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

[TRANSLATION]

Citation: *G. D. v. Canada Employment Insurance Commission*, 2017 SSTADEI 158

Tribunal File Number: AD-16-892

BETWEEN:

G. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: March 23, 2017

DATE OF DECISION: April 19, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed in part. The file is returned to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a member on the penalty issue.

INTRODUCTION

[2] On May 31, 2016, the Tribunal's General Division found:

- The Appellant did not have an interruption of earnings under subsection 14(1) of the *Employment Insurance Regulations* (Regulations).
- The disentitlement imposed pursuant to paragraph 18(1)(*a*) of the *Employment Insurance Act* (Act) and section 30 of the Regulations was justified because the Appellant had not proven his availability to work.
- The earnings received by the Appellant were allocated in accordance with sections 35 and 36 of the Regulations.
- The Appellant had knowingly made false or misleading statements, warranting the imposition of a penalty under section 38 of the Act.

[3] The Appellant is presumed to have filed his application for leave to appeal on July 5, 2016, after receiving the General Division's decision on June 7, 2016. Leave to appeal was granted on August 25, 2016.

FORM OF HEARING

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

- The complexity of the issue(s);

- The parties' credibility was not a key 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] At the hearing, the Appellant was represented by Mr. Pierre Hébert. The Respondent did not attend despite having received a notice of hearing.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, 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.

ISSUES

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

- The Appellant did not experience an interruption of earnings under subsection 14(1) of the Regulations.

- The disentitlement imposed pursuant to paragraph 18(1)(*a*) of the Act and section 30 of the Regulations was justified because the Appellant had not proven his availability to work.

- The Appellant's earnings had been allocated in accordance with sections 35 and 36 of the Regulations.

- The Appellant had knowingly made false or misleading statements, warranting the imposition of a penalty under section 38 of the Act.

SUBMISSIONS

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

- The Respondent raised two factors that contradicted the Appellant's interruption of earnings—the availability of a cellphone and a service truck.

- Although these two factors are accurate, it was demonstrated at the hearing by the three witnesses that it was an employer policy and that all employees had a cellphone during periods of unemployment and four of them had a service truck.

- It was proven that during periods of unemployment, all emergency and service calls went directly to the employer's office and not to the Appellant's cellphone. The cellphone served only to reach employees in cases of emergency.

- It was also proven that two technicians worked year-round for the employer because of their seniority, so the Appellant never had to step in during periods of unemployment. At most, employees were reachable, but the evidence showed that they were not required in this respect.

- The evidence submitted before the General Division proved there was no relationship between the benefits the Appellant received and his employment during the unemployment period. He maintains that the General Division erred when it disregarded the submitted case law, which he believes was applicable to the case.

- The General Division should have declared that the Appellant was still available to work and taken into account his reality and the intention of the law.

- Accounting and testimonial evidence was also submitted before the General Division, showing that the information sent to the Respondent at the time of the initial decision was erroneous and, as it was on the basis of this erroneous information that the initial decision was made, the new evidence produced at the hearing, which was more precise and accompanied by supporting documents, should have allowed the General Division to allow the appeal.

- The evidence was formal and showed that there had been good faith in the processing of the Appellant's statements and that, had there been errors, they had been made in good faith, which should have allowed the General Division to outright dismiss the penalties.

- The General Division erred in finding that the Appellant had acted wilfully, while it reduced the penalty on the ground that the employer had been a victim of accounting manipulations and that proceedings on the issue were in progress.

[9] The Respondent submits the following reasons against the Appellant’s appeal:

- The General Division did not err in fact or in law and properly exercised its jurisdiction.

- The evidence on file showed that the Appellant did not experience an interruption of earnings, within the meaning of the Act, because he benefited from the use of a cellphone.

- There are numerous Federal Court of Appeal decisions regarding the issue of interruption of earnings. An interruption of earnings occurs when a claimant is laid off or separated from their employment and they do not work or receive any earnings from this employment for a period of at least seven consecutive days.

- In CUB 61718B, the Umpire stated that the use of a company truck and cellphone constitute a benefit not unlike earnings. He confirmed the Board of Referees' decision to the effect that the claimant did not experience an interruption of earnings within the meaning of the Act.

- The fact that the Appellant has a company cellphone year-round constitutes a benefit he receives from his employer and is therefore considered income and insurable earnings within the meaning of the Act and the Regulations.

- It has been established that the tribunal hearing an appeal from a decision of the General Division must not substitute its own opinion for that of the General Division unless the decision appears to have been made in a perverse or capricious manner or without regard for the material before it. It is not for the tribunal to evaluate the credibility of the testimony. Its role is limited to deciding whether the General Division’s interpretation of the facts was reasonably consistent with the evidence on file.

- The issue of availability does not impact the issue of interruption of earnings. Regardless of whether the Appellant demonstrated that he was available to work does not change the fact that he is unable to establish a period of benefits because he did not have an interruption of earnings. If the Appeal Division came to a different conclusion, there would have been reason to return the file to the General Division so that a decision could be made on the issue of availability.

STANDARDS OF REVIEW

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

[11] The Respondent submits that the Appeal Division must show deference with regard to the General Division's errors on the findings of fact. The General Division can intervene only if the General Division made these errors in a perverse or capricious manner or without regard for the material before it. The Appeal Division is not to show deference to the General Division on errors of law, jurisdiction or breach of the principles of natural justice—*Pathmanathan v. Office of the Umpire,* 2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in *Canada (Attorney General) v. Jean*, 2015 FCA 242, refers to paragraph 19 of its decision, when the Appeal Division "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:

> 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 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 Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[16] Consequently, 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

Interruption of Earnings

[17] The Appellant argues that the General Division erred in finding that the Appellant had not experienced an interruption of earnings under subsection 14(1) of the Regulations and that he therefore did not meet the requirements to establish a claim for benefits, as presented in section 7 of the Act.

