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

Citation: *Canada Employment Insurance Commission v G. O.*, 2019 SST 1028

Tribunal File Number: AD-19-454

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

G. O.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: October 11, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Respondent, G. O. (Claimant), applied for and received Employment Insurance (EI) benefits, effective in January 2018.

[3] The Appellant, the Canada Employment Insurance Commission, became aware that the Claimant had failed to report that he had worked and had earnings while receiving EI benefits. The Appellant allocated those earnings and imposed a penalty for knowingly making 12 false representations on biweekly reports.

[4] The Claimant requested reconsideration of the penalty, and the Commission reduced the penalty from $5000 to $2000. The Claimant appealed to the General Division of the Social Security Tribunal and requested that the "penalties and taxes" be removed, because of his financial circumstances.

[5] The General Division found that the Claimant made twelve false or misleading misrepresentations when he failed to report his earnings in bi-weekly reports. However, it also found that applying the subjective test for the word "knowingly", the Claimant had not knowingly made the misrepresentations.

[6] The Appellant appealed to the Appeal Division and submitted that the General Division had based its decision on errors of law and serious errors in its findings of fact. Leave to appeal was granted based on possible errors of law.

[7] The General Division erred in law by misapplying binding jurisprudence. The appeal is allowed.

ISSUES

[8] Did the General Division err in law in making its decision by misapplying binding jurisprudence?

[9] If the General Division did err, should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[10] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice, 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.[1] Because the General Division may have erred in law when making its decision, the Appeal Division granted leave to appeal.

[11] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, or law.[2] In addition, the Appeal Division may find an error in law whether or not it appears on the face of the record.[3]

[12] Where an erroneous finding of fact is alleged, the decision must be based on that finding of fact, and the finding must have been made in a perverse or capricious manner or without regard for the material before it, rather than just erroneous.[4]

[13] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under section 58(1) of the *Department of Employment and Social Development Act*.[5]

[14] The appeal before the General Division turned on the question of whether the Claimant knowingly made misrepresentations. The Appellant submits that there are distinct errors of law

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[1] *Department of Employment and Social Development Act* (DESD Act), s. 58(1).
[2] *Canada (Attorney General) v Paradis*; *Canada (Attorney General) v Jean*, 2015 FCA 242, at para. 19.
[3] DESD Act, s 58(1)(b).
[4] *Ibid.* s 58(1)*(*a*)*.
[5] *Garvey v Canada (Attorney General)*, 2018 FCA 118.

or errors of fact. Because the legal test for knowingly making misrepresentations is defined by jurisprudence, the mixed question on appeal here discloses distinct legal issues in which the Appeal Division may intervene.

Issue 1: Did the General Division err in law in making its decision by misapplying binding?

[15] The General Division erred in law by misapplying binding jurisprudence.

[16] The Federal Court of Appeal has held that the legal test as, "a subjective test must be used for the interpretation of the word "knowingly" to determine whether the required knowledge exists. This subjective test of knowledge takes objective evidence into account."[6]

[17] This two-part test is well established in the jurisprudence: First the Commission must show that the claimant knowingly made a false or misleading statement or representation, then the claimant must show that the statement was not made knowingly and provide a reasonable explanation for the incorrect information.

[18] It is in the second part of the test that the Appellant submits the General Division erred. The Appellant argues that the General Division accepted the mitigating circumstances testified upon by the Claimant but failed to take all of the evidence into account. The Respondent points to the Claimant's level of education (two university degrees in sciences and engineering) as an example of evidence the General Division failed to consider.

[19] As stated by the Federal Court of Appeal in *Bellil*, it falls on the claimant "to explain the existence of his inaccurate answers; he had to show that he had not known that his answers were wrong."[9] Mr. Bellil's explanation to justify his erroneous answers was his inattention to the questions. The Federal Court of Appeal found that the General Division had not taken all of the evidence into account, including Mr. Bellil's level of education.

[20] The General Division, in this matter, also did not take into account the Claimant's level of education. The General Division did refer the Federal Court of Appeal decisions in *Bellil*, but failed to take into account all the relevant objective evidence. The Claimant's explanation to

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[6] *Canada (Attorney General) v Bellil*, 2017 FCA 104.

justify his erroneous answers was his inattention to the questions[7] due to his overwhelming life circumstances. The General Division here did not take into account the Claimant's level of education, similar to the *Bellil* case.

[21] The General Division erred in law by misapplying binding jurisprudence.

Issue 2: Should the Appeal Division refer the matter back to the General Division for reconsideration or can the Appeal Division render the decision that the General Division should have rendered?

[22] I have found that the General Division erred in law in making its decision.

[23] The Appellant submits that the evidence that was before the General Division is available to the Appeal Division and, therefore, it would be more expedient for the Appeal Division to render the decision that the General Division should have rendered than to refer the matter back to the General Division.

[24] The Claimant submitted that the General Division considered all the evidence, including his testimony, and its decision should stand.

[25] I find that the appeal record is complete, and I am able to render the decision that the General Division should have rendered. Where the General Division has committed a reviewable error and the appeal record is complete, the Appeal Division has the authority to render the decision that the General Division should have rendered.

[26] There is no dispute that the Claimant made 12 false misrepresentations in bi-weekly reports. The Claimant's explanation of his false answers was his inattention; he accepted the answers that were pre-filled by his web-browser without reading the questions or the attestation and chose the easiest manner to complete the reports while assuming he was entitled to parental benefits because he and his wife had recently had a child. The Claimant is a highly educated person who is capable of understanding the meaning of the question "Did you work?" to which

[7] General Division decision at para 25: The claimant answered the questions "in the easiest manner so as not to have to answer additional questions or calculate earnings."

he answered twelve times “No.” Applying the *Bellil* case to this matter, inattention in answering questions is insufficient to avoid an administrative penalty in circumstances such as these.

[27] The Appellant, in oral and written submissions, noted that the penalty imposed on the Claimant would be further reduced by $1000, because of the additional mitigating circumstances presented at the General Division hearing. It was initially $5000, then reduced to $2000, and with a further reduction of $1000, would be $1000.

[28] For these reasons, the appeal is allowed and the Respondent’s decision on the penalty and notice of violation is confirmed with a modification that the penalty is further reduced by $1000.

CONCLUSION

[29] The appeal is allowed and the penalty is reduced by $1000.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	September 26, 2010
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Louise Laviolette, Representative for the Appellant G. O., self-represented Respondent