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

[TRANSLATION]

Citation: *V. B. v Canada Employment Insurance Commission*, 2019 SST 707

Tribunal File Number: AD-19-322

BETWEEN:

V. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 9, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal in file AD-18-522 in part but dismisses the appeal in file AD-19-322.

OVERVIEW

[2] The Appellant, V. B. (Claimant), worked as a truck driver for the employer until May 4, 2012. On April 19, 2017, the employer issued a Record of Employment indicating that the Claimant had received $69,144 as a court-ordered settlement. The Respondent, the Canada Employment Insurance Commission (Commission), informed the Claimant that the amount received as lost wages and vacation pay was considered earnings and would be deducted from his benefits from August 19, 2012, to April 27, 2013.

[3] The allocation of the amounts generated an overpayment of $11,522. The Claimant requested a reconsideration of that decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[4] The General Division determined that the money the Claimant received constituted earnings under section 35 of the *Employment Insurance Regulations* (EI Regulations) and that those earnings should be allocated according to section 36(9) of the EI Regulations.

[5] The Tribunal granted leave to appeal. The Claimant argues that the General Division did not take into account his argument considering the application of section 46.01 of the *Employment Insurance Act* (EI Act). He also argues that the General Division erred by considering the sum received to be earnings within the meaning of the EI Regulations since the sum was paid in exchange for the relinquishment of his right to reinstatement. Finally, he argues that the General Division committed a breach of natural justice when it allowed the Commission to make an additional argument, after the hearing, without allowing him to reply.

[6] On February 14, 2019, when the hearing of his appeal had been put on hold, the Claimant submitted to the General Division an application to rescind or amend the General Division's decision under section 66 of the *Department of Employment and Social Development Act* (DESD Act). The application was refused on April 12, 2019.

[7] This decision concerns file AD-18-322, that is, the appeal of the General Division's decision, and file AD-19-522, that is, the appeal of the refusal of the application to rescind or amend the General Division's decision.

[8] The Tribunal allows the Claimant's appeal in part.

ISSUES

[9] Did the General Division err by refusing the Claimant's application to rescind or amend presented under section 66 of the DESD Act?

[10] Did the General Division err by finding that the amount paid to the Claimant had not been paid in exchange for the relinquishment of his right to reinstatement?

[11] Did the General Division refuse to exercise its jurisdiction by failing to consider the Claimant's argument concerning the application of section 46.01 of the EI Act?

[12] Did the General Division commit a breach of natural justice when it allowed the Commission to make an additional argument, after the hearing, without allowing the Claimant to reply?

ANALYSIS

Appeal Division's Mandate

[13] The Federal Court of Appeal has determined that the Appeal Division's mandate is limited to the one conferred to it by sections 55 to 69 of the DESD Act.[1]

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

[14] 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.

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

PRELIMINARY MATTERS

[16] The Tribunal proceeded with the hearing of files AD-18-522 and AD-19-322 in the Commission's absence since the Tribunal was satisfied that it had been informed of the hearing, according to section 12 of the S*ocial Security Tribunal Regulations*.

Issue 1: Did the General Division err by refusing the Claimant's application to rescind or amend presented under section 66 of the DESD Act?

[17] The Tribunal is of the opinion that this ground of appeal is without merit.

[18] The Claimant argues that the General Division erred in law in its interpretation of section 66 of the DESD Act. He argues that it based its decision to refuse the application to rescind or amend solely on the basis that he did not present new facts. He argues that section 66 of the DESD Act also allows the General Division to rescind or amend its decision if it is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.

[19] Section 66 of the DESD Act states the following:

> Amendment of decision
>
> 66 (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> a) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is

> satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or
>
> b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[20] The above provision essentially reproduces the terms of the now-repealed section 120 of the EI Act, which read as follows:

> Amendment of decision
>
> 120 The Commission, a board of referees or the umpire may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[21] The test for determining whether "new facts" exist within the meaning of this provision has long been established. The Federal Court of Appeal, referring to the provision before section 120, whose terms are essentially the same, stated the following:[2]

> […] "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue put to the umpire.

