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

[TRANSLATION]

Citation: *A. L. v. Canada Employment Insurance Commission*, 2018 SST 659

Tribunal File Number: AD-17-642

BETWEEN:

A. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 6, 2018

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, A. L. (Claimant), made two initial claims for Employment Insurance benefits: on September 21, 2014, and September 20, 2015. In two different decisions issued on October 18 and 19, 2016, the Respondent, the Canada Employment Insurance Commission (Commission), disentitled the Claimant from these two periods of benefits after determining that he was not unemployed. The Commission also issued the Claimant a penalty and a notice of violation for each of the benefit periods for knowingly making false or misleading statements. The Claimant requested that the Commission review these decisions, and following its review, the Commission decided to uphold its initial decisions. The Claimant appealed the decisions from these reviews to the General Division of the Social Security Tribunal (Tribunal).

[3] The General Division determined that the Claimant had not worked full weeks, under s. 30 of the *Employment Insurance Regulations* (Regulations), during the weeks when he was operating the company Biodermoil exclusively. These weeks must therefore be considered weeks of unemployment.

[4] However, the General Division found that the Claimant had worked full weeks, under s. 30 of the Regulations, over the weeks when he was self-employed working for the company Uber. These weeks should not have been considered weeks of unemployment. The periods in question are the following: July 26, 2015, to August 29, 2015; and November 22, 2015, to May 14, 2016.

[5] The General Division also found that it was justified to maintain the penalties, though it did reduce the amounts in light of certain factors that the Commission had not considered, and upheld the notice of violation.

[6] The Tribunal granted leave to appeal. The Claimant submits that the General Division erred in fact and in law when it found that he had made a false representation by failing to disclose his self-employment with Biodermoil. He maintains that the evidence accepted by the General Division shows that the company was not active at all during his period of unemployment. He had therefore not made any false representations. He also submits that the General Division overlooked evidence showing that he was on medication that precluded him from driving during the period from November 15 to December 20, 2015. This means that, during this period, he was not able to drive for Uber.

[7] The Tribunal must determine whether the General Division erred by not taking into account the Claimant's availability to work and his efforts to find work.

[8] The Tribunal rejects the Claimant's appeal.

ISSUES

[9] Did the General Division err in law by finding that it was reasonable to maintain the penalty imposed on the Claimant in spite of its own conclusion that the Claimant did not work full weeks for Biodermoil?

[10] Did the General Division ignore the evidence that the Claimant was incapable of driving for Uber from November 15 to December 20, 2015, because he was taking medication?

ANALYSIS

Appeal Division's Mandate

[11] The Federal Court of Appeal has established that the Appeal Division has no mandate but the one conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act* (DESD Act).[1]

[1] *Canada (Attorney General) v. Jean*, 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[12] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division. It does not exercise a superintending power similar to that exercised by a higher court.

[13] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, or 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, the Tribunal must dismiss the appeal.

Issue 1: Did the General Division err in law by finding that it was reasonable to maintain the penalty imposed on the Claimant in spite of its own conclusion that the Claimant did not work full weeks for Biodermoil?

[14] This ground of appeal fails.

[15] The General Division found that the Claimant dedicated little time and energy to Biodermoil while he claimed benefits. It concluded from the evidence that the Claimant's company was focused only on online sales and was not very successful.

[16] The General Division found that the Claimant had shown that the exception found in s. 30(2) of the Regulations applied to him because his operation of his company was of such a limited extent that it did not constitute his primary source of income.

[17] The General Division also had to address the matter of the penalty. To impose a penalty on the Claimant, the General Division had to conclude, on a balance of probabilities, that he knew that he was making false or misleading statements.

[18] The General Division concluded that the Claimant knew or "**ought to have known"** that he was making false statements. In doing so, the General Division seems to have applied an objective test. It therefore erred in law.

[19] That said, the only thing that Parliament requires for a decision-maker to impose a penalty is that the person knowingly—meaning being in full possession of the facts—

made a false or misleading statement. The absence of the intent to defraud is therefore of no relevance.[2]

[20] The Federal Court of Appeal has held that there is a reversal of the burden of proof as soon as a claimant gives a wrong answer to a simple question or to questions on a report card.[3] In this particular case, the question to which the Claimant had to respond was simple: "Did you work or receive any earnings during the period covered by this report?" Then, for this same question, the following clarification was added: "[...] This includes self-employment or employment for which you will be paid later."

[21] Therefore, the onus was on the Claimant to explain his untrue answers; he had to prove that he was unaware that his answers were untrue.

[22] As an explanation, the Claimant submitted before the General Division that he did not consider his activities with his company, Biodermoil, to be a real job and that he invested very little time on a weekly basis.

