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

Citation: *Canada Employment Insurance Commission v. D. D.,* 2017 SSTADEI 63

Tribunal File Number: AD-16-1024

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 9, 2017

DATE OF DECISION: February 16, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the decision of the General Division dated July 21, 2016, is rescinded, and the appeal of the Respondent before the General Division is dismissed.

INTRODUCTION

[2] On July 21, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Respondent had sufficient hours to qualify for regular benefits pursuant to section 7 of the *Employment Insurance Act* (Act).

[3] The Applicant requested leave to appeal to the Appeal Division on August 11, 2016. Leave to appeal was granted on August 24, 2016.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- the complexity of the issue under appeal;
- the fact that 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] The Appellant, represented by Carol Robillard, and the Respondent were present at the hearing.

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 Respondent had sufficient hours of insured employment to establish a claim pursuant to section 7 of the Act.

ARGUMENTS

[8] The Appellant submits the following arguments in support of its appeal:

- The General Division exceeded its jurisdiction in determining the insurability of the Respondent's employment with one employer and the quantum of hours accumulated;

- In accordance with subsection 64(3) of the DESD Act (previously section 122 of the Act), jurisdiction to make decisions on insurability and the quantum of insured hours and earnings pursuant to section 90 of the Act rests with the Canada Revenue Agency (CRA);

- The proper avenue for the General Division would have been to refer the matter back to the Appellant under section 32 of the *Social Security Tribunal Regulations* for investigation and report;

- A reasonable conclusion based on the evidence is that a determination of insurability and quantum of hours must be made by CRA.

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

- The Appellant did not take into consideration the period of time that he was working for one employer from September 2013 to December 2014.

- That said employer did not provide him with T4 slips or a Record of Employment for the September 2013 to December 2014 period he worked there.

- He has enough hours to qualify for benefits.

STANDARD OF REVIEW

[10] The Appellant 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 intervene only 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.

[11] The Respondent did not make any representations regarding the applicable standard of review.

[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 Court concluded 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."

[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

[17] Pursuant to subsection 90(1) of the Act, only an officer of the CRA authorized by the Minister can make a ruling on how many hours of insurable employment an insured person has accumulated.

[18] It is well-established in jurisprudence that the CRA has exclusive jurisdiction to make a determination on how many hours of insurable employment a claimant possesses for the purposes of the Act - *Canada (A.G.) v. Romano*, 2008 FCA 117; *Canada (A.G.) v. Didiodato*, 2002 FCA 345; *Canada (A.G.) v. Haberman*, 2000 FCA 150.

[19] Unfortunately for the Respondent, the General Division exceeded its jurisdiction when it determined the insurability of his employment and the quantum of hours accumulated.

[20] A request for a ruling must be made to the CRA which will then determine the number of hours the Respondent has accumulated in insurable employment.

[21] For the above-mentioned reasons, the appeal will be allowed.

CONCLUSION

[22] The appeal is allowed, the decision of the General Division dated July 21, 2016, is rescinded, and the appeal of the Respondent before the General Division is dismissed.

Pierre Lafontaine
Member, Appeal Division