



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. B. S.*, 2017 SSTADEI 9

Tribunal File Number: AD-16-449

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: November 24, 2016

DATE OF DECISION: January 16, 2017

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration.

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*, 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 case involves the allocation of certain alleged earnings.

[7] The Commission submits that the General Division member erred by failing to take into account the written evidence, but instead focused almost entirely on whether or not he found the Respondent's oral testimony to be credible. They ask that I give the decision the

General Division member should have given or, in the alternative, order a new hearing before the General Division.

[8] The Respondent submits that his Employer acted in a fraudulent manner and maintains his position that, consistent with the evidence he gave to the General Division, he did not work the hours or earn the income his Employer says he did.

[9] The General Division member, in his decision, stated that:

“The Tribunal gives the Appellant the benefit of the doubt, and finds that the Appellant did not work the hours reported by [the Employer] on the time records.”

[10] He then went on to accept the Respondent’s statement that he had only earned “between \$150-160 per week while he was working for [the Employer]”, and on that basis allowed the appeal.

[11] I note that according to both the Respondent and the Commission, the Respondent had received some undeclared income from his Employer.

[12] At the Appeal Division hearing, the Respondent admitted that he “made a mistake” in not reporting this income. As no penalty was levied against the Respondent (or at least no such decision is under appeal before me), this “mistake” is of no immediate consequence.

[13] But this does not change the fact that, even according to the Respondent, there are earnings which must be allocated. It was the duty of the General Division member to examine all of the evidence, to determine the exact amount of any earnings, and to ensure that they were allocated correctly. The fact that this was not done and the appeal was instead allowed without any further reference to this income is an error which I am obligated to intervene to correct.

[14] Further, I agree with the Commission argument that the member appears to have disregarded the evidence in coming to his conclusions. Regardless of whether or not the Respondent was credible in his testimony that the Employer had lied regarding the hours worked, it was incumbent upon the member to explain on what basis he did not accept the

abundant documentary evidence (such as the pay stub found at GD3-189, submitted by the Respondent himself) which indicated to the contrary.

[15] Given these findings, it is my view that a new General Division hearing is required. Both parties should be prepared to re-argue their respective positions as to the actual income earned by the Respondent.

CONCLUSION

[16] For the above reasons, the appeal is allowed. The matter is returned to the General Division for reconsideration.

Mark Borer

Member, Appeal Division