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

[TRANSLATION]

Citation: *L. D. v Canada Employment Insurance Commission*, 2019 SST 769

Tribunal File Number: AD-19-202

BETWEEN:

L. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: August 19, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the appeal in part.

OVERVIEW

[2] The Appellant, L. D. (Claimant), worked as general manager of X (Association) for a number of years. Each year, she was laid off around October because of a shortage of work. The Claimant filed claims for Employment Insurance benefits in 2012, 2013, 2014, 2015, 2016, and 2017, and the Canada Employment Insurance Commission (Commission) established benefit periods.

[3] After an investigation in 2017, the Commission determined that the Claimant had not stopped working for the Association and that she had received earnings. In the Commission's view, the Claimant failed to show that there was an interruption of earnings. As a result, the Commission cancelled the benefit periods for the six years. It established an overpayment of $43,506.

[4] The Claimant requested a reconsideration of the decisions on the grounds that there was an interruption of earnings. She argues that she was laid off or separated from her employment with the Association and that she did not work for a period of seven or more consecutive days for which no earnings from that employment were payable. However, the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[5] The General Division found that there was no interruption of earnings for each Employment Insurance benefit period because the Claimant had not been separated from her employment and because she had received earnings from her employment, namely the use of a truck whose expenses were entirely assumed by her employer.

[6] The Tribunal granted leave to appeal. The Claimant argues that the General Division refused to exercise its jurisdiction by failing to consider section 52 of the

Employment Insurance Act (EI Act). She also argues that the General Division erred in law in its interpretation of section 14(1) of the *Employment Insurance Regulations* (EI Regulations).

[7] The Tribunal must decide whether the General Division refused to exercise its jurisdiction and whether it erred in law in its interpretation of section 14(1) of the EI Regulations.

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

ISSUES

[9] Did the General Division refuse to exercise its jurisdiction by failing to consider section 52 of the EI Act?

[10] Did the General Division err in law in its interpretation of section 14(1) of the EI Regulations?

ANALYSIS

Appeal Division's Mandate

[11] 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 *Department of Employment and Social Development Act* (DESD Act).[1]

[12] 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.

[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 made in a

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

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

PRELIMINARY REMARKS

[14] The Claimant withdraws her appeal for the period established October 29, 2017.[2]

[15] The Tribunal accepts the Claimant's withdrawal in accordance with section 14(1) of the *Social Security Tribunal Regulations*.

ISSUES:

Did the General Division refuse to exercise its jurisdiction by failing to consider section 52 of the EI Act for the periods established effective November 4, 2012; November 3, 2013; and November 2, 2014?

[16] The Claimant argues that the General Division failed to exercise its jurisdiction by not considering section 52 of the EI Act. She argues that, despite the absence of evidence on file justifying the Commission's decisions concerning the benefit periods beyond 36 months, that is the periods established in 2012, 2013, and 2014, the Commission upheld them.

[17] The Commission would like to grant the claims beyond 36 months because it did not inform the Claimant that it believed she had made a false or misleading statement and that it had 72 months.

[18] When the Commission exercises a separate power conferred on it by section 52(5) of the EI Act, it has a duty to tell the claimant precisely why, for the particular purposes of the exercise it is undertaking under that section, the statement appeared false to it.[3] The Commission did not do this.

[19] The Tribunal is of the view that the General Division refused to exercise its jurisdiction by failing to consider section 52 of the EI Act.

---

[2] AD6-3.
[3] *Canada (Attorney General) v Langelier*, 2002 FCA 157; *Canada (Attorney General) v Dussault*, 2003 FCA 372.

[20] The Tribunal allows the appeal for the periods established effective November 4, 2012; November 3, 2013; and November 2, 2014.

Did the General Division err in law in its interpretation of section 14(1) of the EI Regulations for the periods established effective November 1, 2015, and October 30, 2016?

[21] The periods established effective November 1, 2015, and October 30, 2016, remain in dispute.

[22] The Claimant argues that the General Division erred by confusing maintenance of the employment relationship and the notion of seven consecutive days without work or earnings.

[23] The Claimant also submits that the General Division erred in law by not distinguishing between the potential and actual use of material at her disposal during certain periods, notably during the holidays. She argues that the General Division did not consider the evidence regarding the absence of any work activity and the non-use of material at her disposal for work-related activities, including during the holiday period.

[24] As the General Division noted, to show there has been an interruption of earnings, the Claimant must satisfy the three conditions set out in section 14(1) of the EI Regulations:

1) she was laid off or separated from her employment with the Association;

2) she did not work for seven consecutive days; and

3) she did not receive earnings from that employment.

[25] The Claimant had to show on a balance of probabilities that she met the three conditions, which are cumulative.[4]

[4] *Massé v Canada (Attorney General)*, 2007 FCA 82; *Canada (Attorney General) v Enns*, A-559-89.

