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

Citation: *Canada Employment Insurance Commission v. L. B.,* 2017 SSTADEI 212

Tribunal File Number: AD-16-1192

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

L. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 4, 2017

DATE OF DECISION: May 24, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On September 24, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the monies received by the Respondent did not constitute earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant requested leave to appeal to the Appeal Division on October 11, 2016. Leave to appeal was granted on October 17, 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] At the hearing, the Appellant was represented by Carol Robillard. The Respondent attended the hearing and was represented by Sandra Guevera-Holguin.

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 monies received by the Respondent were not to be considered earnings pursuant to sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- The Appellant bears the onus of proving that the settlement money constitutes payment for something other than earnings. In the present case, the Minutes of Settlement do not support that the payment was intended to compensate for the relinquishment of reinstatement rights.

- The General Division erred in finding that the money did not constitute earnings and was not subject to allocation pursuant to sections 35 and 36 of the Regulations.

- The Federal Court of Appeal has long held that a settlement payment made in respect of an action for wrongful dismissal is "income arising out of

employment" unless the claimant can demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss.

- Money that is paid for the relinquishment of reinstatement rights is not considered earnings for Employment Insurance (EI) purposes and is not allocated. Three conditions must be in place, namely, the right to reinstatement exists, reinstatement has been sought, and the money is paid to compensate for the relinquishment of that right. In the case at hand, the fact that the claimant's grievance was asking for reinstatement does not equate to the right to reinstatement.

- The evidence does not support that the Respondent was paid the money to relinquish any right to reinstatement.

- The General Division made an erroneous finding of fact and erred when it allowed the appeal because the Respondent had relinquished his "right to seek Reinstatement" by accepting the settlement monies rather than pursuing his grievance for wrongful dismissal. The evidence clearly shows that the settlement money was paid in exchange for the withdrawal of the grievance under the condition that the reason for separation would be changed, references would be provided, both parties would refrain from disparaging comments and the employer would be free of any further claims.

- The settlement money clearly constitutes earnings in accordance with subsection 35(2) of the Regulations, and was correctly allocated pursuant to subsections 36(9) and (10) of the Regulations. Furthermore, the overpayment of $9,413.00 must be repaid pursuant to section 43 of the *Employment Insurance Act*.

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

- The General Division's decision does not disclose any error in fact or in law.

- A grievance was filed in violation of article 5.1 of the collective agreement, as well as sections 79 and 80 of the Labour Relations Act.

- The remedy requested was reinstatement with appropriate discipline imposed.

- The employer offered a settlement in exchange for the withdrawal of the Respondent's grievance.

- The employer was incorrect in labelling the payment as a severance and/or retirement allowance, as the payment received was not a severance, or a retirement allowance—it was paid to relinquish his right to reinstatement.

- The Respondent's oral testimony, the Minutes of Settlement, the union representative's email, and the copy of the grievance clearly support that the monies were received to relinquish his right to reinstatement.

STANDARD OF REVIEW

[10] The Appellant 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 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.

[11] The Respondent made no representations regarding the applicable standard of review.

[12] The Tribunal notes that the Federal Court of Appeal in *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."

[13] The Federal Court of Appeal further indicates 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 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.”

[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] In accordance with the above 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 made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

The Facts

[17] A claim for EI regular benefits was made effective February 8, 2015. The Respondent was employed with CANAD Inns – Polo Park Ltd. until February 2, 2015, when he was dismissed. After the Appellant adjudicated the reason for separation, regular benefits were paid to the Respondent.

[18] An amended Record of Employment was provided showing that the reason for separation was changed to K – other (mutual agreement to terminate employment). Money was paid to the Respondent in the amount of $25,000.00.

[19] The Respondent was notified that the gross amount received was earnings to be deducted from benefits paid from February 8, 2015, to June 20, 2015. This resulted in an overpayment of $9,413.00.

[20] Requesting a reconsideration of the decision, the Respondent argued that the money received was a "retirement allowance" paid to him because of a wrongful dismissal. He accepted the money in exchange for not pursuing his grievance through the union. He also stated that he received the money for relinquishing his right to reinstatement.'

[21] On April 6, 2016, the Appellant notified the Respondent that the decision regarding earnings was maintained. Appealing to the General Division, the Respondent maintained that the money was paid in exchange for the relinquishment of reinstatement rights.

