



Social Security
Tribunal of Canada
[TRANSLATION]

Tribunal de la sécurité
sociale du Canada

Citation: *R. B. v. Canada Employment Insurance Commission*, 2018 SST 754

Tribunal File Number: AD-17-933

BETWEEN:

R. B,

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: July 20, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Applicant, R. B. (Claimant), worked several periods of employment for X—a company for which he was a 33% shareholder until February 28, 2014—and Employment Insurance benefits were paid to him. The Respondent, the Canada Employment Insurance Commission (Commission), then informed the Claimant that it had cancelled his requests for benefits beginning November 9, 2014, because he was using a cellular telephone that was paid for by the company, which means that the Claimant did not experience an interruption of earnings that would make him eligible to receive Employment Insurance benefits. The Claimant requested reconsideration of this decision. The Commission advised the Claimant that it was upholding its initial decision. The Applicant appealed the decision to the Tribunal's General Division.

[3] The General Division determined that there had been no interruption of earnings because the Claimant continued to benefit from earnings from his employment because he could continue to benefit from a cellular telephone left at his disposal after his dismissal. The General Division found that the Claimant had not shown that he had experienced an interruption of earnings because he did not meet all of the conditions set out in s. 14(1) of the *Employment Insurance Regulations* (Regulations).

[4] The Tribunal granted leave to appeal. The Claimant submits that the General Division committed an error of law in its interpretation of s. 35(10)(d) of the Regulations and by finding that the Claimant had not experienced an interruption of earnings.

[5] The Tribunal must determine whether the General Division committed an error of law in its interpretation of s. 35(10)(d) of the Regulations, specifically by finding that there was no interruption of earnings because the Claimant could make personal use of a cellular telephone left at his disposal after his dismissal.

[6] The Tribunal dismisses the Claimant's appeal.

ISSUE

[7] Did the General Division err in law in its interpretation of s. 35(10)(d) of the Regulations, specifically by finding that there was no interruption of earnings because the Claimant could make personal use of a cellular telephone left at his disposal after his dismissal?

ANALYSIS

Appeal Division's Mandate

[8] 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

[9] 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.

[10] 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.

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

Issue 1: Did the General Division err in law in its interpretation of s. 35(10)(d) of the Regulations, specifically by finding that there was no interruption of earnings because the Claimant could make personal use of a cellular telephone left at his disposal after his dismissal?

[11] The Claimant's appeal is dismissed.

[12] The Claimant submits that, in keeping with the General Division's findings of facts, the use of his cellular telephone was not related to his employment, because he had been dismissed and was not working. There was therefore an interruption of earnings.

[13] The Claimant argues that the General Division erred in law by finding that he had not experienced an interruption of earnings under s. 14(1) of the Regulations and that he therefore did not meet the requirements to establish a claim for benefits, as presented in s. 7 of the *Employment Insurance Act* (Act).

[14] Specifically, he argues that the General Division erred by finding that the Claimant had continued to receive earnings from his employer within the meaning of s. 35(10)(d) through his personal use of the company cellular telephone.

[15] Subsection 14(1) of the Regulations states:

(1) Subject to subsections (2) to (7), an interruption of earnings occurs where, following a period of employment with an employer, an insured person is laid off or separated from that employment and has a period of seven or more consecutive days during which no work is performed for that employer and in respect of which no earnings that arise from that employment, other than earnings described in subsection 36(13), are payable or allocated.

[16] Subsections (2) and (10) of s. 35 of the Regulations explain as follows:

(2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into

account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including,

[...]

(10) For the purposes of subsection (2), “income” includes

[...]

d) in the case of any claimant, the value of board, living quarters and other benefits received by the claimant from or on behalf of the claimant’s employer in respect of the claimant’s employment.

[17] As the General Division noted, the three distinct conditions set out in s. 14(1) of the Regulations are cumulative and must all be satisfied for an interruption of earnings to have occurred under the meaning of this paragraph: the claimant must have been laid off or separated from that employment; the claimant must have had a period of seven or more consecutive days during which no work is performed for that employer; and no earnings from that employment must be payable or allocated to that claimant.²

[18] The General Division determined that the Claimant had been laid off by his employer, X, or separated from his employment with this employer as of November 1, 2014. It also found that the Claimant had not worked for the employer, X, for a period of at least seven consecutive days following the end of his employment.

[19] The General Division also found to be truthful the Claimant’s testimony that he had made or received no calls related to work on the company cellular telephone at his disposal during the period following his dismissal and during which he did not work and that he had not made or received any personal calls.

[20] The General Division found that even if the Claimant had not used the cellular telephone at his disposal for professional reasons after his dismissal, it still constituted earnings from his employer under ss. 35(2) and 35(10)(d) of the Regulations.

² Perry, 2006 FCA 258; Enns, A-559-89.

[21] Because he had not experienced an interruption of earnings, the General Division found that the Claimant did not meet all of the conditions to be eligible for Employment Insurance benefits under ss. 7, 48, and 49 of the Act and s. 14(1) of the Regulations.

[22] Did the General Division err by finding that there was no interruption of earnings because the Claimant could continue to make personal use of a cellular telephone left at his disposal after his dismissal?

[23] The Tribunal does not believe so.

[24] The evidence before the General Division shows that the Claimant has had a cellular telephone that the company pays for since at least 2009. He works for the company as a salesperson. He uses the telephone for both work-related and personal reasons.

[25] The Tribunal notes that the evidence before the General Division shows that the use of the telephone is connected or related to the Claimant's work. At the very least, there is a certain connection between the Claimant's employment and the benefit he receives, even if the Claimant does not use it for personal reasons after his dismissal.

[26] The Tribunal also notes that the Claimant was a 33% shareholder from 1999 until 2014, when he decided to sell his shares to focus on his role as a salesperson. He decided to start this company to be his own boss. The company was open full-time in the high season and on a reduced schedule in the winter. Since 2009, the Claimant has not worked outside of the company.

[27] The Tribunal is also of the view that the use of a cellular telephone does represent a cost, even if the amount is not substantial. The Tribunal finds that for an interruption of earnings to occur, the employee must not benefit from advantages of daily value to that employee.

[28] The employer's decision, for economic reasons, to not suspend cellular telephone service after the Claimant's dismissal does not change the fact that this Claimant still has access to a telephone paid for by the company during the entire year.

[29] The Tribunal finds that the General Division did not err in law in its interpretation of s. 35(10)(d) of the Regulations, particularly by finding that no interruption of earnings occurred because the Claimant could benefit from the personal use of a cellular telephone left at his disposal after his dismissal by the employer.

CONCLUSION

[30] The Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

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| HEARD ON: | July 12, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| PERSONS IN ATTENDANCE: | R. B., Appellant Jean-Guy Ouellet, from OULLET, NADON; Appellant's representative Manon Richardson, Respondent's representative |