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

Citation: *A. J. v. Canada Employment Insurance Commission*, 2017 SSTADEI 189

Tribunal File Number: AD-16-1292

BETWEEN:

A. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 18, 2017

DATE OF DECISION: May 5, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 17, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the allocation of the Appellant's pension payments was calculated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant requested leave to appeal to the Appeal Division on November 15, 2016. Leave to appeal was granted on November 29, 2016.

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- The credibility of the parties was 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 attended the hearing. The Respondent did not attend, although it was duly informed of the date of hearing.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development 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 whether the General Division erred when it concluded that the allocation of earnings was performed in accordance with sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- She has been working and paying benefits since the 1970s.
- She was laid off and her employer basically got rid of her. Because of the circumstances, she had to take an early pension and early Quebec pension. It wasn't part of her plans; she still had four years to work.
- Both her pensions are calculated as earnings and with an arbitrary 125%, she is not able to qualify because of an amount of $27.00 per month.
- The 125% is an arbitrary figure and a bureaucratic manoeuver. She has always played by the rules. She was counting on the money to pay back debts.

- It is not a big amount that she would receive but it would make a big difference in her situation.

- She had no choice but to take her pension and it was not an easy situation to lose her job. She needed that help and has paid 46 years of premiums.

- She is convinced that the General Division had already decided before the teleconference hearing and this is corroborated by the words used by the member during the hearing.

- The Respondent told her to appeal the decision so that the law may change.

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

- It is not in dispute that the Appellant's weekly pension amount of $598.00 is greater than 125% of her weekly benefit rate, which is $571.00 per week ($457.00 + $114.00 (25% allowable)).

- The difference is only $27.00; however, there is no discretion given to the Respondent in the application of sections 13 and 19 of the Act.

- The General Division's conclusion that the Appellant cannot receive benefits because her weekly pension amount prevents the serving of the waiting period because it is greater than 125% of her benefit rate, is correct and is not unreasonable based on the evidence before the Tribunal.

- The Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation, and that "it cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard."

- The audio recording of the hearing before the General Division does not support the Appellant's allegations. There is no evidence to show that the General

> Division was biased against the Appellant in any way or that it did not act impartially, nor that there was a breach of natural justice present in this case.

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 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 only intervene 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 (Attorney General) 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 the following:

> 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]here 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 Tribunal's Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 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

Language of the Present Decision

[17] The Tribunal proceeded to write the present decision in English at the Appellant's request and in order to ensure uniformity with the General Division decision. The hearing, however, was held in French.

Principle of Natural Justice and Bias

[18] The Appellant submits that she is convinced that the General Division member had already decided on her file before the teleconference hearing. She feels that the General Division member was biased and she would like to have an impartial hearing.

[19] As stated by the Federal Court of Appeal in *Arthur v. Canada (Attorney General)*, 2001 FCA 223:

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[20] The Appellant bases her allegation of bias on the words used by the member during her hearing. In view of the seriousness of such an allegation, the Tribunal proceeded to listen at length to the hearing before the General Division.

[21] The Tribunal finds that the Appellant's allegation is not supported by the words used by the General Division member. The member proceeded to listen in full to the Appellant's presentation and tried to explain to the Appellant that she had to apply the law in its current state and that she had no jurisdiction to modify its content. She was simply trying to clarify this point to the Appellant. She then expressed her intention of studying the file carefully before rendering her decision.

[22] The Tribunal finds that there is no material evidence demonstrating conduct from the General Division member that derogates from the standard. The Tribunal reiterates that such an allegation cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant.

[23] In view of the above, the Tribunal finds that this ground of appeal has no merits.

Allocation of Earnings

[24] The Appellant stated during the appeal hearing that she is not arguing that the General Division erred in law or 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. She is rather appealing so that the law may be changed to allow claimants in her situation to receive benefits after contributing to the Employment Insurance program all their lives.

[25] The Appellant was employed with Air France until February 28, 2014. She established an initial claim for regular benefits effective March 2, 2014. On her application for benefits she stated that she would be receiving a pension from the Quebec Pension Plan (QPP) in the amount of $747.79 per month effective from February 28, 2014; effective April 1, 2014, she would also be in receipt of a retirement pension from Air France in the amount of $1,841.36 per month.

[26] When the Appellant was laid off, on February 28, 2014, the employer, Air France, paid $633.92 as vacation pay and $51,506.00 as severance pay. The employer confirmed that the Appellant had been laid off after a restructuration and that she was eligible for her retirement.

[27] The Respondent verbally notified the Appellant that the pension income from the QPP was earnings to be deducted at a rate of $173.00 per week starting on March 2, 2014, and that the pension income from Air France was earnings to be deducted at a rate of $425.00 per week, starting on April 1, 2014, pursuant to sections 35 and 36 of the Regulations.

[28] The General Division concluded from the evidence before it that the severance package of $51,506.00 and the vacation pay of $633.92, according to her normal weekly earnings of $788.00, had to be allocated from March 2, 2014, until June 13, 2015. It also concluded that the benefit rate was to be set at $457.00 per week and that the allocation of pensions was calculated to be set at $598.00. By multiplying the benefit rate of $457.00 by 125%, as per the current legislation, the result obtained is $571.00.

[29] Therefore, because the amount of the weekly allocation ($598.00) is higher than $571.00, the waiting period cannot be served and, pursuant to section 13 of the Act, the Appellant cannot begin to receive benefits as long as the waiting period is not served.

[30] In view of the above, the Tribunal finds no reason to intervene on the issue of the allocation of earnings.

Change in Legislation

[31] Unfortunately for the Appellant, and as stated by the General Division, the Tribunal must apply the law and does not have the authority to modify the legislation despite its sympathy for the Appellant's particular situation.

[32] Only Parliament has the authority to change the current legislation regarding the allocation of pension payments.

CONCLUSION

[33] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division