Federal Court of Appeal  Cour d'appel fédérale

**Date: 20190319**

**Docket: A-130-18**

**Citation: 2019 FCA 49**

**CORAM:** **DE MONTIGNY J.A.**
**WOODS J.A.**
**LASKIN J.A.**

**BETWEEN:**

**JAMES WILSON**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Ottawa, Ontario, on March 7, 2019.

Judgment delivered at Ottawa, Ontario, on March 19, 2019.

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| REASONS FOR JUDGMENT BY: | DE MONTIGNY J.A. |
| CONCURRED IN BY: | LASKIN J.A. |
| CONCURRING REASONS BY: | WOODS J.A. |

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## REASONS FOR JUDGMENT

**DE MONTIGNY J.A.**

[1] Mr. Wilson applies for judicial review of the decision rendered on March 28, 2018 by the Appeal Division of the Social Security Tribunal of Canada (Appeal Division). The General Division of the Social Security Tribunal (General Division) had concluded that the applicant's pension from his trade union constituted earnings to be deducted from his sickness benefits, and the Appeal Division found no error in that decision.

[2] In his application for judicial review, Mr. Wilson challenges the decision of the Appeal Division essentially on two grounds. First, he argues that the Appeal Division erred in concluding that the General Division rightly decided that the Canada Employment Insurance Commission (the Commission) did not violate the rules of procedural fairness or natural justice by failing to review the collective agreement or pension plan before deciding that the pension income constituted earnings to be deducted from the sickness benefits. Second, he contends that the Appeal Division erred in law in its interpretation and application of sections 35 and 36 of the *Employment Insurance Regulations*, SOR/96-332 (the Regulations). Having carefully reviewed the record and the parties' submissions, I am of the view that this application for judicial review should be dismissed.

[3] Pursuant to paragraph 35(2)(e) of the Regulations, monies paid or payable to a claimant on a periodic basis or in a lump sum on account or in lieu of a pension are earnings for benefit purposes and are to be allocated under subsection 36(14) of the Regulations to the period for which they are paid or are payable. Subsection 21(3) of the *Employment Insurance Act*, S.C. 1996, c. 23 (the Act) further provides that if earnings are received by a claimant for a period in a week of unemployment during which the claimant is incapable to work because of illness, those earnings shall be deducted from the benefits payable for that week.

[4] Crucial for the determination of this case is the definition of "pension" that is found in paragraph 35(1) of the Regulations. According to that definition, a retirement pension arising out of employment or under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 is to be considered as a

"pension" and the pension benefits are therefore earnings that must be deducted from the benefits (including sickness benefit) payable under the Act (see subsection 21(3) of the Act).

[5] In the case at bar, the central issue before the General Division and the Appeal Division was whether the monthly payments that the applicant received from his union constitute earnings for the purposes of sections 35 and 36 of the Regulations that must be deducted from his sickness benefits. The applicant worked as an electrician for 46 years, and contributed to a group pension plan that was part of his trade union's collective agreement. Unfortunately, he had to stop working on December 23, 2014 as a result of the cancer treatments he had to undergo, and he has never been able to resume working since that time. When he applied for sickness benefits in September 2015, he was told by the Commission that the pension income he was receiving from his union would have to be deducted from his benefits. As previously mentioned, that decision was confirmed by both the General Division and the Appeal Division of the Social Security Tribunal.

[6] There is no issue that the income received by the applicant from his union was money paid or payable on a periodic basis on account of a retirement pension (paragraph 35(2)(e) of the Regulations). The question is whether that pension arose out of employment (subsection 35(1) of the Regulations). The Act and the Regulations are silent on this matter, but this Court in *MacNeil v. Canada (Employment Insurance Commission)*, 2009 FCA 306 (*MacNeil*) identified a few criteria to determine whether or not a pension arises out of employment. These criteria can be summarized as follows: (1) Does the contributor have any control over contributions made to the plan on his behalf? (2) Is the plan a private plan in the nature of a savings plan or a Registered

Retirement Savings Plan (RRSP)? and (3) Do the pension contributions vary directly with the amount of work done by the contributor? (see *MacNeil* at paras. 28-35).

[7] The applicant argues that his pension cannot be considered as a retirement pension arising out of employment, since he and other union members are the only ones contributing to the plan. He argues that since the contractor employers and the union contributed nothing to the plan, the pension income could not constitute earnings.

