Gouvernement du Canada | Government of Canada

Tribunal de la sécurité sociale | Social Security Tribunal

Appeal No. 2013-0696

BETWEEN:

Andrea Rachel et al

Appellants

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL AMENDED DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER:	Mark BORER
DATE OF AMENDED DECISION:	~~July 16,2014~~ August 19, 2014
DECISION:	Appeal allowed

Canada

DECISION

[1] On consent, the appeal is allowed. The decision of the board of referees under appeal is varied in accordance with these reasons.

INTRODUCTION

[2] This case has a long and complex procedural history, stretching all the way back to the passage of the *Health and Social Services Delivery Improvement Act* ("Bill 29") by the government of British Columbia on January 28, 2002.

[3] Bill 29 altered certain provisions in the collective agreements of many provincial health sector workers and resulted in layoffs and changed working conditions for many unionized employees.

[4] As a result of this, Bill 29 was challenged in the courts. Eventually, on June 8, 2007, the Supreme Court of Canada ruled in *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* (2007 SCC 27) that some parts of the bill were unconstitutional.

[5] Following the decision, which did not award damages or other compensation, the government of British Columbia entered into negotiations with the affected workers through their various unions. These negotiations bore fruit, and resulted in moneys being paid to the affected workers according to a detailed agreement. This process was completed in January 2009.

[6] Many of the affected workers had lawfully collected benefits following their layoff. The Commission, in due course, determined that the moneys received as a result of the agreement were earnings and should be allocated according to the *Employment Insurance Act* ("the Act"). This would have the effect of requiring some benefits, varying from claimant to claimant, to be repaid.

[7] An extremely large number of claimants appealed against this determination. To expedite matters, the Commission and the involved unions agreed that Andrea Rachel would "stand in" as the representative claimant on behalf of the remaining Appellants. Claimants were invited to attach their cases to the representative appeal, and an appropriate deadline was set for them to do so. Approximately ~~2200~~ 2400 claimants availed themselves of this opportunity.

[8] On March 2, 2010, in a split decision, a panel of the board of referees ("the first Board") determined that the representative appeal from the previous determination of the Commission should be denied. The Appellant appealed that decision to the Office of the Umpire.

[9] On April 10, 2012 the Office of the Umpire allowed the appeal in part, holding that the majority of the first Board (and therefore the Commission) were correct in their determination that the moneys were earnings according to the Act, but that the issue of how those earnings should be allocated must be returned to a new panel for redetermination.

[10] On February 13, 2013 a new panel of the board of referees ("the second Board") found that the Commission had allocated the earnings correctly, and dismissed the appeal. In due course, the Appellant appealed again to the Office of the Umpire.

[11] On April 1, 2013 the Appeal Division of the Social Security Tribunal of Canada ("the Tribunal") became seized of any appeal not heard by an Umpire by that date.

[12] On March 17, 2014 an in-person hearing was held before me. Both the Appellant and the Commission attended by way of counsel and made submissions. This hearing was eventually adjourned to give counsel an opportunity to make further submissions.

[13] On June 25, 2014 a teleconference hearing was held. Again, both parties attended by way of counsel and made submissions.

[14] I note that this is a highly complex case involving many claimants. I wish to thank both counsel for their well-prepared arguments and able assistance in resolving this matter.

ANALYSIS

[15] The parties, in their submissions before me, have made it clear that they are now in agreement that the moneys in question are earnings and must be allocated according to s.36(9) and (10) of the *Employment Insurance Regulations* ("the EI Regulations"), as found in the previous decisions as listed above. They are also in agreement that the representative claimant herself has no cause for appeal or review on the facts of her specific case.

[16] Instead, the Appellant has appealed the decision of the second Board to the Tribunal for the purpose of securing certain rights of the other claimants in this matter. Her counsel argues that each of these other claimants is entitled to have their claim sent to the General Division of the Tribunal for reconsideration if errors are discovered in the way the claim has been determined or if there are outstanding legal issues to be resolved.

[17] The Commission, having considered the submissions of the Appellant, has agreed that although they are not aware of any such errors or issues the possibility exists that there are some. As such, they agree that claimants are entitled to have their matter reviewed by the General Division if needed.

[18] The purpose of this decision is to set out the details of how this review process will take place.

[19] According to the *Social Security Tribunal Regulations* ("the Regulations"), the Tribunal is required to conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit. To this end, I am entitled to vary or waive compliance with regulatory provisions if special circumstances are shown.

[20] I am of the opinion that this unique case constitutes special circumstances, and to expedite the resolution of this appeal as much as possible, I order as follows:

1. The terms of this decision shall only apply to the approximately ~~2200~~ 2400 claimants who are part of this representative appeal.

2. Any such claimant may request that the Commission make a new decision on their claim, subject to the restrictions below.

3. Any such request must be made on or before December 15, 2014. If such a request is made, ~~Until this request is resolved,~~ collection proceedings shall be suspended until it is resolved. If no such request is made, collection proceedings shall be suspended until December 16, 2014.

4. Any such request must be made in writing to the Commission and must include sufficient information to identify the claimant, a note that the request is pursuant to Appeal Division decision 2013-0696, and the claimant's specific point of argument (i.e. incorrect calculations, incorrect start date of allocation, wrong normal weekly earnings, etc.).

5. Any claimant who is not satisfied with the new decision of the Commission may proceed in the normal course with an appeal of the new decision of the Commission to the General Division of the Tribunal.

6. Any such new decision of the Commission and any hearing of the General Division shall be bound by the previous ruling that the moneys at the heart of this appeal are earnings and must be allocated in accordance with s.36(9) and (10) of the EI Regulations.

