



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. M. D.*, 2017 SSTADEI 238

Tribunal File Number: AD-16-1345

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 6, 2017

DATE OF DECISION: June 16, 2017

REASONS AND DECISION

DECISION

[1] The appeal is allowed only on the issue of the allocation of earnings, since the General Division overstepped its jurisdiction.

INTRODUCTION

[2] On November 15, 2016, the General Division concluded that:

- The Respondent was unemployed within the meaning of sections 9 and 11 of the *Employment Insurance Act* (Act), and section 30 of the *Employment Insurance Regulations* (Regulations);

- The net profits of a business incorporated under Quebec law, if not paid out by declaring a dividend to shareholders in accordance with the applicable law, cannot be considered earnings received by a claimant within the meaning of the Act and cannot be allocated in accordance with section 36 of the Regulations.

[3] On December 6, 2016, the Appellant submitted an application for leave to appeal the decision to the Appeal Division. Leave to appeal was granted on December 13, 2016.

ISSUE

[4] The Tribunal must determine whether the General Division overstepped its jurisdiction in adjudicating on the issue of the allocation of earnings pursuant to sections 35 and 36 of the Regulations.

THE LAW

[5] Under subsection 58(1) of the *Department of Employment and Social Development 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.

STANDARDS OF REVIEW

[6] The Appellant maintains that the Appeal Division does not have to defer to the General Division's conclusions regarding questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law, as well as questions of fact, the General 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 had made in a perverse or capricious manner or without regard for the material before it—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[7] The Respondent did not make any submissions regarding the applicable standard of review.

[8] 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 “[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.”

[9] 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 [...].

[10] The Federal Court of Appeal concluded by emphasizing: “Where 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.”

[11] 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.

[12] 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 or its decision was unreasonable, the Tribunal must dismiss the appeal.

ANALYSIS

[13] The Appellant does not intend to challenge the decision on the state of unemployment. She submits only before the Appeal Division that the appeal should be allowed on the issue of earnings.

[14] More specifically, the Appellant submits that, since the decisions that were rendered pursuant to subsection 112(1) and section 113 pertained only to the state of unemployment, the General Division did not have the jurisdiction to render a decision on earnings. By adjudicating on an issue that was not before it and for which the Appellant has never rendered a decision, the General Division overstepped its jurisdiction.

[15] The Respondent argues that the Appellant was aware from the outset that the Respondent was contesting her overpayment and not just her state of unemployment. The General Division could therefore adjudicate on the issue of earnings and, therefore, did not overstep its jurisdiction.

[16] The General Division recognizes that the Appellant has not adjudicated on the issue of earnings but is nevertheless proceeding with rendering a decision on this issue [Translation] "to avoid having the Commission revisit its incomplete decisions..."

[17] For the Tribunal, it is apparent that the General Division overstepped its jurisdiction by adjudicating on the issue of earnings. The Appellant's reconsideration decision given on February 15, 2016, pertains only to the Respondent's state of unemployment, even though the Appellant's submissions before the General Division are somewhat ambiguous.

Moreover, the overpayment was established from a disentitlement based on the state of unemployment.

[18] Section 113 of the Act clearly provides that an appeal to the General Division can be made only if the Appellant has rendered a reconsideration decision in compliance with section 112 of the Act.

[19] For the above-mentioned reasons, the Tribunal is of the opinion that it is appropriate to allow the appeal in part.

CONCLUSION

[20] The appeal is allowed only on the issue of the allocation of earnings, since the General Division overstepped its jurisdiction.

Pierre Lafontaine

Member, Appeal Division