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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. D. L.*, 2017 SSTADEI 358

Tribunal File Number: AD-17-319

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. L.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 21, 2017

DATE OF DECISION: October 13, 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[1] The appeal is allowed, the General Division's decision is rescinded and the Respondent's appeal before the General Division is dismissed.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 March 21, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Appellant had failed to show that subsection 19(2) of the *Employment Insurance Act* (Act) did not apply to the Respondent with regard to the allocation of his earnings.

[3] The Appellant filed an application for leave to appeal to the Appeal Division on April 10, 2017. Leave to appeal was granted on May 1, 2017.

TYPE OF HEARING

[4] The Tribunal decided that the hearing of this appeal would proceed by videoconference and 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 and the need for clarification in the information;
- the fact that the Appellant and other parties are represented; and
- the need to proceed as informally and as quickly as possible while complying with the rules of natural justice

[5] At the hearing, Carole Vary represented the Appellant. The Respondent attended the hearing, accompanied by his representative, Alexis Deschênes.

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 by applying the threshold for allowable earnings set out in subsection 19(2) of the Act without regard for section 77.95 of the *Employment Insurance Regulations* (Regulations).

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

- Pilot Project No. 18, namely section 77.95 of the Regulations, may contravene the Act due the wording used in section 109 of the Act, which begins with the phrase: "Notwithstanding any other provision of this Act";

- This phrase authorizes the Appellant to enact regulations that would contravene the Act, to the extent that the desired goal falls under the terms of the regulatory power "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 with current

industry employment practices, trends or patterns or would improve service to the public";

- A pilot project adopted by the Regulations for a maximum duration of three years may deviate from the Act;

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

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

- The title of section 77.95 of the Regulations describes the aim of Pilot Project No. 18: "Pilot Project to Encourage Claimant to Work More While Receiving Benefits"

- Pursuant to Pilot Project No. 18, only 50% of the earnings are deducted from the first dollar earned. Section 77.95 of the Regulations therefore aims to verify whether this measure will encourage more claimants to work while receiving Employment Insurance benefits;

- The Appellant may validly adopt regulations within the framework of a pilot project in order to determine which deductions to make from the benefits pursuant to subsection 19(2) of the Act;

- The General Division erred in applying the threshold for allowable earnings set out in subsection 19(2) of the Act without regard for section 77.95 of the Regulations, which provides for the deduction of 50% of the amounts.

[9] The Respondent submits the following against the Appellant's appeal:

- The Appellant in no way mentioned Pilot Project No. 18 (sec. 77.95 of the Regulations) and its application to the present case in his written arguments before the General Division;

- The Appellant is attempting to restart the first-level hearing within the framework of the present appeal while it has only itself to blame for not meeting its burden of proof before the General Division;

- The principle that *no one may invoke their own turpitude* must apply here because the Appellant has deprived itself of the opportunity to submit its submissions at the hearing before the General Division on the application of Pilot Project No. 18;

- The General Division rendered its decision according to its interpretation of the facts and of the law in force, and it did not err in concluding that the Appellant had not shown that subsection 19(2) of the Act did not apply to the Respondent;

- At the most, the general principle of *minimus non curat lex* that we do not concern ourselves with trivial litigation tribunals should compel the Appeal Division to refuse the Appellant's application, given the amounts at issue.

- Pilot Project No. 18 is invalid because it conflicts with section 19 of the Act;

- The Pilot Project clearly, and specifically, counters section 19 of the Act by proposing an entirely new and different way to accounting for the insurable earnings.

- It appears that there is a nuisance in this case because it is impossible to apply and the calculation method of section 19 of the Act and that of Pilot Project No. 18;

- The Federal Court has already ruled that [translation] “[i]n case of conflict between the act and one of its statutory regulations, the act must be considered to prevail and the regulations must be subordinate to it.”

- Section 109 of the Act allows for a certain flexibility for the purposes of establishing ad hoc and exploratory pilot projects, but this would not be an authorization to directly contradict a legislative provision adopted by the Parliament of Canada, let alone a new standard applicable to everyone;

- Pilot Project No. 18 is invalid because it does not comply with the enabling clause;

- The enabling clause, namely section 109 of the Act, delineates precisely the regulatory authority regarding the establishment of pilot projects;

- A pilot project must aim to determine what amendments must be made, whether for streamlining practices or for improving services offered to the public;

- Since the Pilot Project No. 18 does not aim to streamline practices, it must aim to improve services offered to the public to comply with the enabling clause;

- The application of the pilot project to the Respondent consequently means that he sees fit to reclaim the amount of $800 by the Appellant, namely, half of each dollar that he earned during the relevant period. On the other side, according to section 19 of the Act adopted by the legislator, the Respondent would not have an amount to reimburse;

- A pilot project that penalizes claimants by reducing their benefits could not aim to improve services offered to the public;

- Pilot Project No. 18 does not comply with the enabling clause;

- Pilot Project No. 18 is invalid because it is imprecise. A regulation must not be tainted by the lack of imprecision.

