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

[TRANSLATION]

Citation: *D. A. v. Canada Employment Insurance Commission,* 2017 SSTADEI 356

Tribunal File Number: AD-16-1285

BETWEEN:

D. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 14, 2017

DATE OF DECISION: October 13, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On October 7, 2016, the Tribunal's General Division concluded that the allocation of the amounts the Appellant had received as pension was justified under sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On November 13, 2016, the Appellant filed an application for leave to appeal with the Appeal Division after being notified of the General Division's decision on October 13, 2016. Leave to appeal was granted on November 22, 2016.

FORM 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 the parties' credibility was not a key issue;
- the information in the file, including the nature of gaps or the need for clarification in the information; and
- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice.

[5] The Appellant attended the hearing. Counsel Carole Vary represented the Respondent at the hearing.

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 applying the threshold for allowable earnings set out in section 77.95 of the Regulations rather than that from subsection 19(2) of the *Employment Insurance Act* (Act).

SUBMISSIONS

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

- The General Division failed to observe a principle of natural justice and rendered a decision based on an error of law.

- The enacting clause, section 109 of the Act, specifically sets out the regulatory authority with regard to the establishment of pilot projects. It does not allow the Respondent to amend section 19 of the Act to impose its own deduction rates.

- Section 54 of the Act provides that the Respondent may make regulations only with regard to subsections 19(3) and 19(4)—subsections that do not concern his case.

- The General Division should have taken remedial action given the non-conformity of the Regulations regarding the Act.

- The Respondent cannot act contrary to the Act, because its commitment would be absolutely void and contrary to public order.

- The author of Pilot Project No. 18 and the Regulations made an addition to the wording of the Act, so they amended it, which is the sole prerogative of the author of the Act—the Parliament of Canada.

- According to the Act, his weekly benefit of $501 must be reduced only if the weekly earnings received of $116.10 or $117.15 exceeded $125.25 (25% of $501). Therefore, there is no deduction to apply and the overpayment imposed on him is illegal and contrary to public order.

- Section 77.95 of the Regulations, for which Pilot Project No. 18 was established did not receive “the approval of the Governor in Council" and therefore has no legal status.

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

- Pilot Project No. 18, or section 77.95 of the Regulations, can contravene the Act due to the wording used in section 109 of the Act, which begins with the expression, “Notwithstanding anything in this Act."

- This expression allows the Respondent to "make such regulations as it deems necessary respecting the establishment and operation of pilot projects for testing whether or which possible amendments to this Act or the regulations would make this Act or the regulations more consistent with current industry employment practices, trends or patterns or would improve service to the public."

- A pilot project with a duration of up to three years adopted by regulation may modify the Act.

- Subsection 77.95(3) of the Regulations specifies that section 19 of the Act is adapted by adding section 2.1, which clearly states that the amount to be deducted under subsection 19(2) of the Act is equal to 50% of the earnings up to a certain amount.

- For the purposes of Pilot Project No. 18, the amount to be deducted on Employment Insurance benefits is 50% of the earnings. The claimant therefore benefits from a reduced deduction, up to a maximum of 90% of the claimant's weekly insurable earnings.

- The subtitle of section 77.95 of the Regulations clearly defines the purpose of Pilot Project No. 18: "Pilot Project to Encourage Claimant to Work More While Receiving Benefits."

- Under Pilot Project No. 18, only 50% of earnings are deducted starting with the first dollar earned. Section 77.95 of the Regulations therefore aims to verify whether this measure would result in encouraging claimants to work more while receiving Employment Insurance benefits.

- The Respondent can validly adopt regulations as part of a pilot project in order to establish the deductions to deduct from benefits under subsection 19(2) of the Act.

- The General Division did not err in applying the threshold for allowable earnings set out in section 77.95 of the Regulations, which provides for the deduction of 50% of the amounts received.

STANDARD OF REVIEW

[10] The parties made no submissions regarding the appropriate standard of review.

[11] The Tribunal notes that the Federal Court of Appeal in *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."

[12] The Federal Court of Appeal further indicated the following:

> Not 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.

[13] 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."

[14] 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.

[15] 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

Facts not in dispute

[16] The Appellant filed an initial claim for Employment Insurance benefits effective July 28, 2013.