[23] Before beginning each statement, the Claimant received a warning about false or misleading statements, and he confirmed that he had read and understood the section on his rights and responsibilities. Furthermore, the Claimant confirmed that the answers provided in his statements were correct at the end of each statement that he completed for each week of unemployment.

[24] The Tribunal finds that the evidence clearly shows that the Claimant was involved in the operation of a business, even if this business's success was limited.

[25] During his testimony before the General Division, the Claimant declared that he founded Biodermoil in order to have financial autonomy for himself and for his children. Biodermoil produced cosmetics. He invested a lot of time in the company in 2013 and early 2014, before he claimed Employment Insurance benefits. His products were produced by DCP Dermoscience.

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[2] *Canada (Attorney General) v. Bellil*, 2017 FCA 104.
[3] *Canada (Attorney General) v. Gates*, 1995 CanLII 3601 (FCA); *Canada (Attorney General) v. Purcell*, 1995 CanLII 3558 (FCA).

[26] He received the first deliveries of cosmetics in September 2014. At that time, the delivered products were not sellable because there was a defect (the product was separating). He asked DCP Dermoscience to the remake the product and it did. In November 2014, the bulk of his supply of newly-improved delivered products was stolen. After this theft, he had only a fraction of his supply left.

[27] He asked an entrepreneur to develop a website and a Facebook/Twitter page for him so he could try and sell off his remaining products. With the same goal in mind, his wife and his friends also attended some exhibitions, and he did a little marketing for the company himself (telephone, meetings, word of mouth). In spite of these efforts, very little of his merchandise sold. He stated that his website is still active, but his product sales are minimal (two sales in the past six months). He mentioned that he hopes to relaunch the company one day.

[28] The Tribunal is satisfied that the Claimant acted knowingly when he failed to declare his self-employment. In light of all of the evidence, the Claimant knew that he was making a false declaration by responding “No” to the simple question of whether he was self-employed. His explanation for not declaring his self-employment simply is not reasonable.

[29] This ground of appeal must therefore fail.

[30] **Did the General Division ignore the evidence that the Claimant was incapable of driving for Uber from November 15 to December 20, 2015, because he was taking medication?**

[31] This ground of appeal fails.

[32] The General Division found that the Claimant had worked full weeks, within the meaning of s. 30 of the Regulations, during the weeks when he was self-employed working for Uber. These weeks should not have been considered weeks of unemployment. The periods in question are the following: July 26, 2015, to August 29, 2015; and November 22, 2015, to May 14, 2016.

[33] The Claimant declared to the Commission that the deposits from Uber into his account were not for him, but for someone else. He mentioned that his personal account had been used by other people. When he was sick, he could not drive because of his medication.[4] However, he was sharing the income 50/50 with his replacement.

[34] When the Commission questioned him further about his income from Uber, the Claimant stated that when he was sick, he lent his car to someone he knew and that this person drove for Uber. To show good faith, this person offered to have all of the money collected through this work deposited in the Claimant's account. The Claimant could then withdraw the funds belonging to this friend and give them to the friend in cash. The Claimant did not want to reveal the name of the friend in question.[5]

[35] In his notice of appeal with the General Division, the Claimant stated that while he was sick, he had lent his car to a friend to help him pay for his vehicle because it could have been seized if a payment was not made.[6]

[36] At his hearing before the General Division, the Claimant admitted to driving a vehicle for Uber during the periods in question. However, he clarified that he was sick between November 15, 2015, and December 20, 2015. During this time, one of his friends drove the vehicle and they split the income 50/50. He did not declare the self-employed work for Uber because the service was not legal at the time. He did not want to attract problems to himself.

[37] The General Division found that the Claimant had not been in a position to show that this work had been performed in such a limited manner that it did not constitute his primary source of income, even for the periods when one of the Claimant's friends drove the Uber vehicle, because even if the Claimant was sick from November 15, 2015, to December 20, 2015, he remained entirely responsible for the vehicle, the expenses, and the income resulting from this self-employment.

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[4] GD3-208, GD-215.
[5] GD3-216.
[6] GD2-2.

[38] The General Division also found that the Claimant had acted knowingly when he failed to declare his self-employment for Uber. In light of all of the evidence, the Claimant knew that he was making a false statement by responding "No" to the simple question of whether he was self-employed. The fact that the Claimant considered the Uber service to be illegal at the time does not show that he did not know that his responses were inaccurate.

[39] This ground of appeal fails.

CONCLUSION

[40] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	May 15, 2018
METHOD OF PROCEEDING:	Teleconference
PERSONS IN ATTENDANCE:	A. L., Appellant Manon Richardson, Respondent's representative