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

[TRANSLATION]

Citation: *L. S. v. Canada Employment Insurance Commission,* 2017 SSTADEI 449

Tribunal File Number: AD-17-520

BETWEEN:

L. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: December 19, 2017

DATE OF DECISION: December 29, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed.

INTRODUCTION

[2] On June 28, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) concluded that the Appellant's earnings had been allocated in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[3] On July 18, 2017, the Appellant filed an application for leave to appeal with the Tribunal's Appeal Division after he had received the General Division's decision on July 5, 2017. Leave to appeal was granted on July 25, 2017.

TYPE OF HEARING

[4] The Tribunal determined that the appeal would be heard via teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not a prevailing issue;
- the cost-effectiveness and expediency of the hearing choice; 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 and was represented by Kim Bouchard (counsel). The Respondent was represented by Manon Richardson.

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), 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] Did the Tribunal's General Division err in finding that the Appellant's earnings had been allocated in accordance with sections 35 and 36 of the *Regulations*?

STANDARD OF REVIEW

[8] The Federal Court of Appeal determined that the Appeal Division's mandate is conferred to it by sections 55 to 69 of the DESD Act. The Appeal Division does not exercise the review and superintending powers reserved for higher courts—*Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[9] 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

Position of the parties

[10] The Appellant submits that the General Division completely failed to consider his position in its analysis. He submits that the General Division erred in law because it is required to consider all the evidence and clearly explain why it dismissed certain evidence or why it assigned it little or no probative value.

[11] The Appellant also submits that there is no evidence on file demonstrating that the $15,000 that he received constitutes earnings. He maintains that the General Division's decision is clearly unreasonable.

[12] The Respondent argues that, although the amount the Appellant received is not clearly identified as severance pay in the agreement, it is also not identified as punitive damages as the Appellant claims. Furthermore, the Appellant signed the agreement as is.

[13] The Respondent submits that is settled case law that an amount paid to a claimant due to the loss of employment constitutes earnings within the meaning of subsection 35(2) of the Regulations and must be allocated as of the termination of employment pursuant to subsection 36(9) of the Regulations. Since the Appellant was unable to show that the amount was in fact punitive damages, the General Division was justified in finding that the amount should be allocated pursuant to section 35 of the Regulations.

Facts

[14] The Appellant filed an initial claim for sickness benefits on April 17, 2016. He stopped working for his employer on April 15, 2016, due to illness. He filed a complaint for psychological harassment and received amounts of money after reaching an agreement. He received $5,662.80 for vacation pay, $15,000 for stress and inconvenience related to the harassment complaint and another $15,000 for an unspecified reason. The employer eliminated his position.

[15] The Appellant requested reconsideration on September 20, 2016. He indicated that the $15,000 should not be allocated because it had been paid as damages. He agrees with the allocation of the vacation pay.

[16] The employer was contacted and noted that the $15,000 was a form of severance package and that it had simply not bothered to identify it as such.

[17] On July 8, 2016, the Respondent informed the Appellant that the $20,663 he had received had been allocated from April 17 to June 4, 2016. That decision resulted in an overpayment of $2,685. Following the Appellant's request for reconsideration, the Respondent upheld its October 8, 2016, decision.

General Division decision

[18] The General Division found that without solid evidence to the contrary, it had no choice but to conclude that the amount in question was paid to compensate for the Appellant's loss of employment, and that it was indeed the severance pay mentioned by the employer and in the record of employment.

[19] Even if the General Division found the Appellant credible at the hearing, his version of the facts was not sufficient to counterbalance the employer's version of the facts, the record of employment and the agreement between the parties. In the General Division's view, the Appellant was unable to show that the $15,000 constituted something other than earnings.

[20] After reviewing the evidence and the parties' arguments, the General Division found that the $15,000 in question constituted earnings in accordance with section 35 of the Regulations and that this amount had been properly allocated pursuant section 36 of the Regulations.

Did the General Division err in finding that the Appellant's earnings had been allocated in accordance with sections 35 and 36 of the Regulations?

[21] The General Division's role is to consider the evidence presented to it by both parties, to determine the facts relevant to the particular legal issue before it, and to articulate, in its written decision, its own independent decision with respect thereto.

[22] The General Division must clearly justify the conclusions it renders. When faced with contradictory evidence, it cannot disregard it. It must consider it. If it decides that the

evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious—*Bellefleur v. Canada (Attorney General)*, 2008 FCA 13.

[23] In this case, the General Division overlooked the Appellant's evidence showing that due to "special circumstances," the amount should have been considered something other than compensation for lost wages or other employment benefits.

