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

Citation: *R. L. v. Canada Employment Insurance Commission,* 2017 SSTADEI 291

Tribunal File Number: AD-17-101

BETWEEN:

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 18, 2017

DATE OF DECISION: August 1, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 28, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the allocation of earnings was 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 February 1, 2017. Leave to appeal was granted on February 14, 2017.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue(s) under appeal;
- the credibility of the parties was not anticipated to be a prevailing issue;
- the information in the file, including the need for additional information; and
- 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. Although it did receive the notice of hearing, the Respondent did not attend.

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 determined that the allocation of earnings was calculated in accordance with sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- He had taken time off while still employed and received no remuneration for those days, as this would be covered by his vacation pay which would be payable on the anniversary date of November.
- The General Division ignored the applicable case law, namely CUB 51798.
- The General Division Member conducted her hearing in a prejudicial manner by acting as a prosecutor and a judge.

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

- It is not in dispute that the vacation pay of $3,150.81 constituted earnings under subsection 35(2) of the Regulations. What is in dispute, is the Respondent's decision to allocated the vacation pay to the period from December 20, 2015, to January 2, 2016, with a balance of $742.00 allocated to the week commencing January 3, 2016.

- The Appellant argues that the employer should have paid the vacation pay on November 28, 2015, and that the vacation pay should have been allocated effective from this date. Given the Appellant's arguments in this case, it is submitted that the relevant question for the General Division to resolve was whether the vacation pay was paid "for a reason other than a lay-off or separation from an employment" under subsection 36(8) of the Regulations;

- The General Division found that the evidence established that the vacation pay was linked to the Appellant's lay-off in December 2015, and that it should therefore be allocated pursuant to subsection 36(9) of the Regulations.

- The General Division's finding that the Appellant's lay-off, and not an anniversary date as alleged by the Appellant, triggered the pay out of the vacation pay was reasonable;

- The Appellant's vacation pay was paid because of the termination of employment and not because of an anniversary date according to a collective agreement, as per the decision in CUB 51798.

- The Federal Court of Appeal has confirmed that vacation pay that is paid by reason of a "lay-off or separation" must be allocated from the date of lay-off or separation pursuant to subsection 36(9) of the Regulations.

- There is no evidence to show that the General Division was biased against the Appellant in any way or that the Member did not act impartially; nor that there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant did not make any 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 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.

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

ANALYSIS

Principle of natural justice

[17] The Appellant raises the argument that a principle of natural justice was ignored when the General Division did not correct his employer's mistake in order that he be treated the same way his work colleagues were treated by the Respondent.

[18] A principle of natural justice refers to the fundamental rules of procedure exercised by persons and tribunals with judicial or quasi-judicial jurisdiction. The principle exists to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum is given adequate notice to appear and is allowed every reasonable opportunity to present his case and to defend himself and that the decision given is free of bias or the reasonable apprehension or appearance of bias.

[19] The Tribunal finds that the Appellant received proper notice of the hearing, that he was given every opportunity to present his case and that the General Division Member listened to his arguments and provided all the details of his position in its decision.

[20] As stated by the General Division, the Tribunal has jurisdiction to decide only the cases before it and cannot correct the alleged mistakes made by an employer.

[21] For the above reasons, the Tribunal finds that the Appellant's argument has no merits and that no rules of natural justice were breached in the present matter.

Allegation of Bias

[22] The Appellant submits that the General Division Member was biased since she conducted her hearing in a prejudicial manner by acting as a prosecutor and a judge.

[23] As stated by the Federal Court of Appeal in *Arthur v. Canada (Attorney General)*, 2001 FCA 223:

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[24] In view of the seriousness of such an allegation, the Tribunal proceeded to listen at length to the hearing before the General Division.

[25] The Tribunal listened carefully to the recording of the hearing before the General Division. The Tribunal finds that the General Division exercised its role as the trier of facts. The General Division Member's tone was always courteous and respectful during the hearing. The Member proceeded to listen in full to the Appellant's presentation and tried to clarify certain legal points and to understand the Appellant's arguments.

