



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *V. A. v. Canada Employment Insurance Commission*, 2018 SST 783

Tribunal File Number: AD-18-8

BETWEEN:

V. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 2, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, V. A. (Claimant), made an initial application for Employment Insurance benefits. On reviewing the application, the Respondent, the Canada Employment Insurance Commission (Commission), proceeded to allocate vacation pay, severance pay, and a retirement allowance over the Claimant's Employment Insurance benefits. This resulted in an overpayment of \$18,625.00. The Claimant sought reconsideration of the Commission's decision, but the Commission maintained its decision. The Claimant appealed the decision to the General Division.

[3] The General Division found that the Commission was able to reconsider the Claimant's application within 72 months on the grounds that it reasonably found that the Claimant had made a false or misleading statement. Furthermore, the General Division found that the amounts received by the Claimant constituted earnings that were allocated by the Commission according to the regulatory requirements.

[4] The Tribunal granted leave to appeal. The Claimant argues that the General Division failed to exercise its jurisdiction by refusing to analyze the Commission's conduct during its investigation.

[5] The Tribunal must determine whether the General Division failed to exercise its jurisdiction by refusing to analyze the Commission's conduct during its investigation under s. 52(5) of the *Employment Insurance Act* (EI Act), whether it erred by not applying the doctrine of laches or the acquiescence defence, and whether it erred by failing to find that there had been a breach of natural justice because of the delay in the Commission's investigation.

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

ISSUES

Issue 1: Did the General Division fail to exercise its jurisdiction by refusing to analyze the Commission's conduct during its investigation under s. 52(5) of the EI Act?

Issue 2: Did the General Division err by failing to apply the doctrine of laches or the acquiescence defence and by refusing to impose an estoppel on the Commission's claim?

Issue 3: Did the General Division err by failing to find that there had been a breach of natural justice because of the delay to the Commission's investigation?

ANALYSIS

The Appeal Division's mandate

[7] The Federal Court of Appeal has determined that the mandate of the Appeal Division is conferred to it by ss. 55 to 69 of the *Department of Employment and Social Development Act*.¹

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

[9] 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.

PRELIMINARY PROVISIONS

[10] During the hearing, the Claimant informed the Tribunal that she was not disputing the allocation of earnings that the Commission carried out, although she points to calculation errors since the beginning of the proceedings to demonstrate the Commission's wrongful conduct in her case.

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

[11] The Claimant also informed the Tribunal that she was not disputing the Commission's application of s. 52(5) of the EI Act, which enabled it to reconsider the Claimant's application within 72 months if it found that the Claimant had made a false or misleading statement.

Issue 1: Did the General Division fail to exercise its jurisdiction by refusing to analyze the Commission's conduct during its investigation under s. 52(5) of the EI Act?

[12] The Claimant alleges that the General Division did not consider the Commission's conduct during its investigation. She argues that the Commission's wrongful conduct during the investigation caused unreasonable, unacceptable delays.

[13] The Claimant worked for X until she stopped on September 13, 2011. There is no mention of the amounts paid to the Claimant on separation on the Claimant's Record of Employment dated September 22, 2011.

[14] The Claimant received Employment Insurance benefits from September 18, 2011, to July 14, 2012, which is a total of 41 weeks of regular benefits.

[15] On March 21, 2014, after the Commission received information from the Canada Revenue Agency about an application for a business number, the Commission asked the Claimant to provide her tax returns for 2011 and 2012. The Claimant sent them to the Commission in April 2014.

[16] On May 8, 2014, the Commission sent the Claimant a request for additional information concerning the \$140,443.98 and \$11,267.58 that appeared on her 2011 and 2012 tax returns under "other income."

[17] On June 12, 2014, the Claimant completed and signed a [translation] "Other Amounts of Money Questionnaire" from the Commission. In response to the question about which employer paid the other sum, the Claimant replied simply that she had not had an employer since her departure from X. To the question, [translation] "Was this

money paid to you because you stopped working for your employer?” she responded “N/A.”

[18] On November 5, 2015, an email was sent to the Claimant’s attorney informing them that the investigation file was closed and that the case had been transferred for a decision. The attorney was informed that the Claimant would receive a letter about an overpayment of about \$760.00. The Claimant did not receive a written decision to that effect.

