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

Citation: *A. N. v. Canada Employment Insurance Commission,* 2017 SSTADEI 265

Tribunal File Number: AD-17-7

BETWEEN:

A. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 28, 2017

DATE OF DECISION: July 11, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 31, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) concluded that the Appellant's appeal was to be summarily dismissed because the Respondent had properly allocated his earnings under sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On December 23, 2016, the Appellant filed an appeal of the General Division's summary dismissal decision after receiving the General Division decision on November 8, 2016.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing because of:

- the complexity of the issue(s) under appeal;
- the parties' credibility was 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 was present at the hearing. No representative for the Respondent was present, even though the Respondent had received the notice of hearing.

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.

ISSUES

[7] The Tribunal must decide whether it will grant the late application and whether the General Division erred when it summarily dismissed the Appellant's appeal.

OBSERVATIONS

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

- He believes that the payroll system may have contributed to an overpayment.
- He submits that there were five Records of Employment issued by his employer and that he fails to understand why the Respondent did not inquire on the reason for all these Records of Employment.
- He did receive money during the relevant period, but his employer did a full recovery of said money owed from sick leave overpayments, so he was not paid anything while he was collecting Employment Insurance benefits.

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

- The law is clear and states that sums received from an employer are presumed to be earnings and must be allocated unless that amount falls within the exceptions in subsection 35(7) of the Regulations. Furthermore, earnings that an employer pays to compensate for work performed must be allocated pursuant to section 36 of the Regulations.

- The standard for a preliminary dismissal of appeal is high. The Respondent recognizes that "no reasonable chance of success" is not defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act. However, the Federal Court of Appeal has clarified that an appeal should only be summarily dismissed when the failure is "pre-ordained," no matter what evidence or arguments might be presented at a hearing.

- After failing to find evidence to support the notion that the amounts that the employer had paid were not earnings or that they were allocated incorrectly, the General Division summarily dismissed the appeal under subsection 53(1) of the DESD Act with the conclusion that it had "no reasonable chance of success."

STANDARD OF REVIEW

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

[11] The Respondent submits that Appeal Division does not owe any deference to the General Division with respect to questions of law, 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 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 "[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 the following:

> 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 Court concluded 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] Regarding the late application for leave to appeal, the Appellant states that he calculated 30 business days to file his appeal and that he is therefore within the legal time frame to file his appeal. Although an application for leave to appeal must be made to the Appeal Division within 30 days after the day on which it is communicated to the appellant in accordance with subsection 57(1) of the DESD Act, the Tribunal finds, in the present circumstances, that it is in the interest of justice to grant the Appellant's request for an extension of time to file his application for leave to appeal without there being prejudice to the Respondent—*X (Re)*, 2014 FCA 249, *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.).

[18] The Tribunal must decide whether the General Division erred when it summarily dismissed the Appellant's appeal.

[19] Subsection 53(1) of the DESD Act states that "[t]he General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success."

[20] The Tribunal has determined that the correct test to be applied in cases of summary dismissal is the following:

- Is it plain and obvious on the face of the record that the appeal is bound to fail?

[21] To be clear, the true question is whether that failure is pre-ordained no matter what evidence or arguments might be presented at the hearing.

[22] The Appellant completed an application for sickness benefits on January 27, 2015. He subsequently requested that his claim be antedated to June 27, 2014, and this request was allowed. An investigation revealed that during the benefit period, the Appellant was employed for the week of September 28 to October 4, 2014, while in receipt of Employment Insurance benefits (GD3-16).

[23] The employer was sent a Request for Payroll Information and responded indicating that the claimant had earnings of $1,054.78 for the week of September 28 to October 4, 2014 (GD3-17 to GD3-18). The employer's pay period is bi-weekly from Thursday, September 25 to Wednesday, October 8, 2014. The Appellant was given an opportunity to explain the discrepancy on his claim on a "Request for Clarification of Employment Information" form. He responded and agreed with the information that the employer had provided.

[24] The General Division examined the evidence and determined that the Appellant had not established or validated to the General Division that he had been on leave without pay, and that he had not demonstrated that the employer's records were incorrect.

[25] On appeal, the Appellant argues that he did receive money during the relevant period but that his employer did a full recovery of said money owed from sick leave overpayments, so he was not paid anything while he was collecting Employment Insurance

benefits. He questions the accuracy of the five Records of Employment that his employer issued. Because of the new pay system, he cannot retroactively prove to the Tribunal with documentary evidence that he had been on leave without pay.

[26] The burden of proof for contesting the information on pay from the employer falls on the claimant, and that simple allegations aiming to show doubt are insufficient— *Dery v. Canada (Attorney General)*, 2008 FCA 291.

[27] The Appellant has filed documentary evidence in support of his appeal (AD6-1 to AD6-196). Without ruling on the admissibility of said evidence at the appeal level, the Tribunal concludes that nothing in the Appellant's evidence contradicts the employer's evidence for the relevant week in the docket.

[28] In the "Request for Clarification of Employment Information" form, the Appellant agreed with the information that the employer had provided (GD3-20). The documentary evidence that the Appellant has filed on appeal certainly demonstrates that there was an issue with pay and sick leave, but his bank statements clearly show that he had received an amount from his employer during the relevant week (AD6-60). An email from the employer's technical advisor states that they will not recover the leave without pay and will instead use the Appellant's sick leave hours (AD6-16).

[29] As the General Division has stated, the Appellant did not provide any evidence that he was actually on leave without pay during the week of September 28, 2014. As per the instructions of the Federal Court of Appeal, simple allegations aiming to raise doubts are insufficient.

[30] Therefore, the General Division correctly determined that the appeal was to be summarily dismissed.

CONCLUSION

[31] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division