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

Citation: *L. Y. v. Canada Employment Insurance Commission,* 2017 SSTADEI 357

Tribunal File Number: AD-17-300

BETWEEN:

L. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON:

DATE OF DECISION: October 19, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On March 6, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the amount of the general damages settlement was earnings under section 35 of the *Employment Insurance Regulations* (Regulations), and that it had been properly allocated pursuant to section 36 of the Regulations.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on April 7, 2017, and leave to appeal was granted on May 24, 2017.

[3] This appeal proceeded by On the Record for the following reasons:

a) The Member has determined that no further hearing is required.

b) The *Social Security Tribunal Regulations* require appeals to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

c) The Respondent agrees that the General Division made a reviewable error.

ISSUE

[4] Has the General Division made a reviewable error as set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act)?

THE LAW

[5] According to subsection 58(1) of the DESD 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.

SUBMISSIONS

[6] The Appellant submitted that the General Division had made an important error regarding the facts contained in the appeal file. She claims that the General Division ignored evidence that the settlement was associated with her human rights complaint against her employer, and that it was for pain and suffering. She submits that the $10,000.00 should not be subject to allocation. The Appellant raised no specific concern with the inclusion of the vacation pay and pay-in-lieu as earnings or their allocation.

[7] The Tribunal reads the Appellant's further submissions as contending that the General Division misapprehended the evidence and misapprehended the December 3, 2016, Statement of the Appellant's Account in particular, where the General Division noted that, "[…] because the Appellant continued to remain unemployed long after June 15, 2014, that the allocation of these monies should not affect the amount of EI benefits she was entitled to receive." The Appellant believes that the General Division based its decision on its understanding that the Appellant would not be required to repay any overpayment, and the Appellant states this is no longer the case (AD1-A).

[8] The Respondent agrees that the appeal should be allowed. The Respondent submits that the General Division based its decision on an erroneous finding without having regard to all the material before it by failing to consider the document at GD2-5, the letter from the Ontario Human Rights Tribunal.

[9] The Respondent further submits that the General Division's reasons were inadequate in that it cited six Federal Court of Appeal decisions without explaining how they serve to justify its findings.

[10] The Respondent further submits that the Tribunal erred in law in failing to answer the question of whether the claimant had established that part or all of the $10,000.00 settlement had been paid, beyond lost wages.

ANALYSIS

Erroneous finding of fact made without regard to the material before the Tribunal

[11] The General Division is correct that the onus is on the claimant to establish that all or part of the sums received as a result of her dismissal amounted to something other than earnings within the meaning of the Act, as set out in *Bourgeois* v. *Canada (Attorney General)*, 2004 FCA 117.

[12] The Appellant maintains that all or part of the $10,000.00 settlement was something other than earnings. The General Division decision references some of the Appellant's testimony in support of her position as follows:

a) She received $10,000.00 from the employer as a settlement of her complaint against the employer that she had filed with the Ontario Human Rights Tribunal;

b) The settlement was due to a human rights violation issue (par. 21);

c) She was paid the general damages because the employer had harassed her (par. 25);

d) The Appellant submitted medical reports that she had been suffering from mental stress at the time (par. 56);

e) The Appellant stated that she had partially received the settlement monies for mental stress (par. 56).

[13] While the General Division makes no explicit finding against the Appellant's general or specific credibility, it seemingly rejects the Appellant's testimony that she received the settlement monies for mental stress (par. 56). The only justification provided is that there was no evidence **in the file** "confirming this fact."

[14] There is no specific requirement that otherwise credible testimony be confirmed by the file or otherwise corroborated, although there can be circumstances in which the **absence** of prior confirmatory evidence may be a factor in determining an Appellant's credibility. If the General Division is implying that the Appellant cannot be believed because one would have

expected her to have claimed this relationship between the settlement and her mental stress before, then the General Division is mistaken as to the lack of evidence in the file. A number of prior, consistent statements that appear in conversations between the Appellant and the Commission are recorded in the file in which the Appellant provided the following information related to the nature of the settlement:

a) July 29, 2015: "the settlement was due to a human rights violation issue," "stress of harassment that she faced from her employer" (GD3-61)
b) December 11, 2015: "general damages because employer harassed her" (GD3-69)
c) January 20, 2016: "damages for human rights and employer harassed her," "psychological problems due to employer's harassment" (GD3-92)

[15] Furthermore, the file is not the only source of evidence that was available to the General Division. The Appellant's evidence was further corroborated by the written statement and the testimony of the Appellant's witness, who had assisted as his interpreter in his human rights claim.

