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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. M. D.,* 2017 SSTADEI 350

Tribunal File Number: AD-17-218

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. D.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 26, 2017

DATE OF DECISION: October 2, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

INTRODUCTION

[2] On February 28, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the portion of the employer's contributions to the Respondent's pension fund was earnings and that it was appropriate to allocate that sum pursuant to paragraph 36(19)(*b*) of the *Employment Insurance Regulations* (Regulations).

[3] On March 13, 2017, the Appellant filed an application for leave to appeal with the Appeal Division. Leave to appeal was granted on March 16, 2017.

TYPE OF HEARING

[4] The Tribunal decided that the hearing of this appeal would proceed by teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that more than one party will be in attendance.
- the information in the file, including the nature of gaps and the need for clarification in the information; and
- the fact that the parties were represented;

[5] The Appellant, represented by Elena Kitova, was present at the hearing. The Respondent did not attend despite having received the notice to appear.

THE LAW

[6] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the following are the only grounds of appeal:

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 in determining that it was appropriate to allocate the portion of the contributions paid by the employer into the Respondent's pension fund under paragraph 36(19)(*b*) of the Regulations.

SUBMISSIONS

[8] The Appellant's arguments in support of its appeal are as follows:

- It was unreasonable for the General Division to conclude that the portions paid by the employer into the pension fund had not been repaid to the Respondent pursuant to the terms of her employment contract, due to her dismissal or her separation from employment, within the meaning of subsections 36(4) and 36(9) to 36(11) of the Regulations, while in paragraph 16 of her decision, the Tribunal member herself acknowledges that the sum in question was paid to the Respondent after the end of her employment with the employer.

- The facts in the docket clearly show that the Respondent received the sum in question because her employment had ended.

- In accordance with subsection 36(9) of the Regulations, all earnings paid or payable to a claimant by reason of a lay-off or separation from an employment shall, regardless of the period in respect of which the earnings are purported to be paid or payable, be allocated to the date on which the claimant became entitled to receive that money;

- The amount in question being covered by subsection 36(9) of the Regulations, subsection 36(19) does not apply in this case and the General Division erred in finding otherwise.

- The case law of the Federal Court of Appeal has established on many occasions that amounts paid to claimant at the end of their employment are earnings, and that they must be allocated according to the provisions of subsection 36(9) of the Regulations.

- The case law has also established that the nature of the earnings cannot be determined based on the method used by the claimant in cashing it; the investment method results in a personal decision by the Respondent and changes nothing for the purposes of Employment Insurance.

[9] The Respondent has filed no submissions against the Appellant's appeal.

STANDARDS OF REVIEW

[10] The Appellant maintains that the Appeal Division does not have to defer to the General Division's conclusions regarding 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.

[11] The Respondent has not made any submissions regarding the applicable standard of review.

[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 Federal Court of Appeal concludes by emphasizing 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 or its decision was unreasonable, the Tribunal must dismiss the appeal.

ANALYSIS

[17] On April 11, 2016, the Appellant notified the Respondent that, following her layoff, the employer had repaid her the contributions made to her pension fund, totalling $3,942.16. This amount included $2,462.40 in contributions from the employer and $1,479.76 in contributions from the Appellant.

[18] The General Division found that the amount of the repayment of the employer's contributions was earnings, under subsection 35(2) of the Regulations, since there was an obvious link between the accumulation of the amount and the Respondent's employment.

[19] However, the General Division found that it was not open for the Appellant to find that the amount was expressly payable to the Respondent due to her layoff in accordance with subsection 36(9) of the Regulations, since it is the Respondent who decided on the sum, which could have stayed in the employer's coffers and grow until her actual retirement.

[20] With respect, for the reasons mentioned hereafter, the General Division's decision cannot be upheld.

[21] What a claimant chooses to do with the repayment of the employer's contributions to their pension fund at the end of their employment is irrelevant for the purposes of the Act. Whether they choose to cash the money or to transfer it to an RRSP changes nothing with respect to the fact that this compensation constitutes earnings for the purposes of calculating benefits and that it must be allocated as of the date on which the claimant became entitled to receive that money, regardless of the date of repayment.

[22] As emphasized by the Federal Court of Appeal, the idea of subsection 36(9) is to cover any part of the earnings that becomes due and payable at the time of termination of the contract of employment and the commencement of unemployment so that the earnings to which a claimant is entitled at the time of their departure is taken into consideration before they are eligible to receive those benefits.

[23] It is therefore appropriate to allocate the employer's repaid contributions to the Respondent, as prescribed in subsection 36(9) of the Regulations, from the week of the separation from employment.

[24] With all due respect to the General Division, subsection 36(19) of the Regulations would not apply under the circumstances given its suppletive nature and the fact that it goes into effect only when sections 1 to 18 do not apply.

[25] For the above-mentioned reasons, it is appropriate to allow the appeal.

CONCLUSION

[26] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.

Pierre Lafontaine

Member, Appeal Division