[22] The General Division correctly determined that the documents the Claimant presented, as well as the reasons he gave in support of his application to rescind or amend the General Division's decision, were not "new facts" based on the criteria in *Chan*.

[23] It is true that the General Division seems to have incorrectly applied section 66(1)(b) of the DESD Act by finding that it did not have to determine whether the facts presented were material, given its finding that the facts were not new. In the case of a decision relating to the EI Act, section 66(1)(a) provides that the Tribunal may rescind or amend a decision given by it if new facts are presented to the Tribunal **or** if the

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[2] *Canada v Chan*, (1994) FCJ No. 1916 (CA); *Canada v Hines*, 2011 FCA 252.

Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact.[3]

[24] However, the Tribunal is of the view that the Claimant has not shown that the General Division's decision was made without knowledge of, or was based on a mistake as to, some material fact. As the General Division noted, the documents and the reasons the Claimant gave in support of his application to rescind or amend simply repeat facts that he had already presented to the General Division before it made its decision or that are irrelevant to deciding the question of earnings allocation under the terms of the EI Act.

[25] It is good to remember that section 66 of the DESD Act is not intended to enable a claimant to reargue their appeal before the General Division when a decision has already been given.

[26] This ground of appeal is dismissed.

Issue 2: Did the General Division err by finding that the amount paid to the Claimant had not been paid in exchange for the relinquishment of his right to reinstatement?

[27] The Tribunal is of the opinion that this ground of appeal is without merit.

[28] The Claimant argues that the amount he received was paid for the relinquishment of his right to reinstatement and that it does not constitute earnings under section 35 of the EI Regulations, so it should not be allocated under section 36 of the EI Regulations. He argues that the reinstatement was ordered by the Administrative Labour Tribunal (ALT) and not proposed by the employer, which refused to comply with the ALT's order.

[29] Determining whether settlement amounts constitute earnings should include consideration of fundamental principles. First, section 35(2) of the EI Regulations states that the earnings to be taken into account when determining whether there has been an

[3] *Green v Canada (Attorney General)*, 2012 FCA 313; *Badra v Canada (Attorney General)*, 2002 FCA 140.

interruption of earnings include "the entire income of a claimant arising out of any employment."

[30] A sum received in exchange for the relinquishment of the right to reinstatement is not considered earnings and is not allocated. However, three conditions must be met, namely, the right to reinstatement exists, reinstatement has been sought, and the amount is paid to compensate for the relinquishment of that right.[4]

[31] The Claimant argues that the evidence before the General Division clearly shows that he received the sum in exchange for the relinquishment of the right to reinstatement.

[32] The Claimant is relying on numerous proceedings he initiated in which he asked to be reinstated and on the October 2, 2014, ALT decision, which ordered his reinstatement—an order with which, in his opinion, his employer did not comply. He noted that the employer instead wrote him a letter informing him of his reinstatement but also of his immediate lay-off because of a lack of work for him.

[33] Following the October 2, 2014, ALT decision, the Claimant presented a request for quantum, in which he asked the ALT to order the employer to pay him compensation equivalent to the salary of which he was deprived from April 26, 2012, to June 14, 2016. Furthermore, given the difficulty of reinstating him to his employment since the October 2, 2014, order, he asked the ALT to amend it and grant him $42,432 for loss of employment.

[34] In its August 12, 2016, decision, the ALT found that, following the receipt of the employer's letter, the Claimant had not made other efforts to be reinstated to his employment. Additionally, the ALT found that the driver who replaced the Claimant was laid off on May 16, 2014, and that the Claimant would have had the same fate. The ALT found that the lay-off of the replacement was not a means used by the employer to avoid reinstating the Claimant. The ALT granted the Claimant the sum of $69,144.980 for loss of income for the period from August 20, 2012, to May 16, 2014, and the interest

[4] *Canada (Attorney General) v Warren*, 2012 FCA 74.

incurred on that sum as of August 12, 2016. However, it refused to grant the Claimant compensation for loss of employment.

[35] The parties, dissatisfied with the ALT's decision on the quantum request, each filed a request for reconsideration. The hearing was then set for April 7, 2017. The day of the hearing, the parties reached an agreement, which provided the full payment to the Claimant of $69,144.80 (minus source deductions, that is, 35% in taxes) [translation] "in full and final payment of the decision given by Administrative Judge Pierre Cloutier, dated August 12, 2016."

