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

Citation: *G. K. v. Canada Employment Insurance Commission,* 2017 SSTADEI 348

Tribunal File Number: AD-17-98

BETWEEN:

G. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: July 6, 2017

DATE OF DECISION: September 25, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On January 12, 2017, 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 February 3, 2017. Leave to appeal was granted on February 15, 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 was present at the hearing, and Irene Cheng represented him. A representative for the Respondent did not appear, even though the Respondent had received a notice of hearing. An interpreter, Christina Tam, was present at the hearing.

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 monies that the Appellant had received were to be considered earnings and that they had to be allocated pursuant to sections 35 and 36 of the Regulations.

SUBMISSIONS

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

- Section 46.01 of the *Employment Insurance Act* (Act) and subsection 56(1) of the Regulations apply to his specific case, and the General Division did not discuss them in its decision.

- Section 46.01 specifically states that no repayment of an overpayment of benefits is applicable “if more than 36 months have elapsed since the layoff or separation from the employment in relation to which the earnings are paid.”

- The difference from the time of layoff in November 2010 to the receipt of the arbitrated severance payment in December 2014 is much greater than the 36 months as stated in section 46.01.

- He disputes the inconsistent calculations of the amount owing and the application of a second waiting period to this particular claim.

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

- The General Division found that the severance pay ($35,457.71) was earnings and that it had been allocated correctly.

- The General Division made findings of fact that were consistent with the evidence, and it committed no error in dismissing the appeal, because the decision was a reasonable one that conforms to the Regulations, as well as the established case law.

- Before the General Division, the Appellant did not raise the argument regarding section 46.01 of the Act.

- It is submitted that section 46.01 of the Act allows the Respondent discretion not to create an overpayment if more than 36 months have elapsed since the layoff or separation from the employment in relation to which the earnings are paid, as well as if the administrative cost of determining the overpayment equals or exceeds the amount to be collected.

- For the purpose of section 46.01 of the Act, the Respondent conducted a study to compare the amounts from a wrongful dismissal—or the property of a bankrupt individual—and the overpayment amounts. The Respondent determined that the average administrative cost to establish an overpayment in 2016 had been $329.00.

- This amount includes the estimated costs to conduct the necessary investigations and the reconsideration of the claim, to establish communication with the claimant and debt recovery measures, and to conduct the administrative review and the work associated with an appeal. In the matter at hand, the overpayment amount is $1,503.00.

- The Respondent is of the view that, in this case, the overpayment amount of $1,503.00 is higher than the administrative cost of $329.00. Therefore, section 46.01 does not apply.

- With regards to a write-off of an overpayment under subsection 56(1) of the Regulations, the Federal Court of Appeal has repeatedly confirmed that the Respondent has the sole authority under section 56 of the Regulations to a write-off of an overpayment and that neither the Board of Referees (now the General Division) nor an Umpire (now the Appeal Division) is empowered to deal with issues relating to the write-off of an overpayment. Therefore, it cannot be said that the General Division erred in failing to discuss this section, as it is outside of the Tribunal's jurisdiction.

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, 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 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 March 17, 2013.

[18] On December 10, 2012, the union and the Mackenzie Sawmill entered into an agreement that the seniority list would be extended for the purpose of the employees keeping their employment, as the employer's intent was to reopen a small log mill by March 31, 2013. However, the employer was unable to fulfill its commitment and, as a result, the seniority list expired on March 31, 2013. In light of this, as per Article XXVIII

of the Collective Agreement, severance pay became payable 30 calendar days after March 31, 2013.

[19] In September 2013, the union filed a grievance regarding the severance pay under the Collective Agreement, and in the Letter of Understanding dated October 3, 2014, the employer agreed to pay severance pay to specific employees on or before December 31, 2014. The calculation of the severance pay amounts was determined by the employee's seniority as of March 31, 2013.

[20] The employer did not issue an amended Record of Employment. The amount of severance pay paid to each individual employee was supplied to the Respondent via a nominal roll. The Appellant was paid $35,457.71.

[21] On May 10, 2016, the Respondent notified the Appellant that the severance payment in the amount of $35,457.71 was considered earnings, and that it would be applied against his claim from March 31 to September 14, 2013, with a remaining balance allocated to the week commencing September 15, 2013. The decision resulted in an overpayment of $1,503.00 (GD3-14).

[22] The Appellant requested a reconsideration of the Respondent's decision and, on July 16, 2016, the request for a reconsideration was denied.

The General Division's Decision

[23] The General Division concluded that the severance in the amount of $35,457.71 was earnings, and that the income had arisen out of the Appellant's separation from his employment on March 31, 2013. Therefore, these monies needed to be allocated pursuant to subsections 35(2) and 36(9) of the Regulations.

Section 46.01 of the Act

[24] The Appellant argues in appeal that section 46.01 of the Act applies to his specific case. Section 46.01 specifically states that no repayment of an overpayment of benefits is applicable "if more than 36 months have elapsed since the layoff or separation from the employment in relation to which the earnings are paid."