[26] The Tribunal finds that there is no material evidence demonstrating conduct from the General Division Member that derogates from the standard. The Tribunal reiterates that such an allegation cannot rest on an applicant's mere suspicion, pure conjecture, insinuations or mere impressions.

[27] In view of the above, the Tribunal finds that this ground of appeal has no merits.

Allocation of earnings

[28] On appeal, the Appellant states that he had the option of being paid when he took holidays but that he chose not to and instead let his vacation pay accrue during the year.

[29] The Appellant blames his employer for having paid him upon termination of his employment instead of two weeks prior to his lay-off.

[30] In dismissing the appeal, the General Division concluded:

> [56] The Tribunal finds the employers evidence on the file and the oral evidence of the Appellant there was no anniversary date as well the Appellant testified that he could have been paid when he took holidays but rather he choose not to and let his vacation pay accrue to what he stated "he doesn't get paid when he takes his holidays throughout the year and requests them at the end of November because he uses it like a bank account and has money to buy Christmas presents".
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> [57] The Tribunal finds the uncontested evidence established that the Appellant's vacation pay was paid to him in December 2015 because had been laid off. The payment had no relation to the fact that the Appellant had taken some vacation time off during the year.
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> [58] The Tribunal finds that the vacation pay had to be allocated pursuant to subsection 36(9) of the Regulations starting with the week of the end of employment that had led to the payment.
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> [59] The Appellant stated that equality of law is his argument and that if his other coworkers were paid out their holiday pay two weeks prior and it was a mistake of his employer he should not be penalized for this.
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> [60] The Appellant presents the argument that it unfair that the Commission has allocated the vacation monies to an entire month which extended his two week waiting period and this is unfair as well.
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> [61] […]
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> [62] The Tribunal sympathies with the Appellant's situation; however the fact is that he received his vacation pay because his employment ended. The Tribunal does not have the jurisdiction to review to the employment insurance claims of his coworkers but only the appeal before the Tribunal.
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> [63] The Tribunal finds the Appellant's argument appears to be the mistake made by his employer rather than the manner in which the Commission applied the law.
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> [64] The Tribunal does not have the authority to re-write the legislation. The law is clear that neither the Commission nor the Tribunal or Court has authority to exempt a claimant from the qualifying provisions of the

> Act no matter how sympathetic or unusual the circumstances. (Levesque 2001 FCA 304 (CanLII)).
>
> [65] For these reasons, the Tribunal concludes that the Appellant did have earnings arising out of employment pursuant to subsection 35(2) of the Regulations and the Commission correctly allocated these earnings in accordance with subsection 36(9) of the EI Regulations.

[31] It is not in dispute that the Appellant's last day of work was December 18, 2015, and that he then received the amount of $3,150.81. The employer declared in the Appellant's Record of Employment (ROE) that the amount was paid because the Appellant was no longer working (GD3-16).

[32] In an interview with the employer's accountant that was held on April 14, 2016, it was reiterated that the lay-off triggered the payment of the Appellant's accumulated vacation pay and that there was no anniversary date program (GD3-25).

[33] After the General Division hearing, the employer filed a letter dated September 30, 2016, attesting that the holiday pay should have been paid out during the pay period of November 28, 2015 (GD-5-2). However, the employer did not mention anything about an anniversary payment. Furthermore, the employer never issued an amended ROE.

[34] The Tribunal finds that the evidence before the General Division clearly shows that the Appellant was paid his vacation pay when he was laid-off. The preponderant evidence does not support his position that he had taken time off while still employed and had received no remuneration for those days, as this would be covered by an anniversary date. It cannot be found that the vacation pay was paid or payable to the Appellant for any reason other than the separation from employment.

[35] The General Division found that the vacation pay had to be allocated pursuant to subsection 36(9) of the Regulations, beginning with the week of the lay-off that led to the payment.

[36] The Tribunal finds no reason to intervene. The General Division decision is based on the evidence before it, and it follows the applicable legislation and case law.

CONCLUSION

[37] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division