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

Citation: *D. P. v. Canada Employment Insurance Commission,* 2016 SSTADEI 559

Tribunal File Number: AD-16-236

BETWEEN:

D. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: October 4, 2016

DATE OF DECISION: November 28, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On December 25, 2015, the General Division of the Tribunal determined that the allocation of earnings was calculated 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 February 3, 2016 after receiving communication of the General Division decision on January 5, 2016. Leave to appeal was granted on June 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 not present but represented by Andrew Black. The Respondent was represented by Elena Kitova.

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 the General Division failed to mention or consider the evidence of the Appellant;
- That the March 14th discrimination grievance is the subject of the settlement giving rise to the $17,000.00 at issue;
- That the March 14th discrimination grievance arose out of the assault, battery, harassment and discrimination suffered by the Appellant;
- The March 14th discrimination grievance is separate and distinct from the layoff and termination grievances preceding the March 14th discrimination grievance;

- The March 14th discrimination grievance did not raise, assert, mention, imply, involve or in any way touch upon any dismissal, lay-off, termination, or severance;

- The July 28, 2014, minutes of settlement are in settlement of the March 14th discrimination grievance, not the layoff or termination grievances;

- The July 28, 2014 minutes of settlement specifically carve out and preserve the Appellant's right to proceed against her employer for relief in respect of lost wages and other employment related benefits in connection with the layoff and termination grievances;

- The Respondent's representations entirely omit any mention of the March 14th discrimination grievance, notwithstanding its being the subject of the settlement giving rise to the $17 ,000.00 at issue;

- The Respondent's decision is based on a non-existent connection between the layoff and termination grievances on the one hand, and the July 28, 2014, minutes of settlement on the other, that is patently wrong in fact and law;

- The Respondent's representations spuriously distort the factual record including by falsely representing that the $17,000.00 at issue arose "in connection with the January 26th, 2012 and November 29th, 2012 grievances [i.e. the Layoff and Termination Grievances]", even going as far to assert that said representation came from the Appellant's representative, which is frankly outrageous;

- The General Division's decision is based on a fundamental misunderstanding and/or distortion of the factual record without regard to the material facts, documents and submissions before it;

- Paragraphs 23-24, 26, 31-32 and 35 of the decision - including all findings and citations in respect of "lay-off", "separation from employment", "termination of employment", "wrongful dismissal", "severance", etc., make clear that the

General Division entirely misunderstood and/or disregarded the materials, submissions and facts before it;

- There is simply no basis - legal, factual, actual or otherwise - for the General Division's finding that the $17,000.00 at issue was "paid in settlement of a grievance resulting from a termination of employment" (para. 26); or as "compensation for the termination of the Appellant's employment" (para. 29); or as a "severance payment" (para. 31); or "received in settlement of an action relating to her dismissal" (para. 32); or "resulting from the termination of employment" (para. 33); or "paid [...] as severance funds [...] to compensate the Appellant for work performed" (para. 35). In the absence of evidence and reason, these findings are patently arbitrary and erroneous;

- Given the volume and substance of the myriad, particularized, medically corroborated, judicially accepted and unchallenged body of evidence regarding the assault, harassment, discrimination and harm suffered by the Appellant, all of which was and is properly before the Tribunal as incontrovertible evidence, it is inconceivable how the General Division could possibly arrive at a finding of "no evidence" of anything other than "compensat[ion] for the loss of wages or other employment-related benefits enjoyed during employment". There is a wealth of evidence to the contrary;

- Contrary to paragraph 29 of the General Division decision, the grievance to which the Appellant refers to that being the March 14, 2014 discrimination grievance, was filed, twice in fact, and was part of the record;

- The Appellant's materials address in depth the fact and circumstances of the March 14th discrimination grievance, and substantial submissions both oral and written have been offered in respect of its substance, settlement and significance; Indeed, it is arguably the single most important piece of evidence in terms of assessing the origin and reason for the payment at issue. It is and was at all material times before the General Division but disregarded for reasons unknown.

