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

Citation: *D. T. v. Canada Employment Insurance Commission,* 2017 SSTADEI 73

Tribunal File Number: AD-16-1034

BETWEEN:

D. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 23, 2017

DATE OF DECISION: February 27, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On July 25, 2016, the General Division of the Social Security Tribunal of Canada (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 is deemed to have requested leave to appeal to the Appeal Division on August 12, 2016. Leave to appeal was granted by the Appeal Division on September 9, 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 was present at the hearing. The Respondent, represented by Louise Laviolette, was also 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 allocation of earnings was calculated in accordance with sections 35 and 36 of the Regulations.

ARGUMENTS

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

- The decisions rendered so far in his files are consistently incoherent;
- He questions why he was acquitted in 2009 of not declaring his city councillor expense allowance compensation for the period he received benefits and why the General Division is now requesting that he reimburse the amounts he received when he filed for benefits the second time in 2013;
- He was consistent in his procedure and followed the instructions he was given in 2009, when he was told that he did not have to declare his city councillor income while he received benefits, as these were considered excluded because they were an expense allowance;

- These amounts are paid to him on a monthly basis to cover his general expenses while he serves his city as an elected official.

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

- The General Division's finding that the monies received as remuneration as municipal councillor constituted earnings to be allocated is correct and should be supported by the Appeal Division;

- The General Division correctly determined that the monies in question constitute earnings pursuant to section 35 of the Regulations, as it relates to a service performed. As they are earnings, they must be allocated to when those services are performed pursuant to subsection 36(4) of the Regulations;

- There is no evidence that the General Division failed to observe a principal of natural justice, acted unfairly erred in law or made an erroneous finding of fact in a perverse or capricious manner.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the General Division's conclusions 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.

[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 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 "Whe[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] The present decision is rendered in English at the request of the Appellant and in order to ensure uniformity with the General Division's decision. The hearing, however, was held in French at the request of the Appellant.

[18] The Appellant argues that the decisions rendered so far by the Respondent in his files are consistently incoherent. He questions why he was acquitted in 2009 of wrongfully not declaring his city councillor expense allowance compensation for the period he received benefits and why the General Division is now requesting that he reimburse the amounts he received when he filed for benefits the second time in 2013. He was consistent in his

procedure and followed the instructions he was given in 2009, when he was told that he did not have to declare his city councillor income while he received benefits, as these were considered excluded because they were an expense allowance.

[19] It is not in dispute that the Appellant received monies as salary and allowances for expenses as a city councillor (Exhibits GD3-18, GD3-31). The allowances for expenses were not allocated by the Respondent since these amounts were paid to him on a monthly basis to cover his general expenses while he served his city as an elected official.

[20] The relevant provisions of the Regulations read as follows:

> 35. (1) The definitions in this subsection apply in this section.
>
> **employment** means
>
> (c) the tenure of an office as defined in subsection 2(1) of the *Canada Pension Plan.*
>
> **income** means any pecuniary or non-pecuniary income that is or will be received by a claimant from an employer or any other person, including a trustee in bankruptcy.
>
> 36. (1) Subject to subsection (2), the earnings of a claimant as determined under section 35 shall be allocated to weeks in the manner described in this section and, for the purposes referred to in subsection 35(2), shall be the earnings of the claimant for those weeks.
>
> (2) For the purposes of this section, the earnings of a claimant shall not be allocated to weeks during which they did not constitute earnings or were not taken into account as earnings under section 35.
>
> (3) Where the period for which earnings of a claimant are payable does not coincide with a week, the earnings shall be allocated to any week that is wholly or partly in the period in the proportion that the number of days worked in the week bears to the number of days worked in the period.
>
> (4) Earnings that are payable to a claimant under a contract of employment for the performance of services shall be allocated to the period in which the services were performed.

[21] The relevant provision of the *Canada Pension Plan* (CPP) reads as follows:

2(1) In this Act,

office means the position of an individual entitling him to a fixed or ascertainable stipend or remuneration and includes a judicial office, the office of a minister of the Crown, the office of a lieutenant governor, the office of a member of the Senate or House of Commons, a member of a legislative assembly or a member of a legislative or executive council and any other office the incumbent of which is elected by popular vote or is elected or appointed in a representative capacity, and also includes the position of a corporation director, and "officer" means a person holding such an office.

(Underlined by the undersigned)

[22] As per paragraph 35(1)(*c*) of the Regulations, employment means the tenure of an office as defined in subsection 2(1) of the CPP.

[23] The General Division did not err when it found that the Appellant, as a city municipal councillor, fell within the definition in subsection 2(1) of the CPP. The Appellant, by his own admission, is an elected official (Exhibit GD3-13). Therefore, a salary paid to an elected official is earnings pursuant to section 35 of the Regulations as it relates to a service performed. As it is earnings, it must be allocated to when those services are performed pursuant to subsection 36(4) of the Regulations.

[24] Whether earnings are insurable is not relevant to whether they are to be taken into account in order to reduce Employment Insurance benefits otherwise payable - *Doblej v. Canada (A.G.)*, 2004 FCA 19.

[25] Finally, even if the Appellant was unfortunately misinformed by the Respondent's agents, the fact remains that these earnings received during the benefit period must be allocated; and the resulting overpayment must be repaid - *Lanuzo v. Canada (A.G.)*, 2005 FCA 324.

[26] For the above-mentioned reasons, the appeal will be dismissed.

CONCLUSION

[27] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division