- The pilot project adds, or adapts by addition, a new calculation method to that already included in subsection 19(2) of the Act;

- Subsection 19(2) of the Act and its content on pay deductions remain in effect, but they are also contradicted by the regulatory addition of subsection 19(2.1) of the Act;

- The two calculation methods are contradictory, each suggesting a different way of proceeding;

- The text of Pilot Project No. 18, such as it is written and read in conjunction with the Act, is insufficiently precise and does not state a sufficiently intelligible standard to be able to base a judicial decision. Pilot Project No. 8 is therefore tainted with imprecision;

- Pilot Project No. 18 is invalid because it affects acquired rights;

- Pilot Project No. 18 removes the Respondent's right to earn, without penalty, earnings of about $125 per week. Thus, this regulation infringes upon a right that the Respondent acquired through the application of section 19 of the Act.

STANDARDS 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 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."

[12] The Federal Court of Appeal further indicated that:

> 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 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.

[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 Respondent filed an initial claim for Employment Insurance benefits beginning on September 7, 2014.

[17] On May 24, 2016, the Appellant notified the Respondent that the amount of $2,900 received from a contract carried out for a school board constituted earnings to allocate to his Employment Insurance benefits. Since his contract covered May 26 to December 12, 2014, the amount of $2,900 was also allocated over the duration of the contract, namely 29 weeks. The amount of $2,900, divided by 29 weeks, gives $100 of net income per week. As a result, the Appellant allocated an amount of $100 per week to the Respondent's Employment Insurance

benefits from September 7 to December 13, 2014. On May 28, 2016, a debt notice of $800 was sent to the Respondent.

[18] On June 20, 2016, the Respondent submitted an application for reconsideration of the Appellant's decision with respect to the income allocation. He disputed the calculation method used in the income allocation. On July 15, 2016, the Appellant upheld the decision upon reconsideration. On August 16, 2016, the Respondent appealed the Appellant's reconsideration decision dated July 15, 2016.

The General Division's Decision

[19] The General Division found that the amounts received by the Respondent were not at issue and that the Respondent did not oppose the application of sections 35 and 36 of the Regulations. After having emphasized that the Act allowed for claimants to receive a specific amount of earnings while receiving benefits without those benefits being affected, the General Division found that the Appellant had not shown that subsection 19(2) of the Act did not apply to the Respondent. It therefore allowed the Respondent's appeal.

Position of the Parties in Appeal

[20] First of all, it is true that the Appellant made no representation before the General Division pertaining to section 77.95 of the Regulations, namely, Pilot Project No. 18. However, the present docket raises an issue of legislative interpretation that the Tribunal must consider.

[21] The Appellant argues that subsection 77.95(3) of the Regulations specifies that section 19 of the Act is adapted by the addition of subsection 2.1, which clearly expresses that the amount to be deducted pursuant to subsection 19(2) of the Act corresponds to 50% of the earnings on the basis of a certain amount.

[22] The Appellant argues that it may validly adopt the regulations within the context of a pilot project in order to determine the deductions to make on the benefits pursuant to subsection 19(2) of the Act.

[23] The Respondent argues that Pilot Project No. 18 is invalid because it is imprecise, enters into conflict with section 19 of the Act and does not comply with the enabling clause. He argues that the pilot project adds, or adapts by addition, a new calculation method from that already included in subsection 19(2) of the Act and that the two calculation methods are contradictory, each suggesting a different way of proceeding.

[24] The Respondent argues that Pilot Project No. 18 penalizes claimants. Pilot Project No. 18 removes the Respondent's acquired right to earn, without penalty, an income of about $125 per week. The application of the pilot project to the Respondent means that he reclaims the amount of $800 by the Appellant, namely half of each dollar that he earned during the relevant period. By contrast, according to section 19 of the Act adopted by the legislator, the Respondent would have had no amount to reimburse.

Did the General Division err in applying the threshold for allowable earnings set out in subsection 19(2) of the Act without regard for section 77.95 of the Regulations?

[25] The Respondent does not dispute having received the amounts at issue and is not opposed to applying sections 35 and 36 of the Regulations. He disputes the Appellant's calculation method, which enables claimants to receive a specific amount of earnings while receiving benefits without those benefits being consequently affected.

[26] Subsection 19(2) of the Act explicitly provides for certain deductions of benefits when the claimant receives earnings. It provides for the following:

> **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.

[27] The application of this provision to the Respondent would have the effect that he would have no reimbursement to make to the Appellant.