- The July 28, 2014, minutes of settlement specifically carve out and preserve the Appellant's right to proceed against her employer for relief in respect of lost wages and other employment-related benefits in connection with the layoff and termination grievances;

- It is apparent from a plain reading of the March 14th discrimination grievance that it in no way concerns, claims, mentions or in any way relates to any termination, severance, wage loss or "employment-related benefits enjoyed during employment". On the contrary, it is explicitly and solely concerned with "discrimination", "sexual harassment", "personal harassment", "intentional infliction of mental suffering", "assault", "battery" and "compensation for injury to dignity, feelings and self-respect under section 45.2 of the *Ontario Human Rights Code*. The General Division failed entirely to take any regard of these facts, which were plainly stated and repeatedly highlighted on the record, materials and submissions before it; the Appellant has suffered a gross miscarriage of justice as a result;

- The Respondent's submissions are largely unresponsive to the Appellant's arguments and repetitive of the same and similar misrepresentations and omissions made to date.

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

- That in paragraph 22 of its decision, the General Division committed an error in identifying the issue under appeal. However, it’s a clerical error that is

- not prejudicial to the Appellant and has no impact on the outcome of the appeal;

- That the decision of the General Division does not disclose any error in fact or law;

- The General Division assessed the evidence on file, considered the Appellant’s submissions and the testimonies at the hearing to conclude that the monies received as a result of a settlement between the Appellant and her employer,

were intended to compensate her for the loss of wages or other employment-related benefits. Therefore, these monies constitute earnings within meaning of subsection 35(2) of the *Regulations* and should be allocated pursuant to subsection 36(11) of the *Regulations*;

- That the evidence does not substantiate the arguments that the monies were paid as compensation for loss of prestige, injury to reputation and emotional upset. The minutes of settlement specially indicate that the monies were paid as general damages to the claimant's grievances filed on January 26th, 2012, after the Appellant's lay-off was considered a violation of the collective agreement, and November 29th, 2012, to dispute termination of her employment;

- That the evidence does not substantiate the arguments that the monies were paid as compensation for loss of prestige, injury to reputation and emotional upset. The minutes of settlement specially indicate that the monies were paid as general damages to the claimant's grievances filed on January 26th, 2012, after the Appellant's lay-off was considered a violation of the collective agreement, and November 29th, 2012, to dispute termination of her employment;

- Paragraph 2 specifically states: "If the Grievor is not referred to a position of no less than 3 weeks' duration (…) on or before August 11, 2014, the Employer shall pay to the Grievor a lump amount of $17,000.00 as general damages (…)";

- That the decision of the General Division to allocate the monies is based on the evidence before it, in accordance with the Employment Insurance legislation and supported by case law. 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;

- That the Appellant did not show that the General Division made a reviewable error under subsection 58(1) of the *DESD Act*. She is essentially asking the

Appeal Division to review a decision of the General Division anew, looking for a different outcome.

STANDARD OF REVIEW

[10] The Appellant made no representations regarding the applicable standard of review.

[11] The Respondent submits 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.

[12] 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".

[13] 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".

[14] 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".

[15] 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.

[16] 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

The facts

[17] The Appellant filed an initial claim for benefits, established effective December 1, 2013, after she was laid off from her employment with Hydro One Networks on November 27, 2013. She was subsequently laid off on May 20, 2014, and submitted a renewal application for benefits.

[18] While in receipt of benefits, the Appellant received a lump sum amount of $17,000.00 following a settlement with Hydro One Networks Inc. The Respondent determined that the monies issued to the Appellant constituted earnings, pursuant to subsection 35(2) of the Regulations. The Respondent allocated the total amount of $17,000.00 from August 10, 2014 to October 4, 2014, pursuant to subsection 36(11) of the *Regulations*. The Appellant then filed an appeal to the General Division of the Tribunal.

Decision of the General Division

[19] The General Division dismissed the Appellant's appeal finding that the money paid as a result of a settlement was to compensate the Appellant for the loss of wages. The money therefore constituted earnings and was to be allocated pursuant to sections 35 and 36 of the *Regulations*.

[20] Both parties agreed at the appeal hearing that the General Division erred in fact and in law when it concluded that the funds received by the Appellant from her employer were wages and that this money was paid to the Appellant as severance funds. (Paragraph 35 of

the General Division decision). These conclusions of the General Division do not belong in the decision considering the facts of the present case.