7. I shall remain seized of this matter until December 16, 2014. I do this to expedite the process and to resolve any issues or requests that may arise on this complex file as quickly as possible.

[21] It has been over four years since the first appeal of this case was made to the board of referees. I am the fourth adjudicator to rule on this matter, and I have no doubt that some claimants who avail themselves of the avenue of appeal set out above will have cases that will stretch on for some time to come.

[22] In my view, this situation has come about because of the imprecise nature of the so-called "representative appeal". I am of the opinion that greater clarity about this type of appeal would be helpful for future appellants.

[23] Representative appeals have a long history in the employment insurance regulatory regime, going back many decades. Although the use of representative appeals has been accepted at every level of the employment insurance appeal system, including the federal courts, to my knowledge no firm rules have ever been established to govern in any detail how those appeals should be handled administratively.

[24] In the 1977 decision *Lemieux et al v. Canada (Attorney General)* (T-1343-77), the Federal Court made several comments on representative appeals, holding in part that:

> "In principle it may be stated that... whether [cases] should be heard individually or joined together for hearing as a representative case are clearly administrative decisions... In any board or tribunal, including the courts themselves, there may be many good and valid reasons for... hearing a group of cases, even involving similar issues, separately rather than joining them for hearing or hearing one as a representative case with the understanding that the decision in it shall govern all the others. In Unemployment Insurance matters the practice of hearing one case as a representative case and applying its findings to a large number of other cases involving identical issues is very often adopted and is a useful and desirable means of proceeding. This is particularly so for example in cases involving the determination of whether a large number of workers who are members of the same union lost their employment at the same date as the result of an industrial dispute or not. The amounts would be different in each case, but if it were only

> the arithmetical calculations which were involved the issue of the proper attribution might well be settled by the decision in a representative case.

[25] The court went on to state that a representative case can only be brought if the board or tribunal approves, whether or not the parties are in agreement.

[26] There have been many cases since *Lemieux* in which representative appeals have been used to streamline the appeal process and avoid duplicated effort, including at the Tax Court of Canada. In no case I could find, however, were rules that govern this type of administrative procedure set out. Adding to this lack of clarity, some decisions refer to "group appeals" when referring to either joint appeals or representative appeals and often use "joint" and "representative" interchangeably.

[27] Some guidance is provided by the current Regulations, which establish in s.13 that the Tribunal may "deal with two or more appeals or applications jointly". Unfortunately, they do not set out how this should be done or how this would differ (if at all) from a representative appeal. In the case at hand this confusion has led to multiple hearings before the board of referees and the Office of the Umpire and has, as agreed by the parties, necessitated the intervention of the Appeal Division of the Tribunal.

[28] Because of the foregoing, I am of the firm belief that some clarity is in order. To this end I offer the following definitions and recommendations to aid parties in the future. I wish to stress that these are only recommendations. Every Tribunal member has the jurisdiction to decide any and all procedural matters before them, subject to appeal to the Appeal Division.

[29] A joint appeal occurs when two or more cases are joined together by way of s.13 of the Regulations. In such an appeal, each case is examined on its own merits at the same hearing. Usually, a joint appeal is held because there is evidence or pleadings in common and it would be easier to hear the joined cases together. In this type of appeal, a separate decision would usually be issued for each claimant. However, if the Tribunal believed it was in the interests of justice, a single decision containing the facts, law, and conclusions specific to each case could be issued instead.

[30] A joint appeal, while offering less in the way of efficiency gains because each case is still examined on its own merits, offers the opportunity to hear evidence in common and avoid duplication. It also offers the advantage of hearing complex submissions once, rather than repeating substantially the same submissions over and over again in each separate case.

[31] A representative appeal, by contrast, occurs when a number of cases have shared legal and/or factual issue(s) to be resolved that would apply jointly to the claimants. Usually, a representative appeal is held because there are few differences between the various claimants and no need to consider their cases individually. In cases such as this, one decision would be issued that would apply to all the claimants involved in the appeal.

[32] Because representative appeals only examine one representative claimant and issue only one decision, they offer the possibility of a reduced decision writing burden relative to joint appeals. On the negative side, representative appeals often run into difficulty when a party to the appeal asserts issues not applicable to the representative claimant.

[33] In this case, the initial decision to proceed by way of representative appeal offered many advantages in terms of efficiency. Unfortunately, by the time this matter reached the Tribunal it became clear that there were potential issues to be resolved that differed from claimant to claimant and which remained outstanding even after the main legal questions were answered to the satisfaction of the parties.

[34] I firmly believe that it would have saved considerable time if the Appellant had been asked by the first Board if there were any other issues to be resolved other than the earnings and allocation questions. If this had been done, the first Board could have ruled on those issues and avoided the need for this hearing.

[35] Of course, I make this statement with the benefit of hindsight and do not blame the first Board for acting as they did. They proceeded with the agreement of the parties, and cannot be faulted for trying to resolve the enormous number of appeals as efficiently as they could.

[36] On reflection, it is my recommendation that representative appeals, as opposed to joint appeals, should not be used unless there is an agreed upon set of issues to be determined that will be applicable to the entire group of appellants. If there are other issues that vary from party to party it may be better to proceed by way of joint appeal instead, as contemplated by the Regulations. As agreed by the parties here, it is extremely undesirable to have to re-hear cases because important issues have not been addressed.

CONCLUSION

[37] Therefore, on consent and for the reasons above, the appeal is allowed. The decision of the board of referees under appeal is varied in accordance with these reasons.

Mark Borer

Member, Appeal Division