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

[TRANSLATION]

Citation: *A. T. v. Canada Employment Insurance Commission*, 2017 SSTADEI 194

Tribunal File Number: AD-16-1139

BETWEEN:

A. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 20, 2017

DATE OF DECISION: May 9, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On September 1, 2016, the Tribunal's General Division determined that the distribution of earnings had been carried out in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On September 16, 2016, the Appellant submitted an application for leave to appeal to the Appeal Division. The Appeal Division granted leave to appeal on October 31, 2016.

TYPE OF HEARING

[4] The Tribunal determined that the appeal hearing would be held via teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not a key issue;
- the cost-effectiveness and expediency of the hearing choice; and
- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice.

[5] The Appellant did not attend the hearing, but Mathieu Jacques attended as his representative. Manon Richardson represented the Respondent.

THE LAW

[6] 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.

ISSUE

[7] The Tribunal must decide whether the General Division erred in finding that the earnings had been distributed in accordance with sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- He explained in detail the difficult context that he had endured on the worksite to which he was assigned as a security officer for the company Sécur-Québec, the bankruptcy of which was confirmed by the court in docket 760-22-005617-135, despite his opposition.

- In the facts, the representatives of Pergebec had accepted to take over the Sécur-Québec (GD3-21) company and to assume the past financial obligations of Sécur-Québec.

- The Tribunal does not have definitive proof that the sums were paid to him; it would be only a reimbursement of sums that were owing to him before the period at the centre of the dispute, namely, the weeks from October 27, 2013, to January 19, 2014.

- He submitted to the General Division information concerning the agreement that had been reached on repurchasing the contracts, with G. P. and Mrs. S. L. as witnesses.

- The General Division, being the division bearing investigative authority, should have explored this avenue following its indications. This negligence of the General Division in the conduct of its investigation constitutes an error of fact and of law likely to result in the rescinding of the decision on the aspect of the compensation distribution.

- The General Division should have contacted the person in charge at Pergebec— G. P.—to verify his version in comparison with the General Division's version. It is G. P. who has the decision-making authority at Pergebec, not M. O.

- The nature of the income tax return that he submitted should call into question the credibility of the information that the employer provided to the Respondent.

- Knowing that Sécurité Quali-T had taken over Sécur-Québec's activities, the Respondent should have contacted G. P. to ask about the company's modes of transition. The Respondent could have then found out the significant matters of fact with respect to the business transition in which he lost an enormous amount of money and suffered serious financial loss.

- The General Division failed to discharge its burden in its investigation and, consequently, the appeal must be allowed on the question of income distribution.

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

- The Appellant was in attendance and he was able to give his version of the facts. The General Division rendered a decision within its jurisdiction and that is clearly not unreasonable in light of the relevant evidence.

- The issue is the earnings received from Gestion Pergebec Inc., namely, the new employer, and his ex-employer, Sécur Québec Inc., which went bankrupt. The evidence that the employer submitted demonstrates that the sums had indeed been paid to the Appellant (GD3-60 to GD3-66). The amounts correspond to the amount entered on the Record of Employment in the exhibit (GD3-12).

- The General Division did not err in finding that it is the Appellant's overall earnings from all employment that must be distributed under sections 35 and 36 of the Regulations.

- Furthermore, the T4 that the Appellant submitted with his application for leave to appeal stating that he had earned $727.69 for the year 2014, which is accurate, since the Record of Employment indicates in boxes 1 to 3 a total of $727.69; this period of the Record of Employment concerns the pay period from December 15, 2013, to January 18, 2014. It was therefore paid over the course of 2014.

- It is possible that his ex-employer Sécur Québec Inc. owes him money and that he received four weeks from the union to recover the sums that were owing to him, but that has nothing to do with the case that concerns the new employer.

- The General Division's decision is consistent with the legislation and the relevant case law, and it is reasonably consistent with the facts on file. The General Division relied on all the evidence brought before it, and it explained its findings with coherent and consistent reasoning.

STANDARDS OF REVIEW

[10] The Appellant made no submissions regarding the applicable standard of review.

[11] The Respondent argues that the appropriate standard of review for questions of law is correctness, and that the appropriate standard of review for questions of mixed fact and law is reasonableness—*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, specifies in paragraph 19 of its decision that 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 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 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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

[17] In support of his appeal, the Appellant argues that the Respondent's and General Division's investigation was inadequate and insufficient. He argues that the Pergebec representatives had consented to taking over the company, Sécur-Québec (GD3-21), and to assuming the past financial obligations of Sécur-Québec. If sums were paid to him, it would be only a reimbursement of sums that had been owing to him before the period at the centre of the dispute, namely, the weeks from October 27, 2013, to January 19, 2014. He believes that the Respondent and the General Division failed to discharge their burden and, consequently, the appeal must be allowed on the issue of income distribution.

[18] When it dismissed the Appellant's appeal, the General Division stated the following:

> [Translation]
> [29] The Tribunal's role, within the meaning of the *Department of Employment and Social Development Act* and the *Social Security Regulations* is unfortunately not to investigate in the place of the Commission. While perfectly understanding the claimant's intention to provide the contact information of a contact whom he or she would have liked to get information from after the hearing, this investigative privilege is not conferred upon the Tribunal. It is the sole burden of the Commission to have the privilege of investigating and that of an appellant to provide necessary testimony and supporting documents, whether written or oral, at the hearing and even beyond, if the Tribunal so consents, to prove what he or she is advancing.
>
> (Underline by the undersigned)

[19] It seems clear that the General Division resumed, in these very terms, the teachings by the Federal Court of Appeal, which affirmed that the burden of proof for contesting the information on pay from the employer falls on the claimant, and that simple allegations aiming to sow doubt are insufficient—*Dery v. Canada (Attorney General)*, 2008 FCA 291.

[20] The evidence produced before the General Division is based on the employer's statements, which confirmed the amounts payable to the Appellant for each week in question (Exhibits GD3-13 and GD3-59). The employer also provided a copy of the pay

stubs for the period from October 6, 2013, to January 25, 2014 (GD3-60 to GD3-66). The amounts match the amount entered on the Record of Employment (GD3-12).

[21] According to the Appellant, he had asked the General Division to investigate to inquire about his new employer's acquisition procedures. He also submitted a T4-2014 Record of Employment from his new employer that confirms that he had in fact received sums in 2014.

[22] When he was confronted in a telephone interview on June 19, 2016, about the fact that he had reported no earnings for the period in question, the Appellant stated that he needed money and that he did not know what to do to get out of it (GD3-24).

[23] The Tribunal concludes that nothing in the Appellant's evidence contradicts the employer's evidence for the relevant weeks in the docket. That the former employer went bankrupt and the new employer assumed the financial obligations changes nothing with respect to the fact that, according to the evidence before the General Division, the Appellant worked for the new employer during the period in question.

[24] The Appellant could not, through a request for investigation, dispute the veracity of the employer's statements. It was incumbent upon him to prove the opposite before the General Division. Based on the evidence before it, the General Division could not simply arrive at a different conclusion from the one that it reached.

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

CONCLUSION

[26] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division