[21] The Tribunal finds that these erroneous conclusions contained in the decision of the General Division lead to believe that the General Division did not fully understand the issue before it and/or misunderstood the facts before it.

[22] Furthermore, the Tribunal is of the view that the General Division rendered a decision without regard to the material before it, notably, without considering the important March 14, 2013, discrimination grievance. The General Division states in its decision (paragraph 29) that the grievance that led to the settlement between the parties was not filed by the Appellant when she actually did file the grievance twice prior to the hearing (GD3-91, request for reconsideration, GD2-64, notice of appeal to the General Division).

[23] The General Division, in light of the above, came to the conclusion that there was "no evidence to support that the general damages were not intended to compensate for the loss of wages or other employment-related benefits enjoyed during employment" (paragraph 28 of the decision). With this conclusion, the General Division clearly ignored the evidence of the Appellant.

[24] It is undisputed that the General Division was entitled to reject the evidence of the Appellant but when it is faced with contradictory evidence, it must explain why it rejects the evidence of the Appellant and why it prefers one version of events to the other. The failure to do so constitutes an error in law – *Parks*, (A-321-97).

[25] For the above mentioned reasons, the Tribunal is justified to intervene and render the decision that should have been rendered by the General Division. It is not in the interest of justice and the parties to return the file to the General Division since the facts of the case are not contested.

Position of the parties

[26] The Appellant takes the position that it is apparent from a plain reading of the March 14th discrimination grievance that it in no way concerns claims, mentions or in any way relates to any termination, severance, wage loss or "employment-related benefits enjoyed during employment". On the contrary it is explicitly and solely concerned with "discrimination", "sexual harassment", "personal harassment", "intentional infliction of mental suffering", "assault", "battery" and "compensation for injury to dignity, feelings and self-respect under section 45.2 of the *Ontario Human Rights Code*.

[27] The Respondent takes the position that the monies received as a result of a settlement between the Appellant and her Employer, were intended to compensate the Appellant for the loss of wages or other employment-related benefits. Therefore, these monies constitute earnings within meaning of subsection 35(2) of the *Regulations* and should be allocated pursuant to subsection 36(11) of the *Regulations*.

Earnings under section 35 of the Regulations

[28] In characterizing settlement amounts as earnings or non-earnings it is important to keep in mind the basic principles. One starts with subsection 35(2) of the Regulations which provides that the earnings to be taken into account in determining whether there has been an interruption of earning includes “the entire income of a claimant arising out of any employment.”

[29] Case law is abundant to the effect that if a claimant claims that the amounts received from his employer or former employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the claimant to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss - *Canada (A.G.) v. Radigan*, A-567-99; *Bourgeois v. Canada (A.G.)*, 2004 FCA 117.

[30] In the present case, did the Appellant demonstrate that due to "special circumstances" some portion of the $17 000.00 should be regarded as compensation for some other expense or loss?

[31] The Respondent submits that the evidence does not substantiate the arguments that the monies were paid as compensation for loss of prestige, injury to reputation or emotional upset.

[32] The Respondent relies heavily if not entirely on the minutes of settlement that would indicate that the monies were paid as general damages to the Appellant's grievances filed on January 26, 2012, after the Appellant's lay-off was considered a violation of the collective agreement, and November 29, 2012, to dispute termination of her employment.

[33] The Respondent submits that paragraph 2 specifically states: "If the Grievor is not referred to a position of no less than 3 weeks' duration (…) on or before August 11, 2014, the Employer shall pay to the Grievor a lump amount of $17,000.00 as general damages (…)."

[34] It is true that the minutes of settlement refer to the amount of $17,000.00 as general damages. This vague qualification is usually enough to consider the sum received as earnings under section 35 of the *Regulations*.

[35] However, the interpretation of the minutes of settlement by the Respondent is too restrictive and does not take into consideration the minutes of settlement in its entirety and other documentary evidence on record that support the position of the Appellant that the $17 000.00 was received as compensation for some other specific loss under the *Ontario Human Rights Code*.