[8] At the hearing before the General Division, the applicant did not file the collective agreement or the pension plan documents, relying only on his testimony. The General Division nevertheless found the applicant credible and accepted his testimony to the effect that he had no control over the contributions made to the plan on his behalf. It also found that the applicant's pension contributions were tied to and varied directly with his hours of work, and that there was no evidence that the plan at issue was private, similar to a savings plan or RRSP. It is on that basis that the General Division found that the applicant's retirement pension arose out of his employment.

[9] The applicant now submits that the Appeal Division committed an error of law when it concluded that the General Division did not fail to observe a principle of natural justice or refuse to exercise its jurisdiction by not referring the matter to the Commission for investigation. According to the applicant, it was incumbent upon the Commission to obtain and look at the collective agreement or pension plan to ascertain, in light of the *MacNeil* factors, whether or not the pension arose out of employment.

[10] I agree with the respondent that the Appeal Division made no reviewable error in dismissing this ground of appeal. It is well established that a tribunal has no obligation to seek evidence from an applicant. The burden is always on a claimant to substantiate his case and to adduce all the evidence which he intends to rely upon (see *Bourgeois v. Canada (Attorney General)*, 2004 FCA 117; *Grosvenor v. Canada (Attorney General)*, 2018 FC 36 at para. 38). Yet, the applicant chose not to file the pension plan and the collective agreement before the Commission and, subsequently, before the General Division. Despite being represented by counsel, the applicant did not raise any breach of procedural fairness before the General Division, nor did he request any adjournment to submit those documents that he now claims should have been part of the record.

[11] In those circumstances, I fail to see how it can seriously be argued that the General Division breached its duty of procedural fairness. The applicant had every opportunity to answer the case against him and to present evidence in support of his position. If he felt that the actual wording of his collective agreement or pension plan was essential to his case, it was his responsibility to introduce it in evidence. Instead, he elected to rely on his testimony, which the General Division accepted. Moreover, the applicant has not identified, either before the Appeal Division or before this Court, any additional information that could have been gleaned from the pension plan or the collective agreement and that could have led to a different result. Therefore, the Appeal Division was correct to find that the General Division did not fail to observe a principle of natural justice pursuant to paragraph 58(1)(a) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34.

[12] I am further of the view that the Appeal Division did not err in its interpretation and application of sections 35 and 36 of the Regulations. On judicial review, this Court can only intervene if the decision of the Appeal Division is unreasonable, that being the standard of review where an administrative tribunal is interpreting its own statute or statutes closely connected with its function (see *Canada (Attorney General) v. Jean*, 2015 FCA 242 at para. 14; *Canada (Attorney General) v. Bellil*, 2017 FCA 104 at para. 9; *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 3).

[13] The applicant tried to distinguish the circumstances of his case from those considered in *MacNeil*, on the basis that the contributions in that case were made by the employer. However, the General Division rejected that purported distinction and found that in both cases the contributions were taken from the worker's wages, and that the employer's role was merely to administer the transfer of the worker's contribution to the plan. The applicant was unable to convince the Appeal Division that such a finding constituted an error of law, and I am similarly unable to hold that the Appeal Division made any reviewable error of law in so concluding.

[14] I wish to add, in conclusion, that I am quite sensitive to the applicant's plight and to what he may perceive as an unjust result. As the General Division noted, however, the law as it stands must be applied and it is beyond the role of this Court to make compassionate rulings.

[15] This application for judicial review should therefore be dismissed. Since the respondent did not seek costs, none will be awarded.

"Yves de Montigny"

J.A.

"I agree
J.B. Laskin J.A."

**WOODS J.A. (Concurring Reasons)**

[16] I agree with the disposition of the application proposed by my colleague Justice de Montigny, but I would do so on the basis of more limited reasons. In my view, the application may be disposed of based on the reasons of my colleague set out in paragraphs 9 to 11 above. These paragraphs fully address the submissions of the applicant in this Court and it is not necessary to consider other issues.

"Judith Woods"

J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | A-130-18 |
| **STYLE OF CAUSE:** | JAMES WILSON v. ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | MARCH 7, 2019 |
| **REASONS FOR JUDGMENT BY:** | DE MONTIGNY J.A. |
| **CONCURRED IN BY:** | LASKIN J.A. |
| **CONCURRING REASONS BY:** | WOODS J.A. |
| **DATED:** | MARCH 19, 2019 |

**APPEARANCES:**

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