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

Citation: *J. W. v. Canada Employment Insurance Commission,* 2017 SSTADEI 202

Tribunal File Number: AD-14-269

BETWEEN:

J. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: March 21, 2017

DATE OF DECISION: May 15, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On April 8, 2014, the Tribunal's General Division determined that the Appellant's weekly benefit rate had been calculated correctly as per section 14 of the *Employment Insurance Act* (Act).

[3] The Appellant requested leave to appeal to the Appeal Division on May 13, 2014. Leave to appeal was granted on April 14, 2015.

[4] The hearing was suspended, by the parties' request, until a final ruling by the Canada Revenue Agency (CRA). The CRA rendered a final decision on September 7, 2016.

[5] The hearing was held by teleconference on March 21, 2017.

TYPE OF HEARING

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

- the complexity of the issue under appeal;
- the fact that the parties' credibility is not anticipated to be a prevailing issue;
- the information in the file, including the need for additional information; and
- the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[7] At the hearing, Nancy Kerry represented the Appellant, who was present. The Respondent was not present, even though it had received the notice of hearing.

APPLICABLE LAW

[8] 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

[9] The Tribunal must decide whether the General Division erred when it concluded that the Appellant's weekly benefit rate had been calculated correctly as per section 14 of the Act.

OBSERVATIONS

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

- Because she earns an annual salary, her annual income was divided by 365 days to calculate her daily income. However, when determining how much money she had made in the six months prior to her maternity leave, income for the months of July and August is not used because her income must be allocated to the days that she had actually worked. This is a contradiction. If her salary is indeed an annual salary, then she should be allowed to use income for July and August.

- Since she does not work during the months of July and August, then her salary should be divided only by the number of days in the school year.

- The current procedure for calculating teachers' weekly benefit rates is inequitable, and it results in reduced benefits for many teachers.

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

- Section 14 of the Act is very clear regarding how a claimant's benefit rate is to be calculated.

- A detailed explanation of the calculation of the rate of weekly benefits can be found at GD4-4 and GD4-5. The Respondent has correctly applied the legislative provisions in this matter in determining that the rate of weekly benefits is $223.00.

- The express provisions of the legislation cannot be ignored, and benefits cannot be paid contrary to the structure of the Act.

- The General Division committed no error in its decision; its findings were reasonable and compatible with the evidence, jurisprudence and legislation.

- There is nothing to suggest that the General Division decision was biased against the Appellant in any way, or that it did not act impartially. Furthermore, there is no evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[12] The Appellant made no representations regarding the applicable standard of review.

[13] The Respondent submits that the applicable standard of review for questions of mixed fact and law is reasonableness—*Smith v. Alliance Pipeline Ltd.*, [2011] 1 SCR 160, 2011 SCC 7; *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

[14] 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 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."

[15] The Federal Court of Appeal further indicates that "[n]ot 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."

[16] The Federal Court of Appeal concludes that when the Appeal Division "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."

[17] The mandate of the Social Security 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.

[18] In accordance with the above-mentioned instructions, 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

The Facts

[19] A claim for regular benefits was established effective September 30, 2012. The Appellant presented four records of employment. She had a total of 625 hours of insurable employment in her qualifying period between October 2, 2011, to September 29, 2012. The Respondent calculated the weekly benefit rate to be $223.00 (GD3-34). The Appellant disagreed with the benefit rate and made a request for reconsideration. Following the Appellant's request for reconsideration, the Respondent notified the Appellant that its decision remained unchanged. The Appellant filed an appeal to the General Division.

The General Division's Decision

[20] The General Division found that the Respondent had correctly applied the legislation and that the Appellant had received benefits based on her insured earnings in accordance with subsection 14(1) of the Act.

The Benefit Rate

[21] The Appellant's position is that the earnings that she had with the school district should be divided by the number of days in the school year rather than by the total number of calendar days in a 12-month period. Since she does not work during the months of July and August, then her salary should be divided only by the number of days in the school year.

[22] The CRA rendered a decision on September 7, 2016, regarding the Appellant's insurable earnings. In support of its decision, the CRA cited article 10.01 of the Collective Agreement that states:

> Annual salaries determined in accordance with the provisions of this collective agreement shall be paid on the basis of one-twelfth (1/12th) of the annual salary payable for each month, September to August. It is understood and agreed upon by the parties to this agreement that **the July and August salary payments shall be deemed to have been earned in the immediately preceding school year**.
>
> (My emphasis)

[23] The Respondent considers that, although teachers on a 12-month contract are paid an annual salary over a 10 month period or approximately 200 teaching days, they continue to be attached to the employer for a 12-month period. Therefore, it is the total number of calendar days (365 or 366) within the 12-month contract—not the actual number of teaching days—that is used as a divisor to calculate the daily average insurable earnings.

[24] For the Tribunal, the fact that the teacher's salary is an annual salary, paid in 12 equal installments, is "merely a device whereby teachers who earned their annual salary by the performance of services in the other ten months of the year would receive payments in

July and August for convenience in their personal budgeting,"—*Dick et al. v. Deputy Attorney General of Canada*, [1980] 2 SCR 243, 1980 CanLII 204 (SCC).

[25] The undisputed evidence shows that the Appellant is not paid in July and August, since she is not required to render any services during those months.

[26] The agreement of employment also provides that when teachers leave their employment during the school year, they are entitled to a payment calculated on the basis of the number of days that they have worked divided by the number of days in the school year. This is a clear indication that teachers are not paid for the months of July and August, and no provision in the agreement provides otherwise.

[27] The Tribunal agrees with the Appellant that since she does not work during the months of July and August, a non-teaching period, then her earnings should be divided only by the number of working days in the school year.

CONCLUSION

[28] The appeal is allowed.

[29] The Appellant's earnings are to be divided by the number of working days in the school year.

Pierre Lafontaine
Member, Appeal Division