[25] The Appellant argues that the difference from the time of layoff in November 2010 to the receipt of the arbitrated severance payment in December 2014 is much greater than the 36 months as stated in section 46.01 of the Act. Therefore, no repayment of an overpayment of benefits is applicable.

[26] The Respondent submits that section 46.01 of the Act allows the Respondent discretion to not create an overpayment if more than 36 months have elapsed since the layoff or separation from the employment in relation to which the earnings are paid; and if the administrative cost of determining the overpayment equals or exceeds the amount to be collected.

[27] For the purpose of section 46.01 of the Act, the Respondent conducted a study to compare the amounts from a wrongful dismissal—or the property of a bankrupt individual—and the overpayment amounts. The Respondent determined that the average administrative cost to establish an overpayment in 2016 had been $329.00. This amount includes the estimated costs to conduct the necessary investigations and the reconsideration of the claim, to establish communication with the claimant and debt recovery measures, and to conduct the administrative review and the work associated with an appeal. In the matter at hand, the overpayment amount is $1,503.00.

[28] The Respondent is of the view that, in this case, the overpayment amount of $1,503.00 is higher than the administrative cost of $329.00. Therefore, section 46.01 does not apply.

[29] The legislative provision that is relevant to this case reads as follows:

> **45** If a claimant receives benefits for a period and, under a labour arbitration award or court judgment, or for any other reason, an employer, a trustee in bankruptcy or any other person subsequently becomes liable to pay earnings, including damages for wrongful dismissal or proceeds realized from the property of a bankrupt, to the claimant for the same period and pays the earnings, the claimant shall pay to the Receiver General as repayment of an overpayment of benefits an amount equal to the benefits that would not have been paid if the earnings had been paid or payable at the time the benefits were paid.

> 46.01 no amount is payable under section 45, or deductible under subsection 46(1), as a repayment of an overpayment of benefits if more than 36 months have elapsed since the lay-off or separation from the employment in relation to which the earnings are paid or payable and, in the opinion of the Commission, the administrative costs of determining the repayment would likely equal or exceed the amount of the repayment.

[30] The Respondent was informed that an arbitration settlement agreement had been reached between the Appellant and his employer, and that he had received an amount of severance pay. This is specifically one of the reasons listed in sections 45 and 46 of the Act for correcting the calculation of benefits to be paid.

[31] The Respondent, in its submissions, does not dispute that more than 36 months had elapsed since the lay-off or separation from the employment in relation to which the earnings had been paid or had been payable. It argues that section 46.01 is irrelevant here, since the administrative cost of determining the overpayment does not equal or exceed the amount to be collected.

[32] The Appellant disputes the amount of $329.00 to collect the overpayment of $1,503.00, more specifically, when considering the work associated with the present appeal. He believes it to be equal or higher than the amount to be collected.

[33] In view of the absence of a representative for the Respondent at the appeal hearing, the Tribunal requested by letter that it provide a complete and detailed account of how the Respondent arrives at the overpayment of $1,503.00 and the administrative cost of $329.00. The Respondent replied to the Tribunal on August 21, 2017. The Appellant was given an opportunity to reply to the Respondent's further submissions but elected not to do so.

[34] For the purpose of section 46.01 of the Act, the Respondent conducted a study to compare the amounts from a wrongful dismissal—or the property of a bankrupt individual—and the overpayment amounts. The Respondent determined that the average administrative cost to establish an overpayment in 2016 had been $329.00. This amount includes the estimated costs to conduct the necessary investigations and the reconsideration of the claim, to establish communication with the claimant and debt

recovery measures, and to conduct the administrative review and the work associated with an appeal.

[35] In the matter at hand, the overpayment amount is $1,503.00 and the average administrative cost to establish an overpayment had been $329.00 in 2016. Therefore, section 46.01 of the Act is irrelevant here, since the administrative cost of determining the overpayment does not equal or exceed the amount to be collected.

[36] The Tribunal finds that the Respondent had appropriately exercised its discretionary power when it had established that the cost of determining the overpayment did not equal or exceed the amount to be collected.

[37] For the above-mentioned reasons, this ground of appeal is dismissed.

Inconsistent Calculations of the Amount Owing and the Application of a Second Waiting Period

[38] The Respondent explains the calculation of the overpayment clearly in Exhibits GD3-26 and AD7-3. In regards to the waiting period, subsection 19(1) of the Act confirms that earnings that the Appellant had declared in the waiting period had to be deducted from the first three weeks in which benefits would otherwise be payable.

[39] For the above-mentioned reasons, this ground of appeal is also dismissed.

Subsection 56(1) of the Regulations

[40] Regarding the Appellant's request for a write-off, the Federal Court of Appeal has repeatedly confirmed that the Respondent has the sole authority under subsection 56(1) of the Regulations to write off an overpayment. The Tribunal's Appeal Division has also determined on many occasions that the Tribunal is not empowered to deal with issues relating to the write-off of an overpayment.

CONCLUSION

[41] The appeal is dismissed.

[42] The monies that the Appellant had received were to be considered earnings and had to be allocated pursuant to subsections 35(2) and 36(9) of the Regulations.

Pierre Lafontaine

Member, Appeal Division