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

[TRANSLATION]

Citation: *P. K. v. Canada Employment Insurance Commission,* 2017 SSTADEI 213

Tribunal File Number: AD-16-1242

BETWEEN:

P. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARING DATE: April 4, 2017

DATE OF DECISION: May 26, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On September 30, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) found that:

- The disentitlement imposed under sections 9 and 11 of the *Employment Insurance Act* (Act) and section 30 of the *Employment Insurance Regulations* (Regulations) was justified because the Appellant had failed to prove that he was unemployed.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on October 28, 2016. Leave to appeal was granted on November 3, 2016.

FORM OF HEARING

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

- the complexity of the issue(s);
- the fact that the parties' credibility was not a key issue;
- the information on record, including the nature of the missing information, requires clarification; and
- the form of hearing respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

[5] The Appellant attended the hearing and was represented by Mr. Guy Ruel. The Respondent did not attend, despite having received a notice of hearing.

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD 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.

ISSUE

[7] The Tribunal must determine whether the General Division erred in finding that the disentitlement imposed under sections 9 and 11 of the Act and section 30 of the Regulations was justified because the Appellant had not proven that he was unemployed.

SUBMISSIONS

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

- In its initial submissions, the Respondent acknowledged the hours that the Appellant had admitted to spending on his business.
- Ten hours a week does not preclude the unemployment status.
- The General Division has not explained why it dismissed the family's contribution to the development of the business.
- The General Division's conclusion regarding the time devoted to the business is speculative, and it appears to rely a lot more on the scope of the investments than on the hours devoted to the business.

- The General Division's decision is based on the same error as that committed by the Respondent, namely, that the Appellant hopes to one day make the business profitable. The claimant's situation must be assessed during the period at issue.

- The General Division could not reasonably conclude that the Appellant was probably not looking for work, even though he found one, without the investment disappearing or the business ceasing operations.

- The business ran a deficit in each month of its operations.

- The General Division's analysis of the six factors of subsection 30(3) of the Regulations is entirely and erroneously based on the amount of capital invested.

- The General Division's conclusion regarding the value of the business is not based on a comprehensive review, and the Appellant should have had the opportunity to respond on this matter.

- The question to be resolved is not that of future profitability, but that of a current unemployment status.

- The General Division's analysis is not consistent with the teachings of the Federal Court of Appeal on similar matters.

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

- The General Division had to determine to what extent the Appellant was self-employed, and whether it was to such a minor extent that he would not normally rely on it as his main source of income.

- To decide on the matter, the General Division looked at all the facts in the case and analyzed them against the six factors in subsection 30(3) of the Regulations. By doing this, the General Division met all the legal criteria for determining unemployment status.

- The Appeal Division is not empowered to retry a case or to substitute its discretionary power for that of the General Division. Subsection 58(1) of the DESD Act limits the Tribunal's jurisdiction. Unless the General Division failed to observe a principle of natural justice, erred in law, or 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, and the decision is unreasonable, the Tribunal must dismiss the appeal.

- In *Canada (Attorney General) v. Le Centre de valorisation des produits marins de Tourelle Inc.* (A-547-01), Justice Létourneau stated that the Tribunal's function is limited "to deciding whether the view of facts taken by the Board of Referees (now the General Division) was reasonably open to them on the record."

- The General Division made a decision within its jurisdiction and properly assessed the evidence. Therefore, the decision is not unreasonable.

STANDARDS OF REVIEW

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

[11] The Respondent submits 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, 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 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 by emphasizing 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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

ANALYSIS

[17] The Appellant's representative argues that the evidence before the General Division showed that the Appellant had spent very little time at the business and that the business had been running a deficit during the period the Appellant had been receiving Employment Insurance benefits. The General Division erred in considering the future profitability of the business. Based on the evaluation of the factors in subsection 30(2) of the Regulations, he argues, the General Division should have found that during his benefit period, the Appellant was operating a business to such a limited extent that this activity could not constitute his main source of income.

[18] The test for minor self-employment or engagement in business operations requires a determination of whether the extent of such employment or engagement, when viewed objectively, is so minor that the claimant would not normally rely on that level of engagement as a main source of income.

