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

Citation: *A. H. v. Canada Employment Insurance Commission,* 2017 SSTADEI 268

Tribunal File Number: AD-17-73

BETWEEN:

A. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 4, 2017

DATE OF DECISION: July 13, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 15, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the allocation of earnings had been calculated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] The Appellant requested leave to appeal to the Appeal Division on January 25, 2016, after having received communication of the General Division decision on December 30, 2016. Leave to appeal was granted on February 13, 2017.

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 is not anticipated to be 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 as quickly as circumstances, fairness, and natural justice permit

[5] The Appellant attended the hearing. Manon Richardson also attended, and she represented the Respondent.

APPLICABLE LAW

[6] 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

[7] The Tribunal must decide whether the General Division erred when it concluded that the moneys that the Appellant had received were 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 final settlement of the dispute resulted in a lump sum of $21,692 in damages and therefore should not be allocated as retirement allowances.

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

- Because the initial dispute with the employer had been due to the misrepresentations of employment, not the loss of employment, the General Division erred in stating that the result of his settlement with his employer was severance or moneys due to loss of employment.

- Returning the benefits would render the strenuous dispute with the employer and compensation as frivolous.

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

- An amended Record of Employment was issued on March 10, 2015, indicating the Appellant had received from SNC-Lavalin a subsequent payment (retirement allowance) in the amount of $21,692.00 (GD3-16).

- Based upon the facts on file, the Respondent determined that the retirement allowance the Appellant had received from his employer constituted earnings pursuant to subsection 35(2) of the Regulations because the payment had arisen out the severance of the employment relationship and that it was meant to compensate the Appellant for the loss of wages and other benefits related to the employment.

- The retirement allowance constitutes earnings under subsection 35(2) of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations.

- The Federal Court of Appeal has reaffirmed the principle that the onus was on the Appellant to establish that all or part of the sums received as a result of his loss of employment amounted to something other than earnings within the meaning of the Act.

- There is no evidence supporting the premise that the settlement moneys (retirement allowance) were granted for reasons other than for compensation for the loss of employment.

- The General Division's decision to dismiss the appeal was reasonable and complies with established case law. There is nothing in the General Division's decision to suggest that it was biased against the Appellant in any way or that it

did not act impartially, nor is there is any evidence to show there was a breach of natural justice.

STANDARD OF REVIEW

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

[11] The Respondent submits that the Appeal Division does not owe any deference to the General Division's conclusions with respect to 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 for 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 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.

[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 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:

> [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.

[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 Appeal Division of the Social Security Tribunal 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 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

[17] An initial claim for Employment Insurance benefits was established effective July, 20, 2014. The Appellant had been employed with SNC-Lavalin ATP Inc. when he was laid off on July 23, 2014. On March 10, 2015, the employer provided a modified Record of Employment indicating that another amount of $21, 692 had been paid to the Appellant at the end of employment for retiring allowance / retirement leave credits (GD3-16).

[18] On November 9, 2015, the Respondent notified the Appellant that the retiring allowance / retirement leave of $21,692 was considered earnings and that it would be applied against his claim from July 13 to November 2, 2014. The application of that amount created an overpayment of $4,112.

[19] The Appellant made a request for reconsideration of the Respondent's decision to apply earnings against his claim. In support of his request for reconsideration, the Appellant argued that the amount was for damages and that it was obtained after a legal dispute; hence, it was not a retirement allowance. The claimant submitted a copy of the termination of employment email, two lawyer's letters, a reply from SNC-Lavalin and a SNC-Lavalin Final Release (GD3-20 to GD3-35).

[20] Following the Appellant's request for reconsideration, the Respondent upheld the decision.

The General Division's Decision

[21] The General Division found that the amount that the Appellant had received had arisen out of employment and that it therefore had to be allocated according to the Regulations.

Earnings Under Section 35 of the Regulations

[22] In characterizing settlement amounts as earnings or non-earnings, it is important to keep in mind the basic principles. One starts with paragraph 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 includes "the entire income of a claimant arising out of any employment."

[23] The onus is on the Appellant to prove that the settlement, or any portion of it, was not paid for lost income from employment.

[24] The Appellant submits that the final settlement of the dispute with his employer resulted in a lump sum of $21,692 in damages and that it therefore should not be allocated as retirement allowances. He argues that, because the initial dispute with the employer had been due to the misrepresentations of employment, not the loss of employment, the General Division erred in stating that the result of his settlement with his employer was severance or moneys due to loss of employment. He submits that returning the benefits would render frivolous the compensation and the strenuous dispute with the employer.

[25] The Appellant submitted a copy of the termination of employment email (GD-4 to GD2-7) he had personally sent to his employer. In this email dated July 23, 2014, the Appellant requests that:

> • SNC-Lavalin ATP fulfils its 24 month bond obligation and pay him full remuneration for the remaining period of the 24 month bond from the date I was laid off i.e. 16th July 2014 until 13th May 2015 and settle all tax liabilities on the such remuneration.

[26] In a demand letter from his attorneys dated February 14, 2016, the Appellant's initial request is reiterated in the following manner:

> It is our position that Mr. A. H. is entitled to a substantially longer notice period than two weeks. It is our position that an appropriate notice period and severance package would be ten months or the balance of Mr. A. H.'s two year obligation.

[27] The attorneys, in a letter dated October 14, 2014, replied to the Appellant's demand letter with the following counter-offer:

> Without any admission of liability whatsoever and in an ongoing effort to settle the matter in an amicable manner, SNC-Lavalin is prepared to revise its offer by providing Mr. A. H. with a total of 12 weeks base salary as Common Law severance, less the 2 weeks of pay in lieu of termination notice under the Employment Standards Code that was paid out on August 21, 2014, and less the applicable deductions at source.

[28] In a second demand letter from his attorneys dated January 27, 2015, the Appellant submits the following settlement proposal:

> • SNC-Lavalin shall pay Mr. A. H. a lump sum equal to 24 weeks' compensation (less deductions), which shall include amounts for salary, benefits, and RRSP matching. This amount shall be paid in such tax advantageous manner as Mr. A. H. may instruct.

[29] The full and final release that the Appellant filed does not mention that the agreed settlement amount relates to damages. In fact, it does not even mention the settlement.

[30] Furthermore, the evidence submitted before the General Division pertaining to the calculation of the settlement amount of $21,692 demonstrates that it was based on an hourly wage of $49.30/h, at 40 hours per week, for a period of 11 weeks (GD6-3).

[31] Based on the above facts, the Tribunal can come only to the conclusion that the payment arose out the severance of the employment relationship and that it was made to compensate the Appellant for the loss of wages and other benefits related to the employment. The evidence simply does not support the Appellant's position that the settlement moneys were granted to compensate the Appellant for damages.

[32] In view of the above, the Tribunal finds that the General Division correctly determined that the amount that the Appellant had received had arisen out of employment and that it therefore had to be allocated according to the Regulations.

CONCLUSION

[33] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division