[26] In an in-person interview on February 26, 2018, the Claimant stated that she handles hiring and personnel management. She noted that she was in the process of recruiting when the X closed. She mentioned that she was looking for an operational maintenance attendant and a wildlife technician. She received applications and answered questions from interested people.

[27] The Claimant said that, as the general manager, she must attend the meetings of the board of directors. She must prepare to share information with the board members. She noted that being the organization's resource person means she must know about everything that is going on. Each member of the board of directors has a mandate, based on the X's needs, and she is updated on each member's progress. Board meetings take place every two or three months, even when the X is closed.

[28] The Claimant stated that she has had to organize the X's annual general meeting for a number of years. She books the room for March and signs the rental contract. She prepares a summary of the work and improvements completed in the X. She prepares the notices of meeting for the 594 members and has the printer print them. She then completes the mail-outs. The night of the annual general meeting, she must know how the board members' portfolios have advanced to answer the numerous questions she is asked.

[29] The Claimant states that, when the X closes in November, she takes care of voicemail messages and emails remotely from her home. She has access to the X's email and voicemail from her home. She receives emails and voicemail messages at least twice a week, each week, depending on the period of the year. However, at the end of winter and in early spring, she must check more often because people are arranging their fishing seasons. There is also the member renewal, which takes place in the spring.

[30] The Claimant states that she had to renew the employees' accreditation as wildlife assistants. They have a one-day training session to attend, and she must take care of it.

[31] The Claimant indicates that Ministère des forêts, de la faune et des parcs [the ministry of forests, wildlife, and parks] allocates subsidies for the maintenance of Xs' roads and bridges. She prepares the application for June, and if the project is accepted, an

engineer must be asked for a plan and a quote. Local contractors are then invited to bid on the project. When she receives the bids, she informs the board of the outcome and contacts the lowest bidder to inform them. She reviews the conditions for the completion of the work with the successful bidder. She occasionally goes to see the work to check it. In recent years, the X has completed three projects. The work took place when she was not paid. She is the contact or resource person for work before and after the seasonal closure.

[32] The Claimant reread and certified the statement during the interview in the Service Canada office in La Malbaie.

[33] During a second in-person interview on February 28, 2018, the Claimant stated that, since May 15, 2015, she has received a higher salary during the summer season as compensation for the work performed in the winter. Previously, she received $1,000 for the work performed in the winter.

[34] The Claimant reread and certified the second statement during the interview at the Service Canada office in La Malbaie.

[35] During a telephone interview on March 9, 2018, the X's chair confirmed that the Claimant works full-time from May to October, and then continues to work as the X's manager part-time until she resumes full-time work the following May. He stated that the Claimant might work two to four hours one week and a full day the next. It varies. She works four hours per week on average after her last day of work.

[36] The X's chair confirms that, as of the May 2015 contract, the increase in earnings noted on the Claimant's Records of Employment for the summer period includes the wages for the hours worked in the winter.

[37] The chair stated that the Claimant definitely worked more hours after the X's closure than the amount of the increase that she received in her May 2015 contract.

Laid off or separated from her employment

[38] The Claimant stated that, when the X closes in November, she works at home and manages the X's emails and voicemail remotely. She has access to the X's email and voicemail from her home. She checks the emails and the voicemail messages, at least twice a week, each week, depending on the period of the year. She takes a cell phone, the computer from the reception, and paperwork home for the winter. She is the organization's resource person, and she must be aware of everything that is going on. She is the contact person before and after the X's seasonal closure, which an ex-member of the X confirms.

[39] After the X's closure, the Claimant recruits staff, arranges board meetings to inform the members, organizes the annual meeting, books the room for March, and signs the rental contract. She prepares the subsidy project submission, contacts the engineers, reviews the conditions for completing the work with the chosen contractor, checks the contractor's work on-site, remains available for work-related questions, renews the wildlife assistants' accreditations and arranges their training, answers wildlife officers' questions, and renews the 594 members.

[40] For the Tribunal, the evidence clearly shows that the Claimant did not stop working for her employer, even after her last paid day indicated on the Records of Employment. As determined by the General Division, there are certainly fewer tasks when the X is closed, but the fact remains that the Claimant is clearly employed by the Association.

Work stoppage for seven consecutive days

[41] The Claimant submitted notes to the General Division concerning her tasks during the winter season. She argued strongly that she had not worked during the holidays and other periods. She maintained that, as a result, she had had a work stoppage for seven consecutive days and that the General Division acknowledged that fact.

[42] The General Division determined that it had difficulty reconciling the Claimant's personal notes with her initial statements. Furthermore, the Association's chair acknowledged that her hours varied but that she worked four hours per week on average.

[43] The General Division found that the explanations the Claimant provided at the hearing were rather vague regarding when she stopped completing tasks for the Association. It also determined that the Claimant had qualified the information the Commission obtained during the reconsideration, as well as at the General Division hearing.

