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

Citation: *K. S. v Canada Employment Insurance Commission*, 2019 SST 528

Tribunal File Number: AD-19-78

BETWEEN:

K. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 3, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Tribunal dismisses the appeal.

OVERVIEW

[2] The Appellant, K. S. (Claimant), worked seasonally on a boat catching fish and was paid commission based on the amount of fish that he caught. He applied annually for employment insurance benefits in the off-season. As a result of an investigation, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was collecting benefits during periods in which he was not unemployed. The Claimant requested a reconsideration and the Commission maintained its initial decision. He appealed to the General Division of the Tribunal.

[3] The General Division found that the Commission properly extended the period to reconsider the Claimant's claim for benefits to within 72 months, and that it could reconsider the disputed claims. It found that the Claimant had not proven that he was unemployed and that he was therefore disentitled from receiving employment insurance benefits during these periods. The General Division concluded that it did not have jurisdiction to reconsider the Claimant's obligation to repay the overpayment.

[4] The Appeal Division granted leave to appeal. The Claimant puts forward that the issue was not when he was paid but when he was actually working. He argues that this as impacted the decision of the Commission to review the claims under section 52 of the *Employment Insurance Act* (EI Act). He also submits that the General Division erred in law by not considering him as a fisher under the EI Act. He finally submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner.

[5] The Tribunal must decide whether the General Division erred in law and whether it based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner.

[6] The Tribunal dismisses the appeal.

ISSUES

Issue no 1: Did the General Division err when it concluded that the Commission could review the claims under section 52 of the EI Act?

Issue no 2: Did the General Division err in law when it concluded that he was not a fisher under the EI Act?

Issue no 3: Did the General Division err when it concluded that the Claimant had worked full working weeks while employed as a fisherman during the periods from March 13, 2012 to May 18, 2012, March 7, 2013 to November 16, 2013, May 27, 2015 to December 5, 2015, and March 7, 2016 to December 7, 2016?

ANALYSIS

Appeal Division's mandate

[7] The Federal Court of Appeal has determined that when the Appeal Division 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.[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.[2]

[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 made in a perverse or capricious manner or without regard for the material before it, the Tribunal must dismiss the appeal.

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

Issue no 1: Did the General Division err when it concluded that the Commission could review the claims under section 52(5) of the EI Act?

[10] The Federal Court of Appeal has established that, in order for the Commission to extend the period in which it can reconsider a claim under section 52(5) of the EI Act, the Commission does not have to establish that the Claimant did in fact make false or misleading statements; rather, the Commission must show only that it could reasonably consider that a false or misleading statement was made in connection with a benefit claim.[3]

[11] As stated by the General Division, the Commission had records of employment from the employer showing that the Claimant was employed as a commercial fisherman in the periods of March 13, 2012 to December 30, 2012, and March 27, 2015 to December 5, 2015. The employer confirmed to the Commission that dating back to 2011, the Claimant's employment history had been the same, that he was re-hired on a full-time basis and was paid commission as a commercial fisherman.

[12] In applying the teachings of the Federal Court of Appeal to this case, the General Division did not err when it concluded, on the basis of the evidence, that the Commission could reasonably find that the Claimant had made a false or misleading statement or representation and therefore could be granted a period of 72 months to reconsider the Claimant's benefit claims.

[13] This ground of appeal is therefore without merits.

Issue no 2: Did the General Division err when it concluded that he was not a fisher under the EI Act?

[14] The General Division found that the Claimant could not be considered a fisher as defined in section 153(1) of the EI Act. This section requires that the fisher be self-employed in fishing. This therefore excludes a claimant who has an employer-employee relationship and who receives compensation for the service he provides to the employer.

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[3] *Langelier*, A-140-01, *Lemay*, A-172-01, *Dussault*, A-646-02.

[15] The Canada Revenue Agency (CRA) ruled that the Claimant was an employee and that is employment was insurable under paragraph 5(1) (a) of the EI Act. The Claimant did not appeal that decision and it is therefore binding.

[16] Accordingly, because the Claimant was not self-employed in fishing, the General Division correctly concluded that the Claimant was not a fisher according to section 153(1) of the EI Act.

[17] This ground of appeal is therefore without merits.

Issue no 3: Did the General Division err when it concluded that the Claimant had worked full working weeks while employed as a fisherman during the periods from March 13, 2012 to May 18, 2012, March 7, 2013 to November 16, 2013, May 27, 2015 to December 5, 2015, and March 7, 2016 to December 7, 2016?

[18] The Claimant puts forward that the Commission assumes he was working full weeks. He argues that his work as a fisherman entails that he works sporadically and that he goes through non-working periods. The Claimant argues that even if the employer states that he had to remain available, that does not mean that he was working.

[19] Employment Insurance benefits are payable for a week of unemployment to claimants who qualify to receive them. Section 11 of the EI Act defines a week of unemployment as a week in which the claimant does not work a full working week.

[20] In an initial interview with an investigator with Service Canada conducted on August 25, 2017, the employer stated that the Claimant was hired in March 2017, on a full time basis as a commercial fisherman. The employer further stated that the Claimant was employed under the same conditions since 2011, more precisely, straight commission based on catch and working full work weeks regardless of catch, weather conditions or other factors. The employer also stated that the Claimant was expected to be available all day regardless of weather as if it cleared, they would go out.[4]

[4] GD3-206.

[21] In an initial interview conducted on September 27, 2017, the Claimant agreed with the employer that he had to be ready for work each day regardless of the weather as this could change and the boats may still go out.[5]

[22] The record of employments issued by the employer demonstrate that the Claimant was going back to full time work once the season commenced.[6]

[23] The CRA ruled that the Claimant was an employee from March 13, 2012 to December 30, 2012; March 07, 2013 to November 16, 2013; August 04, 2014 to December 21, 2014; March 27, 2015 to December 05, 2015; March 07, 2016 to December 09, 2016 and March 20, 2017 to December 21, 2017, and that is employment was insurable under paragraph 5(1) (a) of the EI Act. The Claimant did not appeal the CRA decision although the Commission advised him of that possibility.[7]

[24] The Claimant acknowledged that he was working for the employer for 25 years and that he never sought alternate employment either during the layoffs or during the season.[8]

[25] The Claimant and the employer did not file any records of the Claimant's working time to support his position that he was unemployed during all the relevant periods.

[26] The General Division concluded, based on the preponderant evidence before it that the Claimant did not prove that he was unemployed and that he should be disentitled from receiving employment insurance benefits during the relevant periods.

[27] The Tribunal finds that, in light of the evidence before it, the General Division could simply not arrive at a different conclusion from the one at which it did arrive.

[28] This ground of appeal is therefore without merits.

CONCLUSION

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[5] GD3-209.
[6] GD3-102, GD3-138.
[7] GD3-232.
[8] GD3-209.

[29] For the reasons above-mentioned, the Tribunal dismisses the appeal.

Pierre Lafontaine

Member, Appeal Division

HEARD ON:	May 22, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	K. S., Appellant David R. Nash, representative of the Appellant