[18] Specifically, the General Division erred in finding that the Appellant had continued to receive earnings from his employer within the meaning of paragraph 35(10)(*d*) through his use of the company truck and cellphone.

[19] Subsection 14(1) of the Regulations provides as follows:

> (1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

[20] Subsections (2) and (10) of section 35 of the Regulations explain as follows:

> (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including,

> […]
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> (10) For the purposes of subsection (2), "income" includes
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> […]
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> (d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant's employer in respect of the claimant's employment.

[21] In a telephone interview held on January 23, 2014, the company supervisor, C. B., stated that every employee had their own company cellphone (Exhibit GD3-23). This was confirmed by the co-owner of the company, S. P., in an interview held on March 17, 2014.

[22] In an interview on February 5, 2015, the Appellant stated that for the last two years, he had used a cellphone that was registered under and paid for by the company for both personal and professional purposes. Before that, for at least four years, he still used the company cellphone but only to make and receive work-related calls. He had his own personal cellphone (Exhibit GD3-119).

[23] Before the General Division, the Appellant testified that during the off-season, he was called in to work to submit bids and meet with clients. He consistently worked 8 to 12 hours over a week, as needed. For the last four or five years, he has had a company cellphone at all times and can use it for personal use.

[24] Before the General Division, Mrs. S. P. testified that two employers were full-time and six other were seasonal, including four technicians, who remained available throughout the year: F. L., P. H., the Appellants J. D. and G. D., as well as two office employees.

[25] She confirmed that the Appellants had a company cellphone the same as all the other employees. She negotiated a plan for eight cellphones and all employees had one whether they were unemployed or not. If the cellphone use exceeded the negotiated plan, the employee in question had to personally pay the expenses incurred. The company had seven trucks, including four parked at the homes of the four technicians. This was preferable when emergency calls were received.

[26] While employees were in a period of unemployment, they could work eight to 10 hours per week and it was pretty consistent; among other things, to respond to clients' questions, prepare bids and follow-up on requests.

[27] As a result , the Tribunal has no doubt that the Appellant's use of a truck and cellphone provided by his employer constitutes benefits he receives from this employer and are therefore considered income and insurable earnings within the meaning of the Act and the Regulations.

[28] The use of the company truck and cellphone prevents an interruption of earnings are required by the Regulations. Contrary to the Appellant's claims, the evidence submitted before the General Division clearly shows that the use of the company truck and cellphone is related to the work the Appellant does for the employer.

[29] As noted by the Tribunal during the appeal hearing, it does not have the authority to retry a case or to substitute its discretion for that of the General Division. The Tribunal's powers are limited by subsection 58(1) of the *Department of Employment and Social Development Act*. 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.

[30] The Tribunal finds that the General Division's decision on the issue of interruption of earnings was made based on the evidence submitted before it, and that this was a reasonable decision that complies with both legislation and jurisprudence.

Availability

[31] It is true that the General Division should not have summarily dismissed the Appellant's appeal on the issue of availability. However, given the Tribunal's findings on the issue of interruption of earnings, it was not necessary to decide on the issue of the Appellant's availability.

Allocation of Earnings

[32] The Federal Court of Appeal reaffirmed that the onus of proof to dispute payroll information is on the claimant, and that mere allegations are insufficient—*Dery v. Canada (Attorney General)*, 2008 FCA 291.

[33] The evidence submitted before the General Division by the Respondent relies on the employer's initial statements, which confirmed the amounts payable to the Appellant for each week in question (Exhibits GD3-118 to 121).

[34] The Appellant produced a handwritten note that indicates the company's sales and salaries paid for each two-week pay period. He also produced certain passages from the employer's detailed payroll journal, which indicate the salaries paid for each two-week pay period.

[35] However, nothing in the Appellant's evidence contradicts the employer's initial evidence for the weeks relevant to this case. Nothing in the documents filed specifies the hours or earnings, from Sunday to Saturday, for each week in question. The documents filed rather point rather to two-week periods, from Saturday to the second Saturday. There was no document on file showing that the Appellant had not received the earnings initially indicated by the employer for the weeks in question.

[36] As the Federal Court of Appeal explained, it is insufficient for a claimant to simply question the employer's information to meet their burden of proof.

[37] For these reasons, it is not necessary for the Tribunal to intervene on the issue of the allocation of the Appellant's earnings.

Penalty

[38] It is clear from the General Division's decision that it found, without taking into account the Appellant's explanation, that he had knowingly made false or misleading statements regarding his employment earnings for the period in question.

[39] However, the General Division retains the possibility that the employer had been a victim of accounting manipulations to reduce the amount of the Appellant's penalty.

[40] The Tribunal finds that the General Division did not consider whether, subjectively, the Appellant knew he was making false or misleading statements.

[41] To impose a penalty on the Appellant, the General Division had to find, on a balance of probabilities, that he subjectively knew that the statements were false— *Canada v. Purcell*, A-694-94.

[42] For all these reasons, the Tribunal refers the matter back to the Tribunal’s General Division (Employment Insurance Section) for a new hearing by a member solely on the issue of the penalty.

CONCLUSION

[43] The appeal is allowed in part. The file is returned to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a member solely on the penalty issue.

Pierre Lafontaine

Member, Appeal Division