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

Citation: *M. M. v. Canada Employment Insurance Commission*, 2017 SSTADEI 293

Tribunal File Number: AD-17-102

BETWEEN:

M. M.

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 allowed in part and the file is returned to the General Division of the Social Security Tribunal of Canada (Tribunal) for a new hearing before a different member only on the issues of penalty and notice of violation.

INTRODUCTION

[2] On January 11, 2017, the Tribunal's General Division determined that:

- the allocation of earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations) was to be upheld;

- the imposition of a penalty pursuant to section 38 of the *Employment Insurance Act* (Act) for making a misrepresentation by knowingly providing false or misleading information to the Respondent was to be upheld; and

- the Notice of Violation issued pursuant to section 7.1 of the Act was to be upheld.

[3] The Appellant requested leave to appeal to the Appeal Division on February 3, 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 under appeal
- the fact that 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 attended the hearing. Although the Respondent had received the notice of the hearing, it did not attend.

THE 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 allocation of earnings had been performed in accordance with sections 35 and 36 of the Regulations, that a penalty was imposed in accordance with sections 38 of the Act and that a notice of violation was issued in accordance with section 7.1 of the Act.

SUBMISSIONS

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

- The General Division erred in the interpretation and application of the legal test to impose a penalty.

- The facts demonstrate that she did not know or ought to have known that she had to report her income.

- The Respondent did not discharge its onus of establishing that Appellant had knowingly made false statements with respect to income earned while on maternity leave.

- Her explanation was reasonable, it should have been given weight and consideration in the General Division's decision itself, and it should not have been considered merely as a mitigating factor in the consideration of the penalty resulting from the rendering of a decision.

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

- The Appellant worked and received money from Walaw Inc. during the period from January 13 to May 18, 2013. During this same period, the Appellant was in receipt of parental benefits. As such, the Respondent determined the money was earnings pursuant to subsection 35(2) of the Regulations and that the unreported earnings had to be allocated in accordance with 36 of the Regulations.

- The General Division's finding that the Appellant had worked and had earnings and that the Respondent had accurately allocated the earnings was reasonable and compatible with the evidence it accepted;

- The Appellant had subjective knowledge that she had returned to work while in receipt of parental benefits, and her failure to report her early return to work in January 2013 was done knowingly despite her explanation that it was her understanding that, because she was working only part-time, she was allowed to still claim parental benefits.

- The Respondent has met the onus of establishing that the Appellant made 10 false or misleading statements when she accepted benefit warrants for 18 weeks (January 13 to May 18, 2013) after her return to work with Walaw.

- Furthermore, although the Appellant may have been working only part-time during the period under review, her gross earnings from Walaw (GD3-20) were substantially greater than her benefit rate. It is respectfully submitted that it is neither logical nor reasonable for the Appellant to believe that, in those circumstances, her entitlement to benefits would not be affected because she was working only part-time.

- It is respectfully submitted that it was open to the General Division to make the findings of fact that it did, and that the General Division committed no error in dismissing the appeal on this issue because the decision was a reasonable one that conforms to the Act, as well as the established case law;

- The Respondent maintains that it exercised its discretion judicially under subsection 7.1(4) of the Act when it decided to issue a Notice of Violation;

- There is nothing in the General Division's decision to suggest that it was biased against the claimant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant has not made 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, 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 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 Court concluded that "[w]he[n] 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 is not disputing that she worked during her benefit period and that she had earnings from Walaw Inc. during the period from January 13 to May 18, 2013.

[18] The General Division decision to allocate the Appellant's earnings to a period during which she was on claim complies with sections 35 and 36 of the Regulations and is supported by the evidence in the file.

[19] The Appellant argues in appeal that the General Division erred in the interpretation and application of the legal test to impose a penalty.

[20] The Tribunal finds that the General Division's decision lacks clarity and that it is ambiguous. The General Division, on one hand, concludes from the evidence that the Appellant ought to have known that she had to report her earnings as she earned them and, on the other hand, concludes that she knew she was making a false statement. It then proceeds to reduce the penalty on the basis that the Appellant was "confused with the information she read on the website, and was not able to understand the information by talking to an agent," which was the Appellant's explanation for unknowingly making a false statement.

[21] Upon review of the General Division decision, it seems that the General Division applied an objective test. It did not clearly ask itself whether the Appellant had subjective knowledge that the representations that she had made were false.

[22] To impose a penalty on the Appellant, the General Division had to conclude, on a balance of probabilities, that the Appellant subjectively knew that she was making false or misleading statements—*Canada (Attorney General) c. Bellil*, 2016 FCA 107.

[23] In view of this conclusion, the General Division decision on the issue of the notice of violation cannot stand.

[24] For all the above-mentioned reasons, the file will be returned to the General Division for a new hearing before a different member only on the issues of the penalty and the notice of violation.

CONCLUSION

[25] The appeal is allowed in part, and the file is returned to the General Division for a new hearing before a different member only on the issues of penalty and notice of violation.

Pierre Lafontaine
Member, Appeal Division