General Division Decision

[22] The General Division allowed the Respondent's appeal finding that the Respondent's oral evidence, along with the new documentary evidence provided in GD2-19 and GD5-2 to GD5-3, demonstrated that there was a right to reinstatement, that discussions regarding reinstatement were held and that the amount of $25,000.00 was paid as compensation for withdrawing the grievance for relinquishing the right to reinstatement.

[23] Consequently, pursuant to section 35 of the Regulations, the General Division found that the amount received did not constitute earnings and that it therefore need not be allocated.

Earnings under Section 35 of the Regulations

[24] In characterizing settlement amounts as earnings or non-earnings, it is important to keep in mind the basic principles. One starts with subsection 35(2) of the Regulations, which provides that the earnings to be taken into account in determining whether there has been an interruption of earning include "the entire income of a claimant arising out of any employment."

[25] Money that is paid for the relinquishment of reinstatement rights is not considered earnings for EI purposes and is not allocated. Three conditions must be in place, namely,

the right to reinstatement exists, reinstatement has been sought, and the money is paid to compensate for the relinquishment of that right – *Canada (Attorney General) v. Warren*, 2012 FCA 74.

[26] The Appellant submits that the evidence does not show that the Respondent was paid the money to relinquish any right to reinstatement.

[27] The Appellant relies heavily, if not entirely, on the Minutes of Settlement that indicate that the monies were paid as a "retirement allowance" and that certain other conditions that are contained in the Minutes demonstrate that nothing clearly states that the Respondent agreed to relinquish reinstatement.

[28] It is true that the Minutes of Settlement refer to the amount of $25,000.00 as a "retirement allowance." However, the Appellant's interpretation of the Minutes of Settlement is too restrictive and limited and does not take the Minutes of Settlement into consideration in their entirety. Furthermore, other oral and documentary evidence supports the Respondent's position that he had the right to be reinstated, that he sought reinstatement, and that the $25, 000.00 was received as compensation to relinquish any right to reinstatement.

[29] The Minutes of Settlement dated June 10, 2015, indicate the following:

> **WHEREAS** Mr. L. B. was an employee of the Employer, working at Canad Inns Polo Park until February 11, 201 5, on which date his employment was terminated;
>
> **AND WHEREAS** Mr. L. B. and the Union have filed a grievance contesting the termination and referring the matter to arbitration;
>
> (Underlined by the undersigned)

[30] The grievance filed by the union on February 20, 2015, that led to the Minutes of Settlement specifically refers to a request to be reinstated with appropriate disciplinary measures.

[31] Sections 79 and 80 of the *Labour Relations Act of Manitoba*, which was reproduced in article 5.1 of the Respondent's collective agreement, states:

> 79(1) Every collective agreement shall contain a provision requiring that the employer have just cause for disciplining or dismissing any employee in the unit bound by the collective agreement.

[32] The full and final release incorporated in said Minutes of Settlement specifically states that the Respondent releases the employer of any claim for reinstatement.

[33] The General Division concluded that the monies received by the Respondent were paid in consideration of him relinquishing his rights to reinstatement. The General Division's conclusion on that question is expressed as follows:

> [41] The Tribunal finds from the Appellant's oral evidence along with the new documentary evidence provided in (GD2-19 and GD5-2 to GD5-3) demonstrates that there was a right to reinstatement, that discussions regarding reinstatement were held and that the amount of $25000.00 was paid as compensation to withdraw the grievance for relinquishing the right to reinstatement. Consequently, pursuant to section 35 of the Regulations, the Tribunal finds the amount received does not constitute earnings and that it therefore need not be allocated.

[34] The Tribunal listened carefully to the hearing before the General Division, and particularly to the Respondent's testimony. The Respondent's description of the events leading to the settlement supports his position that the amount was paid to him because the employer did not want to reinstate him. As the Appellant stated before the General Division, "they did not want him back." The union representative also stated that "the employer under no circumstances wanted to reinstate Mr. L. B.'s employment".

[35] The amount was clearly not received as a "retirement allowance" although characterized that way by the employer. There is no evidence submitted by the employer pertaining to the calculation of the alleged "retirement allowance" or showing that the payment was based on past services.

[36] The Respondent bore the onus of proving before the General Division, on a balance of probabilities, that the settlement money constituted payment for something other than earnings.

[37] In view of the above, the Tribunal finds that the General Division correctly determined that the Respondent had met his burden of proof and that the payment was made in consideration of him relinquishing his right to reinstatement and that it did not constitute earnings arising from employment – *Canada (Attorney General) v. Plasse*, A-693-99.

CONCLUSION

[38] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division