[17] On September 5, 2014, the Appellant contacted the Respondent to report that he had been receiving a retirement pension effective September 1, 2013. He received five hundred eight dollars ($508) per month. The Appellant explained to the Respondent that he had applied for the Quebec Pension Plan (QPP) in July 2014. He was then provided the opportunity to go back to September 2013. He chose this option. He did not believe this would affect his Employment Insurance file.

[18] The Respondent concluded that the Appellant's retirement pension constituted earnings and that they should be allocated at a rate of $116 per week from September to December 2013 and $117 per week from January to September 2014, pursuant to sections 35 and 36 of the Regulations. The allocation generated an overpayment of $2,641.

[19] On June 8, 2015, the Appellant requested reconsideration of the Respondent's decision concerning the allocation of earnings. He disagreed with the calculation of the allocated earnings. On July 15, 2015, the decision was upheld by the Respondent. The Appellant therefore appealed to the General Division.

General Division Decision

[20] Relying on the arguments that the two parties made and on the evidence, the General Division concluded that the amounts the Appellant received as pension should be considered earnings under paragraph 35(2)(*e*) of the Regulations and that they should be allocated under subsection 36(14) of the Regulations. Furthermore, the General Division concluded that Pilot Project No. 18, established under section 77.95 of the Regulations, had been correctly applied by the Respondent.

Position of the parties in appeal

[21] The Appellant alleges that the General Division failed to observe a principle of natural justice and erred in law. He argues that the enacting clause, section 109 of the Act, clearly sets out the regulatory authority with regard to the establishment of pilot projects and that it does not allow the Respondent to amend section 19 of the Act in order to impose its own deduction rates. He submits that article 54 of the Act provides that the Respondent may make regulations only with regard to subsections 19(3) and 19(4)—subsections that do not concern his case.

[22] The Appellant also submits that the author of Project No. 18 made an addition to the wording of the Act, so it was therefore amended, which is the sole prerogative of the author of the Act, that is, the Parliament of Canada. Furthermore, he submits that section 77.95 of the Regulations, for which Pilot Project No. 18 was established, would not have received the "approval of the Governor in Council" and would therefore have no legal status.

[23] Finally, the Appellant submits that, according to subsection 19(2) of the Act, his weekly benefit of $501 must be reduced only if the weekly earnings received of $116.10 or $117.15 exceeded $125.25 (25% of $501). Therefore, there is no deduction to be applied and the overpayment imposed is illegal and contrary to public order.

[24] The Respondent submits that subsection 77.95(3) of the Regulations specifies that section 19 of the Act is adapted by the addition of paragraph 2.1, which clearly states that the amount to be deducted under subsection 19(2) is equal to the total of 50% of the earnings up to a certain limit.

[25] The Respondent submits that it can validly adopt regulations in a pilot project in order to establish the deductions to be deducted from benefits under subsection 19(2) of the Act.

The Tribunal must decide whether the General Division erred in applying the threshold for allowable earnings set out in section 77.95 of the Regulations.

[26] The Appellant does not contest having received the amounts in question, nor does he oppose the application of sections 35 and 36 of the Regulations. He disputes only the Respondent's calculation method, which allows claimants to receive a certain amount of earnings while receiving benefits, without them being affected.

[27] Subsection 19(2) of the Act specifically provides for certain deductions of benefits when earnings are received by a claimant. The following is provided:

> Earnings in periods of unemployment
>
> (2) Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds
>
> (a) $50, if the claimant’s rate of weekly benefits is less than $200; or
> (b) 25% of the claimant’s rate of weekly benefits, if that rate is $200 or more.

[28] If this provision were applied to the Appellant, he would not be required to reimburse the Respondent.

[29] However, in section 109 of the Act, Parliament has provided the Respondent with the ability to establish pilot projects for determining, once tested, which amendments to make to the Act or its regulations.

[30] However, the provision regulates the Appellant’s exercise of this authority to establish pilot projects. The regulations adopted under section 109 of the Act, **which may contradict the other provisions in the Act**, must however be consistent with current industry employment practices, trends or patterns that would improve service to the public.