[36] It is clear to the Tribunal that the amount the Claimant received was not paid to compensate him for relinquishing his right to reinstatement.

[37] The agreement reached between the parties specifically references the payment for the August 12, 2016, ALT decision, which provided the sum of $69,144.80 for lost income from August 20, 2012, to May 16, 2014, and the interest incurred on that sum as of August 12, 2016. Furthermore, given the difficulty of reinstating him to his employment since the October 2, 2014, order, the Claimant asked the ALT to amend the decision and replace the reinstatement order with $42,232 for loss of employment, which was refused. Finally, the agreement reached between the parties does not indicate in any way that the employer is paying the Claimant the sum so that he will relinquish the right to be reinstated to his employment.

[38] The Claimant had the burden of proving before the General Division that, on a balance of probabilities, the amount constituted something other than earnings from employment.

[39] Based on the above, the Tribunal finds that the General Division correctly deemed that the amount had not been paid to the Claimant for the relinquishment of his right to be reinstated to his employment.[5]

[5] *Canada v Plasse,* A-693-99.

[40] As noted by the General Division, the August 12, 2016, ALT decision to which the agreement specifically refers is clear and precise on the amount allocated and the reason for the payment.

[41] The Tribunal finds that the General Division's decision on the issue of the allocation of the Claimant's earnings was made based on the evidence before it and that this decision complies with both legislation and case law.

[42] This ground of appeal is dismissed.

Issue 3: Did the General Division refuse to exercise its jurisdiction by failing to consider the Claimant's argument concerning the application of section 46.01 of the EI Act?

[43] Before the General Division, the Claimant argued that he does not have to reimburse the overpayment because more than 36 months have elapsed since his lay-off or separation from employment in relation to which the earnings were paid and that the administrative cost of determining the repayment likely equals or exceeds its value, as section 46.01 of the EI Act states.

[44] The General Division acknowledged that the Commission had not expressed an opinion on the application of section 46.01 of the EI Act, and, consequently, on the exercise of its discretion, but it did not rule specifically on the issues raised by the Claimant. It therefore refused to exercise its jurisdiction.

[45] Since the file before the Appeal Division was incomplete, the file should be returned to the General Division so that it can decide the issue raised by the Claimant concerning the application of section 46.01 of the EI Act.

Issue 4: Did the General Division commit a breach of natural justice when it allowed the Commission to make an additional argument, after the hearing, without allowing the Claimant to reply?

[46] The Claimant is invoking a breach of natural justice because the General Division allowed the Commission to make an additional argument, after the hearing, without allowing him to respond.

[47] The Tribunal has repeatedly stated that the General Division must show caution when it asks one party for additional arguments after a hearing, without allowing the other party to reply. Such a practice could give the aggrieved party a ground for appeal.[6]

[48] The Claimant still argued before the General Division that the amount received had been paid for the relinquishment of his right to reinstatement and that it did not constitute earnings under section 35 of the EI Regulations and, for that reason, did not need to be allocated under section 36 of the EI Regulations.

[49] The Tribunal notes that the clarifications the General Division asked for, after the May 1, 2018, hearing, concerned the Commission's allocation of the earnings. The Commission repeated the position it expressed in GD4, which had been available to the Claimant since July 5, 2017, well before the General Division hearing.

[50] The Tribunal is therefore of the view that the General Division did not fail to observe a principle of natural justice.

[51] This ground of appeal is therefore dismissed.

CONCLUSION

[52] For the reasons mentioned above, the Tribunal allows the appeal in file AD-18-522 in part and dismisses the appeal in file AD-19-322.

[53] It is appropriate to refer file AD-18-522 back to the General Division so that it can decide only on the issue the Claimant raised concerning the application of section 46.01 of the EI Act.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	August 2, 2019

[6] *YL v Canada Employment Insurance Commission*, 2016 SSTADEI 215.

METHOD OF PROCEEDING:	Videoconference
APPEARANCE:	V. B., Appellant