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

[TRANSLATION]

Citation: *L. G. v Canada Employment Insurance Commission*, 2019 SST 1283

Tribunal File Number: AD-18-843

BETWEEN:

L. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

DATE OF DECISION: October 7, 2019

DECISION AND REASONS

DECISION

[1] The Tribunal allows the Claimant's appeal on the issue of the reconsideration but dismisses the appeal on the issue of the penalty (warning).

OVERVIEW

[2] The Appellant, L. G. (Claimant), made an initial application for Employment Insurance benefits. She stated that she had worked for X and at X. The Commission established a benefit period. The Claimant received 48 weeks of benefits during the period from May 9, 2010, to April 23, 2011, for a gross total of $21,851.

[3] The Commission then investigated the insurability of the employment with X. In February 2015, the Canada Revenue Agency (CRA) determined that the Claimant had not had a work contract with X. The Claimant filed a notice of appeal with the CRA concerning the insurability of her employment with X, but the CRA found that the employment was not insurable. The Commission informed the Claimant that the claim for benefits was being reconsidered because it found that the information she had provided was false. It cancelled the benefit period and established an overpayment of $21,851.

[4] The Claimant asked the Commission to reconsider the initial decision. The Claimant submits that she was not responsible for the situation because she followed her father's advice. The Commission changed its decision regarding its claim. The Commission considered the Claimant to have had insurable employment at X when she applied for benefits. As a result, the overpayment was reduced to about $18,251, subject to a new calculation. However, the Commission upheld the decision about the reconsideration and decided to impose a warning. The Claimant appealed the Commission's reconsideration decision to the General Division.

[5] The General Division found that the Commission could reconsider her claim in view of the CRA's decision and the Claimant's admission that she had never worked for X. It found that, in the absence of insurable employment, the claim for benefits should be

cancelled. The General Division found that the penalty was justified because the Claimant had claimed Employment Insurance benefits knowing that she had not worked for X.

[6] The Tribunal granted leave to appeal. The Claimant argues that the General Division erred in its interpretation of section 52 of the EI Act and that it erred in its interpretation of the case law on the imposition of a penalty.

[7] The Tribunal allows that Claimant's appeal on the issue of the reconsideration but dismisses the appeal on the issue of the penalty (warning).

ISSUES

[8] Should the Commission's claim be cancelled because the decision-making process set out in section 52 of the EI Act was not completed in time?

[9] Did the General Division err in law by failing to follow the Federal Court of Appeal's teachings on cases involving a penalty?

PRELIMINARY REMARKS

[10] The Tribunal proceeded with the hearing in the Commission's absence because it was satisfied that the Commission had been informed of the hearing, in accordance with section 12(1) of the *Social Security Tribunal 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]

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

[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, made an error of 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.

Issue 1: Should the Commission's claim be cancelled because the decision-making process set out in section 52 of the EI Act was not completed in time?

[14] The Tribunal allows the Claimant's appeal on the issue of the reconsideration.

[15] The Claimant argues that the Commission acknowledges that, to date, the Claimant still does not know the overpayment amount resulting from the reconsideration process. She submits that this clearly shows that the decision-making process set out in section 52 of the EI Act has not been completed and that the claim must be cancelled.

[16] In its arguments to the Appeal Division, the Commission acknowledged that it should have presented the rate and the weeks of entitlement to the General Division as issues instead of the cancellation of the claim for benefits because the initial decision had been changed during the reconsideration.

[17] In effect, the Commission considered, at the reconsideration request stage, that the Claimant had enough hours to establish a claim with her employment at X, where she accumulated 1,028 hours of insurable employment from July 9, 2009, to June 11, 2010, which reduced the $21,851 overpayment to about $18,251.

[18] While preparing the appeal to the Appeal Division, the Commission also noticed that it had not considered another Record of Employment from X, from September 15, 2009, to May 10, 2010. A second new calculation will need to be done because that Record of Employment affects the rate and the weeks of entitlement, which could once again reduce the overpayment amount.

[19] The Commission has asked the Appeal Division to return the file to the General Division so that a new decision can be given based on the new calculation with the two Records of Employment.

[20] The Tribunal is of the view that the General Division erred by finding on the Commission's initial decision cancelling the Claimant's benefit period. That decision had been replaced during the reconsideration process by a new decision concerning the rate and the duration of benefits. It is worth stressing that the Commission's submissions before the General Division were confusing. The Tribunal is therefore justified in intervening and giving the decision that the General Division should have given, in accordance with section 59(1) of the DESD Act.

