



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *V. D. v. Canada Employment Insurance Commission*, 2017 SSTADEI 328

Tribunal File Number: AD-16-1379

BETWEEN:

V. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: July 25, 2017

DATE OF DECISION: September 7, 2017

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. The Appellant and the Commission each attended and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (the DESDA), the only grounds of appeal are that:

- (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.

ANALYSIS

[6] As I noted in my decision granting leave to appeal, this is not an ordinary file.

[7] The Appellant in this matter was a member of a large and extremely complex group appeal. I issued an amended decision in that matter in 2014 (the 2014 decision) which, on consent, resolved the main legal points in dispute and established a special regime for dealing with any remaining outstanding issues. This special regime included generous

timelines to request a reconsideration from the Commission, but it specifically excluded any challenge to the agreed upon resolution of the main legal issues.

[8] Out of approximately 2,400 initial appellants who were given access to this special regime, four (4) have requested leave to appeal to the Appeal Division. This is one of those appeals.

[9] Beyond the deadline set in the 2014 decision, the Appellant attempted to avail herself of the special regime. The Commission, noting the missed deadline, refused to reconsider the Appellant's file. The General Division upheld that determination, substantially for the same reasons.

[10] In her application for leave to appeal, the Appellant submits that she did not receive a copy of the 2014 decision in a timely fashion.

[11] Essentially, the Appellant argues that because neither her own counsel nor the Tribunal ever successfully communicated the 2014 decision to her, natural justice required that she be granted an extension of time to access the special regime authorized by the 2014 decision. On that basis, I granted leave to appeal.

[12] At the hearing held before me, after the parties had made their submissions, I ordered (with the parties' agreement) that the Commission provide to the Tribunal "all relevant documents in their possession regarding this matter." Also by agreement, the both the Appellant and the Commission were given an opportunity to make written submissions regarding these documents.

[13] The Appellant argues two main points. First, she argues that there was no proof that she received benefits during the time in question. Second, she argues that the overpayment amount and the method by which it had been calculated have never been explained to her. The Appellant does not challenge the fact that she received earnings that need to be allocated, but instead argues that the Commission has not properly proven their case with actual evidence.

[14] For their part, the Commission accepts that I have the discretionary power (according to s. 3 of the *Social Security Tribunal Regulations*) to extend the procedural deadlines set out in the 2014 decision if I find that special circumstances exist. They note that, due to the considerable amount of time that has passed since the initial claim, they would suffer prejudice if I extended the deadline. They also submit that the Appellant has not shown a reasonable chance of success on the underlying merits of her appeal, and argue that, for this reason, there would be no value in extending the Appellant's deadlines because the appeal would be destined to fail even if I were to find that special circumstances existed.

[15] Notwithstanding this, however, at the hearing before me the Commission stated that while they maintain their above positions, they would not object to me extending the deadline should I find that a reasonable chance of success on the underlying merits of the case does indeed exist.

[16] I accept that the Appellant was unaware of the special regime, or indeed of the 2014 decision, until after the deadline had passed.

[17] That being said, contrary to the Appellant's position, I am unable to find that the Appellant did not receive employment insurance benefits during the time in question. The Appellant has presented no evidence upon which I could make any such finding, while the Commission has presented evidence to the contrary.

[18] I am, however, left with some doubt as to the actual calculations used to determine the overpayment amount, given the different sums listed on the notices of debt sent to the Appellant. Although the Commission has presented some evidence on this point, I find that the Appellant has shown a reasonable chance of success in challenging the final overpayment amount.

[19] To show a reasonable chance of success is a very low threshold to meet. To be clear, the only finding I am making is that the Appellant's arguments have risen above this threshold such that there would be some potential value in allowing this matter to proceed.

[20] Although for the purposes of this appeal that is sufficient, I caution the Appellant that if the reconsideration that ensues is not to their liking, they will have to establish their

case on the balance of probabilities. This is a much higher threshold, and it is one that will have to be met by bringing evidence and showing exactly how the calculations are mistaken.

[21] The purpose of the special regime established in the 2014 decision (found at GD3-19) and consented to by the parties was to create a method by which each claimant's individual circumstances could be examined to ensure that the 2014 decision had been correctly applied and that any issues not covered by the 2014 decision particular to an individual appellant could be canvassed.

[22] Examples of potential issues (found at paragraph 20, sub-heading 4 of the 2014 decision) included such things as incorrect calculations, an incorrect start date for the allocation, and the wrong normal weekly earnings. With the parties' full consent, the finding that "the moneys at the heart of this appeal are earnings and must be allocated in accordance with s. 36(9) and (10) of the [*Employment Insurance Regulations*]" was specifically excluded from reconsideration (at sub-heading 6).

[23] In negotiating the 2014 decision, all parties understood that the special regime was by necessity imperfect but that it was preferable (for everyone) to holding 2,400 *de novo* General Division hearings. It was also understood that there would be a need to monitor the process to ensure that the parties' interests were protected, and that for this to happen further Appeal Division intervention might be required. I have taken these understandings into account in exercising my discretion.

[24] Given my above findings, as well as after giving careful consideration to and taking into account the Commission submissions as summarized above, I find that the Appellant has shown special circumstances and that the Appellant should be permitted to take advantage of the reconsideration process created by the special regime as if her request for reconsideration had been filed in a timely manner.

[25] This appeal has had a long journey but, out of approximately 2,400 files, this is the only file where special circumstances have been found for extending the deadline for requesting a reconsideration decision under the special regime. I would suggest that this speaks to the wisdom of the parties in establishing the terms of the 2014 decision, and

demonstrates that a just and expeditious determination of this large group of appeals has indeed taken place as intended.

CONCLUSION

[26] For the above reasons, the appeal is allowed in accordance with these reasons.

Mark Borer

Member, Appeal Division