[16] The Appellant's witness testified that the Appellant had been awarded $10,000.00 for both income loss and for mental stress, and that the parties had agreed not to speak ill of each other.

[17] While the decision cites the Appellant's witness's testimony at par. 35 and 55, there is no indication that this evidence is considered and there is no apparent reason for its rejection; the General Division does not make either an explicit or an inferential finding against the Appellant's witness's credibility or his evidence.

[18] Finally, the Respondent is correct that the General Division does not specifically identify that a copy of the April 28, 2014, letter from the Ontario Human Rights Tribunal is in evidence at GD2-5. However, the General Division accurately notes at par 18: "On April 28, 2014, the Ontario Human Rights Tribunal confirmed the settlement between the Appellant and the employer and closed the file." It thus appears that the General Division took notice of the document.

[19] However, the Respondent's concern appears to relate more to the General Division's failure to reference the document in its analysis. The Respondent references *Oberde Bellefleur OP Clinique dentaire O. Bellefleur (Employer) v. Canada (Attorney General)*, 2008 FCA 13, which stated, "[…] [the Board of Referees] must analyze all of the evidence and if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain why."

[20] The April 28, 2014, letter at GD2-5 has little probative value beyond confirming that the settlement between the Appellant and the employer took place in the context of a human rights complaint. This would be significant if the General Division questioned that the settlement had been reached in connection with such a complaint, but the General Division does not raise such a question (see par. 58). I am not satisfied that the General Division "dismissed" the 2014 letter, despite the General Division's failure to discuss the letter in its analysis. What is at issue is whether or in what amount the settlement was on account of anything other than earnings. Aside from confirming the context of the negotiations, the letter is of little apparent assistance to the General Division in determining the issue.

[21] Nonetheless, having regard to the failure of the General Division to consider the Appellant's prior consistent statements found in the file, or to consider the corroborative testimony of the Appellant's witness, I find that the General Division erred in making an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it, per paragraph 58(1)(*c*) of the DESD Act.

The General Division erred in law

[22] The General Division's finding that the settlement monies had been paid for general damages in return for non-admission of liability in par. 57 follows directly from its finding that the documentary evidence did not confirm the Appellant's contention that she had received the settlement for mental stress. The General Division continues in par. 58 to state that the Appellant has not proven anything "other than general damages."

[23] The General Division appears be of the opinion that the characterization of the settlement as "general damages" is somehow determinative of the issue, or that the settlement

could not be addressed in whole or part to mental stress and be considered “general damages” at the same time.

[24] I take notice of the fact that it is common at law for “general damages” to address or include those damages that are difficult to quantify, such as pain or suffering. Damages for harassment or mental stress may also be classified as “general damages.”

[25] The Respondent contended that the General Division failed to address the key question as to whether the claimant had established that part or all of the $10,000.00 settlement had been paid, beyond lost wages.

[26] I agree. The correct test is that set out in *Bourgeois*, *supra*: “[…] the onus [is] on the claimant to establish that all or part of the sums received as a result of his or her dismissal amounted to something other than earnings within the meaning of the Act.” The General Division referenced this test but did not apply it.

[27] The test does not require the Appellant to prove that the damages were something other than general damages, and the answer to this question is unhelpful in determining whether the Appellant has met the onus of establishing that some portion of the settlement she received was other than earnings.

[28] Therefore, I find that the General Division failed to apply the correct test and that it erred in law per paragraph 58(1)(*b*) of the DESD Act.

[29] The Appellant’s challenge to the apportionment of earnings appears to relate principally to the inclusion of the full $10,000.00 settlement. Although the Appellant believes that the General Division misapprehended the Commission’s intention in terms of recovering an overpayment, or the effect of its own decision on future recoveries, it is not necessary for the Tribunal to consider this question, given the Tribunal’s other findings above.

CONCLUSION

[30] The appeal is allowed. The decision is remitted to the General Division for reconsideration and a new decision.

Stephen Bergen
Member, Appeal Division