision dated June 13, 2016, the Member found that the Respondent "was not paid on an hourly basis because she was expected to spend a number of hours on other ancillary duties outside the teaching contact hours, such that subsection 9.1 of the *Regulations* does not apply.";
- The Member also held that the actual hours worked by the Respondent during her qualifying period of employment were not known or ascertainable by the Employer. Therefore, "the number of hours in insurable employment should be obtained by dividing the total earnings for the period of employment by the minimum wage of \$10.25, pursuant to subsection 10(4) of the *Regulations*.";
- The Respondent takes no position with respect to whether the General Division exceeded its jurisdiction when it determined the number of insurable hours of employment worked by the Respondent;
- The Respondent is content to seek a *CRA* ruling with the understanding that the factual findings (as well as mixed fact/law findings) of the General Division are unaffected, and that the full General Division docket file will be provided to the *CRA* Officer.

STANDARD OF REVIEW

[10] The parties submit that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division. It can only intervene if 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 - *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 indicates 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”.

[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] Pursuant to section 90(1) of the *Act*, only an officer of the *CRA* authorized by the Minister can make a ruling on how many hours an insured person has had in insurable employment.

[17] It is well established in jurisprudence that the *CRA* has exclusive jurisdiction to make a determination on how many hours of insurable employment a claimant possesses for the purposes of the *Act* - *Canada (A.G.) v. Romano*, 2008 FCA 117, *Canada (A.G.) v. Didiodato*, 2002 FCA 345, *Canada (A.G.) v. Haberman*, A-717-98.

[18] In view of the above, the Tribunal finds that the General Division exceeded its jurisdiction when it determined that the Respondent had accumulated 1155 hours of insurable employment.

[19] The Tribunal is therefore justified to intervene and send the matter back to the General Division for a new hearing to take place after a *CRA* ruling on the insurable hours of the Respondent. As mentioned at the appeal hearing, the Tribunal does not have jurisdiction to impose the General Division's factual findings to the *CRA* officer who will independently conduct an investigation.

CONCLUSION

[20] The appeal is allowed and the file is sent back to the General Division for a new hearing.

[21] The Appellant will however obtain a *CRA* ruling prior to the hearing before the General Division.

Pierre Lafontaine
Member, Appeal Division