[19] The recent case law by the Federal Court of Appeal has established that an overall analysis of the six criteria must be conducted, without giving precedence to one or more of the criteria, and that each file must be assessed on its merits—*Martens*, 2008 FCA 240; *Goulet*, 2012 FCA 62; *Inkell*, 2012 FCA 290.

[20] The Tribunal believes that the text of the Regulations must be considered in its entirety, given that a person could spend little time on their business but nevertheless make it their main source of income. In addition, a lack of sufficient income does not necessarily mean that a claimant is unemployed.

[21] Subsection 30(3) of the Regulations sets out the six factors to consider in determining whether the claimant's engagement in the operation of the business is of such a minor extent that he or she would not normally rely on it as his or her main source of income. The circumstances that make it possible to determine whether the claimant's employment or engagement in the operation of a business is of the minor extent described in subsection (2) are:

a) the time spent;

b) the nature and amount of the capital and resources invested;

c) the financial success or failure of the employment or business;

d) the continuity of the employment or business;

e) the nature of the employment or business; and

f) the claimant's intention and willingness to seek and immediately accept alternate employment.

[22] The General Division noted the Appellant's insistence on showing that he had worked no more than 10 to 15 hours per week on his business. Given the extent of the Appellant's initial efforts, all the responsibilities he assumed and the amount of his initial investment ($86,000), the General Division considered the Appellant's statement that he had

spent only 10 to 15 hours per week on these activities during the period he was receiving Employment Insurance benefits to be unreliable.

[23] The General Division determined that the Appellant was trying to minimize his involvement in his business in terms of the time he spent on it, and that it could not give credibility to his testimony on the time he spent on his business, even if he had received help from friends and family members.

[24] The General Division also considered that the Appellant had invested $86,000 to start his business, i.e. financing of $60,000 that he himself had negotiated, a capital investment of $21,000 and a grant of $5,000. He purchased a van (GMC Sierra 1500 Crew Cab) for approximately $60,000. He said he also spent approximately $25,000 to buy and retrofit a trailer that he uses as a mobile showroom and to haul doors and windows.

[25] The General Division noted that the business was indeed in deficit, but that there was no indication that the Appellant's business was headed for financial failure.

[26] The General Division noted the amount of the Appellant's investment in his business since its creation in 2013, as well as the evidence of the continuation of the business, namely the use of an accountant, a website, a commercial line and advertising.

[27] The General Division determined that the Appellant's business specializes in the sale of doors and windows, the same specialty as that of his former employer. It noted that selling doors and windows seems to be related to the Appellant's field of expertise.

[28] Finally, the General Division determined that the Appellant had little intention or availability to immediately seek and accept alternate employment. It concluded that the Appellant's primary intention was to operate the business he had just created to make it profitable, and not to look for and immediately accept a new job, even if he had indeed found a job nearly three years after the creation of his business.

[29] After analyzing the six criteria set out in subsection 30(3) of the Regulations, the General Division found that the evidence presented before it showed that the Appellant was not employed or engaged in operating his business to such a minor extent he would not

normally rely on that employment or engagement as a main source of income, pursuant to subsection 30(2) of the Regulations.

[30] The Tribunal is of the opinion that the General Division's application of the objective test set out in subsection 30(2) to the Appellant's situation shows that at least four of the relevant factors indicate that the Appellant's engagement in the business in his benefit period was not to a minor extent.

[31] Case law has consistently stated that unless there are particular circumstances that are obvious, the issue of credibility must be left to the discretion of the General Division, which is better able to make a decision on it. The Tribunal will intervene only if it is obvious that the General Division's decision on the issue is unreasonable, in light of the evidence before it. The Tribunal does not find any reason to intervene in this case on the issue of credibility as assessed by the General Division.

[32] The Tribunal is not empowered to retry a case or to substitute its discretion for that of the General Division. The Tribunal's jurisdiction is limited by subsection 58(1) of the DESD 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 had made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

[33] The Tribunal finds that the General Division's decision was made based on the evidence submitted before it, and that this was a reasonable decision that complies with both the legislative provisions and the case law.

[34] There is no basis for intervention by the Tribunal.

CONCLUSION

[35] The appeal is dismissed.

Pierre Lafontaine

Member, Appeal Division