[19] On November 30, 2016, the Commission contacted the employer for information about the amounts paid after the separation. The Commission determined that the amounts the Claimant received in the first payment on October 12, 2011—\$11,383.33 as vacation pay, \$127,280.00 as severance pay, and \$11,600.00 as a retirement allowance—constituted earnings under s. 35(2) of the *Employment Insurance Regulations* (Regulations) and that amounts paid by an employer by reason of a lay-off or separation should be allocated under ss. 36(9) and 36(10) of the Regulations.

[20] After receiving new information, the Commission informed the Claimant on December 29, 2016, that it had reconsidered the Claimant’s application for benefits, starting on September 18, 2011.

[21] On January 14, 2017, a notice of debt for \$18,625.00 was sent to the Claimant since she had not declared her income properly, resulting in an overpayment. The overpayment corresponds all of the Employment Insurance benefits paid to the Claimant from September 18, 2011, to July 14, 2012.

[22] As the General Division determined, the evidence is clear that the Commission could reasonably have found that a misrepresentation had been made in relation to the Claimant’s claim for benefits and that it was justified in reconsidering the claim within 72 months under s. 52(5) of the EI Act.

[23] On reading the General Division's decision, the Tribunal notes that, contrary to the Claimant's statements, the General Division did consider the Commission's conduct and the Claimant's argument about the investigation's unreasonable delays.

[24] The General Division acknowledged that the delay in proceeding to the reconsideration of the Claimant's claim was rather long. However, it found that the investigation initially triggered in connection with the Claimant's self-employment was extended after the subsequent discovery of undeclared sums revealed through the disclosure of the Claimant's 2011 and 2012 tax returns.

[25] The General Division also considered the fact that, after disclosing her tax returns, the Claimant did not declare that she had received an amount of money in connection with her separation from her employment in the [translation] "other amounts questionnaire" sent by the Commission, which also contributed to the length of the investigation. The General Division considered that it was therefore reasonable to expect that the investigation could be extended in this context.

[26] The General Division also found that the EI Act did not impose any particular time frame on the Commission for conducting or completing an investigation other than the requirement that the investigation be completed within the time frame stipulated by the EI Act.

[27] The Tribunal is therefore of the view that the General Division did not refuse to exercise its jurisdiction. The General Division effectively decided the issue raised by the Claimant, and the Appeal Division has no jurisdiction to retry the case.

[28] The Tribunal is also of the view that the General Division did not err in law in finding that the Commission had the right to allocate the amounts paid by the employer by reason of the Claimant's lay-off or separation from an employment, under s. 52(5) of the EI Act, as long as the reconsideration and amendment were completed within the six-year time frame stipulated in s. 52(5) of the EI Act.

[29] The Claimant argues that the November 5, 2015, email from the Commission concluded the investigation initiated by the Commission. She maintains that the November 5, 2015, decision bound the Commission for the entire investigation in relation to her self-employment and the other sums she received from the employer.

[30] The Tribunal cannot agree with this argument.

[31] The case law clearly states that, at any moment, meaning as often as the Commission likes, the Commission can revisit its decision about any claims for benefits, whether payments have been made or not, if it determines that a person has received money by way of benefits for which the person was not qualified or to which the person was not entitled, or has not received money for which the person was qualified and to which the person was entitled, subject obviously to the limits stipulated by the EI Act of 36 months or 72 months.²

[32] Even if the Tribunal should consider the Commission's investigation on the Claimant's self-employment closed in November 2015, the Commission could, after receiving information obtained from the employer in November 2016, reconsider the Claimant's claim for benefits under s. 52(5) of the EI Act because it was still within the 72-month time frame.

Issue 2: Did the General Division err by failing to apply the doctrine of laches or the acquiescence defence and by refusing to impose an estoppel on the Commission's claim?

[33] The Claimant argues that applying the doctrine of laches or the acquiescence defence and imposing an estoppel on the Commission's claim was warranted because the Commission was wrong in exercising its rights, which caused unreasonable delays in the investigation and harm to the Claimant.³

² CUB 11526, CUB 5664.

