



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *R. T. v. Canada Employment Insurance Commission*, 2017 SSTADEI 12

Tribunal File Number: AD-16-900

BETWEEN:

R. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: January 12, 2017

DATE OF DECISION: January 17, 2017

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the Social Security Tribunal's General Division (Employment Insurance Section) for a new hearing by another member on each issue.

INTRODUCTION

[2] On June 14, 2016, the General Division of the Tribunal determined that:

- The Appellant's earnings were allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).
- The imposition of a penalty was justified under section 38 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on July 5, 2016. Leave to appeal was granted on July 14, 2016.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- The complexity of the issue or issues;
- The fact that the parties' credibility was not one of the main issues;
- The information on file, including the type of information missing;
- The need to proceed as informally and quickly as possible in accordance with the criteria in the Tribunal's rules relating to the circumstances and considerations of fairness and natural justice.

[5] The Appellant and his representative, Sylvain Bergeron, attended the hearing. The Respondent was represented by Stéphanie Yung-Hing.

THE LAW

[6] 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 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.

ISSUES

[7] The Tribunal must determine if the General Division erred when it found that:

- a) The Appellant's earnings were allocated in accordance with sections 35 and 36 of the Regulations;
- b) Imposing a penalty under section 38 of the Act was justified.

SUBMISSIONS

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

- The General Division member cites only trivial facts and the Appellants evidence is in no way taken into consideration, or even mentioned in the decision;
- The General Division retained only the Respondent's evidence and simply ignored the Appellant's evidence;

- The Federal Court of Appeal has clearly established that the General Division must consider all of the evidence presented and not just the Respondent's version;
- In the [translation] "Submissions" section, the General Division does not even mention the Appellant's position on appeal, and instead writes trivial information that has nothing to do with his position;
- Before the General Division, he contested the results of the interview with the Employment Insurance agent and he showed that the interview report had been pre-typed, a fact that the General Division ignored.
- The statutory declaration or interview with the investigators is untrue and not credible;
- The Appellant was not proven to have knowingly made false or misleading statements.

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

- The General Division did not err in finding that it is the Appellant's overall earnings from all employment that must be allocated under sections 35 and 36 of the Regulations;
- The General Division's conclusion confirms the Respondent's position;
- However, the General Division seems to have erred in failing to explain why it was rejecting the Appellant's argument with regard to the amount of earnings to be allocated;
- The General Division cannot merely state that it is the Appellant's overall earnings that must be allocated in accordance sections 35 and 36 of the Regulations;

- Given the fact that since 2005, the parties have argued the same issues before several proceedings and that the Respondent has consistently maintained that it had calculated unreported earnings based on documents provided by employers entitled [translation] "Wage Calculation", the Respondent requests that the Appeal Division uphold the General Division's decision.
- If it is accepted that the Appellant was unable to report his earnings on a weekly basis because he did not know how much they would be, the only possible explanation would thus be that the Appellant had knowingly made false or misleading statements when failing to report that he was working during these weeks of unemployment;
- In this case, the fact that the Appellant had made false statements was admitted, and thus the General Division did not err in upholding the penalty imposed by the Respondent.

STANDARDS OF REVIEW

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

[11] 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.

[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 “[w]hen it 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 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.

[14] 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."

[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] 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

Allocation of Earnings and Penalty

[17] In this case, the General Division had to decide whether the allocation of the Appellant's earnings complied with sections 35 and 36 of the Regulations and if a penalty needed to be imposed on the Appellant under section 38 of the Act.

[18] The role of the General Division is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[19] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it; it must consider it. If it decides that the evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious - *Bellefleur v. Canada (A.G.)*, 2008 FCA 13.

[20] In this case, the General Division overlooked the evidence submitted by the Appellant. He attempted to show to the General Division that what he considers to be the actual pay slips should be used to calculate his earnings, rather than the "Wage Calculation" document, from which the Respondent based his earnings.

[21] The case has many times been sent back to the Board of Referees and to the General Division for the same reasons (see *Canada (Employment Insurance Commission) v. R.T.*, SSTAD 115(CanLii), CUB 72474 and CUB 75282A) Without explanation, the General Division disregarded the Appellant's evidence and merely cited trivial fact on the matter in the [translation] "Evidence" and [translation] "Submissions" sections. Even reading through the [translation] "Analysis" section, it is not possible to determine the Appellant's position before the General Division.

[22] Furthermore, as regards the matter of the penalty, the General Division based its decision on the Appellant's admissions at the interview of April 14, 2005, to conclude that he had acted knowingly; however, these admissions have been contested by the Appellant and the General Division does not mention in its decision why it did not accept the Appellant's objection to the admissions or why it did not accept his explanation regarding the false statements.

[23] Finally, the Tribunal finds that the General Division's decision is somewhat ambiguous and unclear. The General Division goes on to cite findings of fact rendered by previous umpires on the file rather than render her own conclusions following the *de novo* hearing held before her.

[24] Given the aforementioned errors, the Tribunal has just cause for intervening in this case and for referring the matter to the General Division for a new hearing.

[25] The Respondent asks that the Tribunal render the decision that should have been rendered by the General Division. The Tribunal is of the opinion that it cannot satisfy the Respondent's request given that the evidence relating to earnings is strongly contested by the Appellant and that the credibility issue would be best determined by the General Division.

CONCLUSION

[26] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a new member on each issue.

[27] The General Division decision dated June 14, 2016, should be removed from the file.

Pierre Lafontaine

Member, Appeal Division