



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. Doomra Investments Inc.*,
2016 SSTA DEI 539

Tribunal File Number: AD-15-898 and AD-15-899

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

Doomra Investments Inc

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: July 28, 2016

DATE OF DECISION: November 3, 2016

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

INTRODUCTION

[2] Previously, a General Division member allowed the Respondent's appeal.

[3] In due course, the Commission filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. Both the Commission and the Respondent attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are that:

- (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.

ANALYSIS

[6] This is a complicated case involving an alleged employment insurance fraud.

[7] The Commission, after a detailed investigation, determined that the Respondent operated a business which issued a number of false records of employment (ROEs).

The Commission, believing that the Respondent was fully aware that the ROEs were false, assessed a large penalty.

[8] The Respondent did not dispute that some false ROEs were issued. Instead, the Respondent argued that they were unaware of any fraud, were a victim of their accountant, and therefore did not knowingly make a false statement.

[9] The General Division member assessed the party's submissions and reviewed the lengthy evidentiary record before ultimately preferring the evidence of the Respondent over that of the Commission. After explaining why he accepted that the Respondent was a victim of the accountant's fraud, he allowed the Respondent's appeal and removed the penalty.

[10] On appeal, the Commission maintains their position that the Respondent knowingly made false statements and submits that the General Division ignored the evidence by concluding to the contrary. At the hearing, they made reference to various parts of the evidentiary record to substantiate their arguments. They ask that their appeal be allowed.

[11] The Respondent stands by their evidence that they were a victim of their accountant and did not knowingly issue any false ROEs. At the hearing, however, they did admit that they knowingly made false statements to the Commission investigators after the fact. They submitted that they only did this because their accountant threatened that they would face jail time if they deviated from the accountant's version of events.

[12] During oral arguments, in response to my questions regarding the evidence in the file, the Commission stated that they redacted certain documents before the General Division because they did not feel that they were relevant to the appeal.

[13] As the documents had been redacted, it was impossible for me to determine whether or not they were relevant. If they were relevant, absent a compelling legal reason to the contrary, they would have to be provided in an un-redacted form to the Respondent. If this was not done, it would give rise to the obvious suspicion (true or not) that exculpatory information was being withheld by the Commission.

[14] I therefore issued the following order:

“The reconsideration files in these matters contains [sic] a number of redacted pages, from GD3-617 to GD3-628 and from GD3-630 to 633. The Commission submits that these pages contain investigation notes from other employees of the Respondent where the ROEs were not deemed to be misrepresentations, and as such are not relevant. This may very well be true. On the other hand, not being able to see these documents, I cannot currently determine if this is so. It may be that the redacted interviews contain exculpatory evidence that might assist the Respondent in answering the Commission allegations that false statements were made knowingly. For this reason, I order that the redacted pages listed above, and any other redacted materials, be provided to the Tribunal by August 8, 2016. Upon receipt, I will review these materials. If I find that the Commission is correct and they are not relevant, they will be disposed of and will not be sent to any other party. If I determine that they are relevant, then I will solicit submissions from the parties before taking any further action. If the Commission fails to provide the materials as ordered, then I will also solicit submissions before issuing a decision in these files.”

[15] The Commission provided the redacted materials in un-redacted form, and after reviewing them I determined that they were indeed relevant. I came to this determination because these documents discuss (for example, at AD4 -14) employees of the Respondent, their relationship to the Respondent’s accountant, and certain statements made by the accountant regarding the Respondent.

[16] While I make no specific findings of fact, it is clear to me that these un-redacted documents would have been of assistance to the General Division member in determining the correct resolution of the file. This is especially true given the Respondent’s position that they were not a party to the accountant’s fraud.

[17] The Commission submits that, having found that the materials are relevant, I should order a new hearing so that these documents can be considered by the General Division. The Respondent made no submissions on this point.

[18] This situation leaves me deeply troubled.

[19] The Commission was in possession of documents which formed part of their investigation of the Respondent and his accountant and would be expected to be relevant, but unilaterally redacted those documents. While I take note of the fact that they redacted the documents in such a way that it was clear that the redaction had taken place (and I therefore have no hesitation in accepting that they did so in good faith), the fact remains that evidence which should have been before the General Division member was not available to him.

[20] The Commission is a party to appeals before the Tribunal, but as the initial decision maker in all employment insurance matters it is also the bedrock upon which the Tribunal system rests. The other parties (and the Tribunal) rely upon the completeness of the documents provided by the Commission. Without the absolute assurance that all relevant information has been provided, the ability of the Tribunal to decide appeals justly would be in question.

[21] Even worse, one can easily imagine a situation where a document is redacted in such a way that it is not obvious that a redaction took place. Such a situation, although not present in this file, would represent a tremendous breach of the natural justice rights of the parties which could not easily be detected and corrected.

[22] If the Commission has concerns about a particular document with regard to privacy rights, relevance, or any other matter, they are free to seek guidance from the Tribunal member in accordance with s. 4 of the *Social Security Tribunal Regulations*. Otherwise, however, the Commission should err on the side of caution and all documents which might be relevant must be disclosed.

[23] I note that Parliament appears to have contemplated that the Tribunal would have occasion to make privacy related orders, at least in regard to hearings, by giving the

Tribunal the power (at s. 62 of the DESDA) to close hearings to the public “if the Tribunal is of the opinion that the circumstances so require”.

[24] I also note that Parliament gave the Tribunal (at s. 64(1) of the DESDA) the power to resolve “**any** question of law or fact that is necessary [emphasis added]”.

[25] To be clear, it is not appropriate for the Commission, a party to the appeal, to be determining whether or not evidence is relevant and should or should not be redacted. That is the role of the Tribunal member as established in the DESDA, the *Social Security Tribunal Regulations*, and the general powers of all administrative tribunals to manage their own proceedings.

[26] From the above, I must conclude that the General Division decision was not made based upon all of the evidence, as some of the evidence was blacked out and unreadable. There is no doubt in my mind that by not making further enquiries to determine whether or not the redactions were necessary given the circumstances, the member breached the natural justice rights of the parties and their rights to a procedurally fair hearing. For these reasons, the resulting decision cannot stand.

[27] I agree with the Commission that this file needs a new hearing so that, in light of the now un-redacted information, the parties are able to make their respective cases in full.

[28] To expedite matters, I direct that if possible the new hearing be conducted by the same member as heard the present appeal.

[29] Because I have reached this conclusion, it is unnecessary for me to rule on any of the Commission’s other arguments at this time.

CONCLUSION

[30] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer

Member, Appeal Division