³ Julie McCann, *Prescriptions extinctives et fins de non-recevoir*, (Montreal: Wilson & Lafleur, 2011).

[34] The EI Act clearly stipulates that the Commission's recourse must be exercised within 36 or 72 months, depending on the circumstances. In this case, the Commission acted within the time frame stipulated by the EI Act.

[35] Furthermore, the Federal Court of Appeal has already established that the common law principles of fairness do not apply to the EI Act and its regulations.⁴ The Commission had to apply the EI Act because it does not grant the Commission any discretion when a Claimant has received a sum by way of benefits to which the person was not entitled.

[36] The Tribunal is also bound by the EI Act. It cannot refuse to apply it, not even for considerations of fairness.

[37] Furthermore, the Tribunal is of the view that the evidence before the General Division does not show that the Commission acted in such a way as to lead the Claimant believe, through clear actions and unequivocal words, that it would not take action against her following the information received from the employer.

[38] Finally, the Tribunal is of the view that the Claimant did not meet her burden before the General Division, which consisted of showing that she had experienced harmful effects or significant prejudice because of the Commission's investigation delays.

[39] Imposing an estoppel on the Commission's claim based on the doctrine of laches or the acquiescence defence was therefore not warranted.

Issue 3: Did the General Division err by failing to find that natural justice had been breached because of the delay to Commission's investigation?

[40] The Claimant argues that natural justice was breached because of the Commission's investigation delays. She bases her request for remedy on the applicable principles of administrative law.

⁴ Granger, A-684-85 (ruling confirmed by the Supreme Court of Canada, decision 19959); Canada (Attorney General) v. Hamm, 2011 FCA 205.

[41] As stated previously, the Commission concluded its investigation within the 72-month time frame stipulated by the EI Act. The Tribunal does not have the power to change the EI Act.

[42] The principle of natural justice refers to the fundamental rules of procedure exercised by persons and tribunals with judicial or quasi-judicial jurisdiction. The principle exists to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum receives adequate notice to appear and every reasonable opportunity to present their case and that the decision given is free of bias or the reasonable apprehension or appearance of bias.

[43] The Claimant received the reconsideration decision from the Commission on March 14, 2017. She filed her appeal before the General Division on April 5, 2017. A notice of hearing was sent to the Claimant on September 5, 2017. The General Division heard the case on October 31, 2017, and rendered its decision on November 29, 2017. A total of about seven months elapsed between the filing of the appeal and the hearing of the appeal before the General Division.

[44] The Federal Court of Appeal has stated that a delay, without more, will not constitute an abuse of process that warrants a stay of proceedings. To justify a stay in the administrative law context, the Court says proof that significant prejudice has resulted from an unacceptable delay is required.⁵

[45] A breach of natural justice and of the duty of fairness may occur when the delay impairs a party's ability to answer the complaints against them because, for example, memories have faded, essential witnesses have died, or evidence has been lost. In short, the undue delay must impair the fairness of the hearing.

[46] An unacceptable delay may constitute an abuse of process in certain circumstances, even if the fairness of the hearing has not been impaired. Therefore, to amount to an abuse of process in cases where the fairness of the hearing has not been

⁵ *Canada (Attorney General) v. Norman*, 2002 FCA 423; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307.

impaired, the delay must be clearly unacceptable and have directly caused significant prejudice. In addition to its long duration, the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected.

[47] The Tribunal finds that the delay in the proceedings did not interfere with the Claimant's ability to answer the complaints against her, notably because she does not dispute having received the sums from the employer or the allocation of earnings carried out by the Commission.

[48] The Tribunal finds that the Claimant did not meet her burden before the General Division, which consisted of showing that the delay in the proceedings was unacceptable and that she had experienced significant prejudice of such magnitude that the public's sense of decency and fairness is affected.

[49] There is nothing to support ordering a remedy based on the applicable principles of administrative law.

CONCLUSION

[50] For the reasons set out above, the Tribunal dismisses the appeal.

Pierre Lafontaine
Member, Appeal Division

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| HEARD ON: | July 25, 2018 |
| METHOD OF PROCEEDING: | Teleconference |
| APPEARANCES: | V. A., Appellant Christian Dubé-Rousseau, Attorney for the Appellant |