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

[TRANSLATION]

Citation: *R. T. v. Canada Employment Insurance Commission,* 2017 SSTADEI 48

Tribunal File Number: AD-16-1359

BETWEEN:

R. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: February 8, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred to the General Division (Employment Insurance Section) for a new hearing before a new member.

INTRODUCTION

[2] On November 28, 2016, the General Division of the Social Security Tribunal (Tribunal) found that the disentitlement imposed on the Appellant under sections 18 and 50 of the *Employment Insurance Act* (Act) and section 9.001 of the *Employment Insurance Regulations* (Regulations) was justified because he had failed to prove his availability for work.

[3] On December 8, 2016, the Appellant filed an application for leave to appeal with the Appeal Division. Leave to appeal was granted on December 15, 2016.

ISSUE

[4] The Tribunal must determine whether the General Division erred in finding that the disentitlement imposed on the Appellant under sections 18 and 50 of the Act and section 9.001 of the Regulations was justified.

THE LAW

[5] 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.

STANDARDS OF REVIEW

[6] The Appellant did not make any submissions regarding the applicable standard of review. The Respondent claims that the standard of review applicable to questions of law is correctness, and the standard of review applicable to questions of mixed fact and law is reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50).

[7] 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."

[8] The Federal Court of Appeal further indicated:

> 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.

[9] The Federal Court of Appeal concluded by pointed out that "[w]he[n] 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."

[10] 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.

[11] 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 or its decision was

unreasonable, the Tribunal must dismiss the appeal. The parties made no submissions concerning the applicable standard of review.

ANALYSIS

[12] The Appellant argues that the General Division did not consider the fact that when it issued an amended decision, the Respondent imposed a penalty on him. The General Division therefore refused to exercise its jurisdiction.

[13] The Applicant also argues that the General Division failed to consider material before it or the jurisprudence establishing that claimants are exempted from actively looking when their best chance of finding work is an imminent call-back from their employer or the jurisprudence establishing that the Respondent must notify claimants that a reasonable time has elapsed and that they need to start looking actively for work.

[14] It is the Respondent's position that the matter should be returned to the General Division of the Tribunal. The issues before the General Division were to determine whether the Appellant was available and looking for work under paragraph 18(*a*) of the Act and whether a false representation had been made knowingly in accordance with section 38 of the Act.

[15] It submits that the General Division did not make any findings on the matter of the false representation. Furthermore, the General Division did not explain its decision and refuted the arguments and jurisprudence of the Appellant's representative by which claimants who can reasonably expect to be called back to work can be excused from the obligation to show that they are actively seeking employment, at least for a reasonable period of time.

[16] Considering the arguments in support of the Appellant’s appeal and considering the Respondent’s position, and after reviewing the file and the General Division’s decision, the Tribunal agrees to allow the appeal.

CONCLUSION

[17] The Tribunal allows the appeal and refers the matter back to the General Division (Employment Insurance Section) for a new hearing on the issues by a new member.

[18] The Tribunal orders that the General Division's decision dated November 28, 2016, be removed from the file.

Pierre Lafontaine

Member, Appeal Division