[36] The minutes of settlement dated July 28, 2014, indicate the following:

> "**WHEREAS** the Union filed a grievance on March 14, 2013, alleging *inter alia*, that the Grievor was subject to harassment and discrimination under the *Ontario Human Rights Code*, which has proceeded to a hearing before the Ontario Labour Relations Board with Board file No. 0106-13-G (the "Grievance");

> **AND WHEREAS** the Employer independently investigated and concluded that, with respect to some of the allegations made by the Grievor, the Grievor was subject to conduct contrary to the Employer's expectations;
>
> (Underlined by the undersigned)

[37] The grievance filed by the Union on March 14, 2013, that led to the minutes of settlement specifically refers to the following complaint:

> "From the time that Ms. D. B. started working at Hydro-One, the Grievor has been subject to discrimination, sexual harassment, as well as personal harassment and a poisoned work environment. The Employer has failed to provide the Grieve with a workplace free of discrimination and harassment. The Grievor has also been subject to intentional infliction of mental suffering, and assault and battery by other workers, her supervisors and by management."

[38] In filing the March 14, 2013 grievance, the Union sought the following relief:

> " 2. Monetary compensation, including aggravated damages and compensation for injury to dignity, feelings and self-respect under section 45.2 of the *Ontario Human Rights Code*."

[39] The full and final release incorporated in said minutes of settlement also states that:

> "**IN CONSIDERATION** of the payments to me and the other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and set out in the Minutes of Settlement dated July 28, 2014, I, **D. B.** on behalf of myself, my heirs, administrators and assigns, (hereinafter collectively referred to as the **"Releasor")** herey release and forever discharge **HYDRO ONE NETWORKS INC.**, its parent, subsidiaries and affiliates, and each of its and their respective, current and former officers, directors, employees, representatives, attorneys, trustees, benefit plan fiduciaries, plan administrators, insurers, servants and agents, and their successors and assigns (hereinafter collectively referred to as the **"Releasee"**) , jointly and severally from any and all actions, causes of action, contracts and covenants, whether express or implied, claims and demands for damages, indemnity, entitlements, costs, benefits, wages, interest, loss or injury of every nature and kind whatsoever arising out of the Grievance dated March 14, 2013 (OLRB Board file No. 0106-13-G) and with respect to the facts raised in the Grievance and/or out of human rights, harassment and/or reprisal allegations premised on events prior to the date of the attached Minutes of Settlement, inclusive of any human rights, harassment and/or

> reprisal claim arising from Board file No. 1531-12-G and Board file No. 2796-12- G."
>
> (Underlined by the undersigned)

[40] The release is unambiguous. The release is given by the Appellant with respect to the facts raised in the grievance dated March 14, 2013 and/or out of human rights, harassment and/or reprisal allegations premised on events prior to the date of the minutes of settlement.

[41] In view of the above evidence, the position of the Respondent that the monies were paid as general damages to settle the Appellant's grievances filed on January 26, 2012, and November 29, 2012, is untenable.

[42] Furthermore, paragraph 8(e) of the minutes of settlement specifically excludes the complaints of January 2012 (1531-12-G) and November 2012 (2796-12-G) when it states that:

> "These Minutes of settlement are without prejudice and shall not in any way, including by way of setoff, affect the Grievor's and/or Union's outstanding and independent claims for compensation or other relief arising in 2796-12-G or 1531-12-G or any other grievances relating to the Grievor's layoff or recall prior to the date of these Minutes."

[43] The July 28, 2014 minutes of settlement specifically exclude and preserve the Appellant's right to proceed against her employer for relief in respect of lost wages and other employment-related benefits in connection with the layoff and termination grievances. In other words, the human rights, harassment and/or reprisal allegations were settled between the parties but not the layoff and termination grievances.

[44] The Tribunal, applying the instructions of the Federal Court of Appeal to the facts of the present case, finds that the Appellant has met her burden of proving that due to "special circumstances", the amount of $17, 000.00 should be regarded as compensation for some other expense or loss and not to compensate her for a loss of wages or other employment-related benefits.

[45] Therefore, these monies do not constitute earnings within the meaning of subsection 35(2) of the *Regulations* and should not be allocated.

CONCLUSION

[46] The appeal is allowed.

[47] The settlement amount of $17,000.00 received by the Appellant does not constitute earnings within the meaning of subsection 35(2) of the *Regulations* and should not be allocated.

Pierre Lafontaine
Member, Appeal Division