[24] The General Division also based its decision on an erroneous finding of fact made in a perverse or capricious manner. Indeed, it based its decision on the employer's version of the facts that the amount in question was severance pay. However, the employer did not confirm with the Appellant that it was in fact severance pay. Rather it stated that it did not bother to qualify the amount received by the Appellant.

[25] Furthermore, the General Division seems to have imposed too great a burden of proof on the Appellant, requiring that he show solid evidence that the amount received did not constitute earnings to be allocated.

[26] The Tribunal is therefore justified to intervene and to render the decision that the General Division should have rendered.

[27] Case law is abundant to the effect that if a claimant claims that the amounts received from his employer or former employer were paid out for reasons other than the loss of revenue arising from employment, in the case of a settlement or agreement based upon a lawsuit, a complaint or a claim because of a dismissal, it is up to the claimant to demonstrate that due to "special circumstances" some portion of it should be regarded as compensation for some other expense or loss—*Canada (Attorney General) v. Radigan*, A-567-99; *Bourgeois v. Canada (Attorney General)*, 2004 FCA 117.

[28] In this case, it must be determined whether the Appellant demonstrated that due to "special circumstances" the $15,000 should be regarded as compensation for something other than the loss of wages or other employment benefits.

[29] The General Division found that the evidence does not substantiate the Appellant's argument that the amount was paid as compensation for psychological harassment and punitive damages.

[30] The General Division found that, if the $15,000 in question had been paid as compensation for psychological harassment and punitive damages, it would have been specified in the agreement.

[31] The General Division based its conclusion on the settlement agreement reached between the parties. It is worth quoting an excerpt from the agreement:

> In consideration of the withdrawal of the Complaint and to compensate the Employee's Joss of employment, the Company will pay an amount of $35,662.80 (Jess legal applicable deductions). The amount agreed to is comprised of the following:
>
> i) $15,000 as damages for any stress and inconvenience relating to the allegations comprised in the psychological harassment complaint, without recognition of liability, payable by cheque to the employee;
>
> ii) $15,000, payable by cheque ta the following RRSP account numbers indicated by the Employee in the attached docunent ($9,000 in account # X (Fidelity) and $6,000 in account # X (Fidelity);
>
> iii) An amount of$ 5,662.80 $ (less legal applicable deductions) in owed vacation, corresponding to 6% of Mr. L. S.'s gains, as per his employment contract, will be paid by electronic deposit at the expiry of the current pay period;

[32] It is true that the $15,000 paid to the Appellant, mentioned in paragraph ii), is not qualified as damages in the agreement. That said, as the Respondent noted, this amount is also not identified as severance pay.

[33] The Tribunal is of the opinion that the General Division's interpretation of the agreement is too restricted and limited and does not take into consideration all the circumstances of the file. Other oral and documentary evidence supports the Appellant's opinion that he received the amount as compensation.

[34] The General Division should have looked beyond the terms of the settlement agreement and instead at the authenticity of the facts.

[35] On March 11, 2016, the Appellant filed a complaint for psychological harassment against his employer and not for wrongful dismissal.

[36] The preamble of the agreement specifies that the settlement was reached after the Appellant filed a psychological harassment complaint with the Labour Relations Board.

[37] The agreement also provides that the amount received was paid in exchange for the withdrawal of the complaint and that it should not be considered earnings for the purposes of Employment Insurance.

[38] It is true that the Tribunal is not bound by the parties' interpretation of the Regulations. However, it is another piece of evidence that shows the parties' intention regarding the agreement and that supports the Appellant's claim that the amount received constituted damages and was not meant to compensate for his loss of employment.

[39] The Tribunal also listened attentively to the hearing before the General Division, particularly the Appellant's testimony, which was found credible by the General Division. The Appellant's description of the events leading to the agreement support his position that the amount was paid to him as damages in exchange for the withdrawal of his psychological harassment complaint.

[40] The employer did not provide any evidence demonstrating that the payment was based on past services. The General Division also failed to consider the fact that the Appellant had worked only eight months for this employer. Therefore, we could not expect such a large amount for loss of earnings. Furthermore, during the telephone interview, the employer was not able to clearly qualify the $15,000 received by the Appellant.

[41] The Appellant had the burden of proving before the General Division, on a balance of probabilities, that the settlement amount constituted something other than compensation for the loss of wages or other employment benefits.

[42] Applying the instructions of the Federal Court of Appeal to the facts of this case, the Tribunal finds that the Appellant has met the burden of providing that due to “special circumstances,” the $15,000 should be regarded as compensation for some other expense of loss and not as compensation for the loss of wages or other employment benefits.

[43] Therefore, this amount does not constitute earnings within the meaning of subsection 35(2) of the *Regulations* and should not be allocated.

CONCLUSION

[44] The appeal is allowed.

Pierre Lafontaine
Member, Appeal Division