[31] Section 109 of the Act provides a non-exhaustive list of possible pilot projects by the use of the word "including": *National Bank of Greece v. Katsikonouris*, [1990] 2 RCS 1029. The period of application of a regulation adopted under section 109 of the Act is, unless repealed, three years.

[32] The Tribunal is of the view that section 109 of the Act allowed the Appellant to validly adopt Pilot Project No. 18, specifically section 77.95 of the Regulations, in order to anticipate the deductions under subsection 19(2) of the Act. Paragraph 54(*e*) of the Act already allowed the Respondent to establish certain regulations concerning the deductions on earnings received by a claimant for employment through an employment benefit.

[33] The subheading of section 77.95 of the Regulations clearly defines the purpose of Pilot Project No. 18: "Pilot Project to Encourage Claimant to Work More While Receiving Benefits." This pilot project is therefore intended to verify whether this measure would encourage claimants to work more while receiving Employment Insurance benefits.

[34] Pilot Project No. 18 significantly improves services to the public because it makes it possible to exceed the threshold provided under subsection 19(2) of the Act, that is, 25% of the claimant's rate of weekly benefits, if that rate is $200 or more.

[35] The Tribunal has no difficulty finding that Pilot Project No. 18 is intended to improve services to the public, because it encourages claimants to work more while receiving benefits. The Tribunal finds that the Respondent could validly adopt regulations as part of a pilot project in order to establish the deductions to be deducted from benefits pursuant to subsection 19(2) of the Act.

[36] Section 77.95 of the Regulations, which establishes Pilot Project No. 18, provides the following:

> 77.95 (3) For the purpose of Pilot Project No. 18, section 19 of the Act is adapted by adding the following after subsection (2):
>
> **(2.1)** The amount to be deducted under subsection (2), except for the purpose of section 13, is equal to the total of

> **a)** 50% of the earnings that are less than or equal to 90% of the claimant’s weekly insurable earnings used to establish their rate of weekly benefits, and
>
> **b)** 100% of any earnings that are greater than 90% of the claimant’s weekly insurable earnings used to establish their rate of weekly benefits.

[37] It is true that at first glance, the wording of subsection 77.95 of Pilot Project No. 18 does not seem very encouraging. The Appellant's use of the words [translation] "subsection 19(2) of the Act is adapted by adding" rather than simply stating that "subsection 19(2) of the Act is adapted," as provided for in the regulation establishing Pilot Project No. 17, seems to create this unpleasant first impression.

[38] However, a close reading of subsection 77.95 shows that section 2.1 is intended to replace subsection 19(2) of the Act, not add to it. It clearly indicates that "**[t]he amount to be deducted under subsection (2)**" of section 19 of the Act, except for the purpose of section 13, is equal to the total of 50% of the earnings that are less than or equal to 90% of the claimant's weekly insurable earnings used to establish their rate of weekly benefits.

[39] Moreover, the Tribunal finds that subsection 77.96(2) of Pilot Project No. 18 offers the claimant the final choice, under certain conditions, to submit to Pilot Project No. 17, but does not allow them to submit to subsection 19(2) of the Act.

[40] The Tribunal finds that Pilot Project No. 18, as written and read with the Act, demonstrates sufficient accuracy and sets out a sufficiently intelligible standard to form a judicial decision. There is no inconsistency between the various legislative provisions.

[41] Finally, the Appellant submits that section 77.95 of the Regulations, for which Pilot Project No. 18 was established, would not have received "the approval of the Governor in Council" and would therefore have no legal status. However, it is apparent from the Canada Gazette, Part 2, vol. 146, no. 14, that the Governor General in Council had effectively approved section 77.95 of the Regulations on June 19, 2012, which came into effect on June 20, 2012, following its registration (AD3-141 to AD3-150).

[42] For the above reasons, the Tribunal finds that the General Division correctly applied the threshold for allowable earnings set out in section 77.95 of the Regulations, which provides for the deduction of 50% of the earnings.

CONCLUSION

[43] The appeal is dismissed.

[44] The General Division did not refuse to exercise its jurisdiction and did not err in law in allocating the Appellant's pension earnings to 50% of the amounts under section 77.95 of the Regulations.

Pierre Lafontaine

Member, Appeal Division