[28] However, the legislator provided for, in section 109 of the Act, the possibility for the Appellant to implement pilot projects aiming to determine, after testing, which amendments could be made to the Act or to its Regulations.

[29] However, the provision frames the exercise of this power of the Appellant to establish pilot projects. Yet, the regulations adopted under section 109 of the Act, **which may be contrary to other provisions of the Act**, must allow for consistency with current industry employment practices, trends or patterns or would improve service to the public.

[30] Section 109 of the Act provides for a non-exhaustive list of possible pilot projects by the use of the word "notably"—*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 SCR 1029, 1990 CanLII 92 (SCC). The duration of the application of such a regulation adopted pursuant to section 109 of the Act is, unless repealed, three years.

[31] The Tribunal is of the opinion that section 109 of the Act enabled the Appellant to validly adopt Pilot Project No. 18, more specifically, section 77.95 of the Regulations, in order to provide for deductions pursuant to subsection 19(2) of the Act. Paragraph 54(*e*) of the Act already enabled the Appellant to establish certain regulations concerning the deductions for the earnings that a claimant receives for a job within the context of an employment benefit.

[32] The subtitle of section 77.95 of the Regulations describes otherwise the aim of Pilot Project No. 18: "encourage claimants to work more while receiving benefits." This pilot project therefore aims to verify whether that measure will encourage more claimants to work while receiving Employment Insurance benefits.

[33] Pilot Project No. 18 clearly enables an improvement of the services offered to the public, because it makes it possible to exceed the threshold provided for in subsection 19(2) of the Act, namely 25% of the rate of weekly benefits if it is $200 or more.

[34] The Tribunal has no difficulty in finding that Pilot Project No. 18 aims to improve services offered to the public, because it encourages the claimant to work more while they receive benefits. The Tribunal finds that the Appellant could validly adopt the regulations within the context of a pilot project in order to determine the deductions to make on benefits pursuant to subsection 19(2) of the Act.

[35] The Respondent argues that the Pilot Project No. 18 adds, or adapts through addition, a new calculation method from the one already included in subsection 19(2) of the Act. It argues that subsection 19(2) of the Act and its content on the deductions of earnings remain in effect, but that they are contradictory by the regulatory addition of subsection 19(2.1) of the Act. Both calculation methods would therefore be contradictory since they propose a different way of calculating the deductions.

[36] Section 77.95 of the Regulations, which establishes Pilot Project No. 18, provides for the following in its subsection (3):

> **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 on first glance, the writing of subsection 77.95(3) of the Pilot Project No. 18 does not seem among the cheeriest. The Appellant's use of the words "subsection 19(2) of the Act is adapted by adding," rather than simply saying that "[p]aragraph 19(2) of the Act is

adapted," as the Regulations establishing Pilot Project No. 17 provide, seems to create this unpleasant first impression.

[38] However, a close reading of subsection 77.95(3) shows that subsection 2.1 aims to replace subsection 19(2) of the Act and not to add to it. It clearly specifies that **"[t]he amount to deduct under subsection (2)"** of section 19 of the Act, except for the application of section 13, corresponds to 50% of the earnings, until the earnings exceed 90% of their weekly insurable earnings that has been taken into account to establish his or her rate of weekly benefits.

[39] The Tribunal notes otherwise that subsection 77.96(2) of Pilot Project No. 18 offers the irrevocable choice to the claimant, under certain conditions, to submit themselves to Pilot Project No. 17, but does not however make it possible to submit itself to subsection 19(2) of the Act.

[40] The Tribunal finds that Pilot Project No. 18, as it is written and read in conjunction with the Act, provides proof of a sufficient specification and states a sufficiently intelligible standard to be able to rule on a judicial decision. There is no contradiction between the various legislative provisions.

[41] Finally, the Respondent maintains that Pilot Project No. 18 removes his right to earn, without penalty, an income of around $125 per week. In this way, this regulation would infringe upon a right that he acquired through the application of section 19 of the Act.

[42] Pilot Project No. 18 covers claimants who have submitted an application for benefits over the course of the period from August 5, 2012, to August 1, 2015. The Respondent submitted a claim for Employment Insurance benefits beginning on September 7, 2014. There can be no issue here of acquired right, since the Respondent's legal situation was not established at the moment of the coming into force of Subsection 77.95(3) of the Regulations.

[43] For the above-mentioned reasons, the Tribunal finds that the General Division erred in applying the threshold for allowable earnings set out in subsection 19(2) of the Act without regard for section 77.95 of the Regulations, which provides for the deduction up to 50% of the amounts.

CONCLUSION

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

[45] Section 77.95 of the Regulations has precedence over the threshold of allowable earnings set out in subsection 19(2) of the Act.

Pierre Lafontaine

Member, Appeal Division