[44] It is true that the General Division indicated in its decision that it was possible that the Claimant did not work for seven consecutive days, but that finding clearly contradicts the preponderance of evidence and its own finding that the Claimant had qualified her remarks at the hearing and that it could not reconcile the Claimant's initial statements with her personal notes.

[45] Furthermore, the General Division noted from the evidence that the Association's chair stated that the Claimant's hours varied after the X closed, but that she worked four hours per week on average. He also stated that the Claimant definitely works more hours after the X closes than the amount of the earnings increase she received in her May 2015 contract.

[46] The Tribunal is also of the view that the questions the investigator asked during the two interviews were not general. The aim of the interview was explained to the Claimant beforehand. The clarification of the answers the Claimant provided concerning her work amply supports a finding that she did not have a work stoppage for seven days.

[47] The Federal Court of Appeal confirmed that the reduction from full-time employment to one day of work per week does not correspond to an interruption of earnings because the period during which there are no earnings must be seven or more consecutive days.[5]

---

[5] *Canada (Attorney General) v Duffenais*, A-551-92.

[48] The Federal Court of Appeal also confirmed that continuing to work without pay does not correspond to an interruption of earnings within the meaning of the EI Act. There must be seven or more consecutive days after the lay-off during which no work was completed for the employer.[6]

[49] The preponderant evidence before the General Division amply supports a finding that the Claimant did not stop working for seven consecutive days.

No earnings received from that employment

[50] The General Division found that the Claimant had a truck whose expenses were completely assumed by the Association. During the winter, the truck was in the Claimant's parking lot, and she used it to carry out tasks for the Association.

[51] The General Division found that the use of a truck belonging to the Association constituted earnings. Consequently, the Claimant received earnings from her employment during the winter.

[52] The Claimant argues that the General Division erred in its interpretation of the term [translation] "use" regarding the determination of insurable earnings. She argues that the possibility of using the truck cannot constitute earnings. The Claimant argues that to find otherwise would mean that, in the absence of any use of material at a person's disposal and in the absence of any work-related activities for seven consecutive days or for the entire unemployment period, a person would be prevented from qualifying for a benefit period.

[53] During her in-person interview on February 26, 2018, the Claimant stated that she had a truck at her disposal that she used to run errands for the X. In her in-person interview on February 28, 2018, the Claimant stated that the board of directors had decided to leave a truck with her in the winter because it was more economical for the X.

---

[6] *Canada (Attorney General) v Perry*, 2006 FCA 258.

The Association's chair confirmed that the Claimant kept the truck to use for her trips as the general manager.

[54] The Commission confronted the Claimant with the employer's credit card statements and the expense claims she submitted to her employer. Those documents cover the months of January, March, and December 2015; the period from September 13, 2016, to January 31, 2017; and from December 1, 2017, to January 1, 2018. Those documents show that the client regularly bought gas for the employer's truck during those periods and that she was running other errands on her employer's behalf. The Claimant stated, contrary to her initial statements, that she was not the only person using the employer's vehicle in the winter.

[55] The Tribunal is of the view that this version is difficult to reconcile with the fact that she kept the truck at her home with the Association's authorization to use it for her trips as general manager. It is also inconceivable that other employees worked and used the truck in the winter while the Claimant, as the X's general manager, was supposed to have stopped working.

[56] Furthermore, the Tribunal reviewed the work schedule the Claimant submitted to the General Division for the fall-winter 2016-2017 period. She claims that she did not work during the period from December 11, 2016, to January 7, 2017.[7]

[57] Yet, the expense claim the Claimant submitted to the employer shows that she requested, in her own name, the reimbursement of work-related expenses incurred on December 20 and December 24, 2016.[8]

[58] For the reasons mentioned earlier, the Tribunal is of the view that the General Division did not err by considering that the Claimant used the truck for her employment and that it constituted earnings within the meaning of the EI Regulations. The evidence

[7] GD3E-48.
[8] GD3E-47.

before the General Division shows that the use of the truck is connected to the work the Claimant did for the employer.

General Division's finding

[59] The Tribunal is of the view that the General Division did not err by finding that the Claimant had not met the three conditions set out in paragraph 14(1) of the EI Regulations. The Claimant failed to show that, for the periods established effective November 1, 2015, and October 30, 2016, there was an interruption of earnings within the meaning of the EI Act and the EI Regulations.

CONCLUSION

[60] The appeal is allowed for the periods established effective November 4, 2012; November 3, 2013; and November 2, 2014.

[61] The appeal is dismissed for the periods established effective November 1, 2015, and October 30, 2016.

[62] The Claimant's withdrawal for the period established effective October 29, 2017, is acknowledged.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	August 1, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. D., Appellant Jean-Guy Ouellet (counsel), Representative for the Appellant