[21] On March 11, 2015, the Commission gave a decision on the reconsideration of the Claimant's claim for benefits. It is worth reproducing the essence of the Commission's decision:

> [translation]
> You are entitled to Employment Insurance regular benefits.
>
> Furthermore, the Employment Insurance benefits established for your claim cannot begin as of April 25, 2010, as you requested, because you were not entitled to benefits on that date.
>
> We have cancelled your claim for Employment Insurance benefits, which began on April 25, 2010, because the Canada Revenue Agency has decided that your employment was not insurable.
>
> […]
>
> We will send you a notice of debt and instructions for repayment. If you have questions about the establishment of the overpayment, please contact the Employment Insurance call centre by calling 1-800-808-6352.

[22] On March 21, 2015, the Commission proceeded to send the Claimant a notice of debt that indicates an overpayment of $21,851. Following a reconsideration request from the Claimant, the overpayment was reduced **to about $18,251**.

[23] The Federal Court of Appeal had an opportunity to analyze the recovery system for unemployment insurance benefits created by Parliament. The Court first stated that it was an exceptional one, which is a departure from the ordinary law, and that sections in question must be strictly construed. Regarding the operation of that system, the Court stated that the notification of the claimant, like the other operations mentioned in section 52 of the EI Act, had to take place within the specified time frame to give the Commission a right of action and recovery against a claimant.[2]

[24] The Federal Court of Appeal has stated that the Commission has 36 months as of the payment date to reconsider a claim, make a decision, make the necessary calculation, and give notice. If the Commission decides that an error was made in one sense or another while paying benefits, it must inform the claimant that an error has been made **and of the amount**.

[25] Section 52(5) extends the deadline for reconsidering the claim to 72 months, if the Commission finds that a false or misleading statement or representation has been made in relation to that claim.

[26] The Tribunal notes that, on March 11, 2015, the Commission reconsidered the benefits paid to the Claimant as of May 9, 2010. To date, the Claimant still does not know the overpayment amount resulting from the reconsideration process.

[27] As of today's date, that is 113 months after payment of benefits began, the Commission has still not calculated a definitive overpayment amount and merely stresses on appeal that a second new calculation must be completed based, however, on information that it has had since the beginning of the decision-making process.

[28] In fact, the Commission has had the Records of Employment from X and X—the Records of Employment issued on June 9, 2010, and July 16, 2010— in its possession since the beginning of the reconsideration process.

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[2] *Brière v Canada (Attorney General)*, A-637-86; *Canada (Attorney General) v Laforest*, A-607-87; *Brien v The Canada Employment and Immigration Commission*, A-425-96.

[29] For the reasons mentioned above, the Tribunal is of the view that the Commission has not satisfied the requirements of section 52 of the EI Act, namely calculating the improperly paid amount and notifying the Claimant in time. Allowing the Commission to repeatedly redo its overpayment calculations would contravene the requirements of section 52 of the EI Act, which sets out that the operations mentioned in that section must be completed within a strict time frame.

[30] Since the Commission failed to notify the Claimant of the amount erroneously paid within the specified 72-month period—which it easily could have done—the Tribunal finds that the reconsideration the Commission engaged in was completed improperly and illegally.

[31] The Claimant's appeal must therefore be allowed on the issue of the reconsideration.

Issue 2: Did the General Division err in law by failing to follow the Federal Court of Appeal's teachings on cases involving a penalty?

[32] On reading the file, the Tribunal notes that the Commission does not seem to have given an initial decision on the issue of the warning but that it mentions having upheld it following the Claimant's reconsideration request. It appears, based on the Claimant's notice of appeal to the General Division, that it was aware of the reconsideration decision in view of the warning before the hearing before the General Division, which is the real appeal tribunal.

[33] The Claimant argues that the General Division decision is based on mere scepticism and does not satisfy the burden of proof regarding the imposition of a penalty or a warning.

[34] Parliament's only requirement for imposing a penalty is that of knowingly—that is, with full knowledge of the facts—making a false or misleading representation. The absence of the intent to defraud is therefore of no relevance.

[35] The General Division determined that, although the Claimant was influenced by her father, she still made her statement to the Commission knowing that she had not worked for X. The General Division found that the Claimant had subjective knowledge of the falsity of her statement because she went to a Service Canada office to receive benefits with the Record of Employment issued by X when she knew that she had not worked for that business in any way.

[36] The Tribunal is of the view that the General Division did not err by rejecting the Claimant's explanation in light of all the evidence. It is clear to the Tribunal that the Claimant acted knowingly because she knew that she had never worked for the business X.

[37] There is therefore no need for the Tribunal to intervene on the issue of the penalty.

CONCLUSION

[38] For the reasons mentioned above, the Tribunal allows the appeal on the issue of the reconsideration but dismisses the appeal on the issue of the penalty.

Pierre Lafontaine
Member, Appeal Division

HEARD ON:	September 26, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Jean-Guy Ouellet (counsel), Representative for the Appellant L. G., Appellant