Citation: ***Canada Employment Insurance Commission v. G. Z.,*** **2015 SSTAD 683**

Date: June 3, 2015

File number: AD-14-203

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

G. Z.

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

Heard by Teleconference on May 28, 2015

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant	Joanne Davis
The Respondent	G. Z.

INTRODUCTION

[1] The Respondent was diagnosed with leukemia in January 2012. In May of that year he was separated from employment. He received a severance package and some other income from his former employer until July 2012. In March 2013 the Respondent applied for Employment Insurance benefits (EI). He requested that his benefits be antedated to June 2012. The Appellant refused this request. The Respondent appealed to the General Division of the Social Security Tribunal. The General Division held a hearing and allowed the Respondent's appeal. It decided that the Respondent's diagnosis of leukemia and loss of job were exceptional circumstances such that his claim should be antedated to June 2012.

[2] The Appellant was granted leave to appeal the General Division decision on February 18, 2015. The hearing of the appeal was conducted by teleconference based on the following:

a) The nature of the issues to be resolved and the submissions of the parties;

b) The fact that credibility of the parties was not anticipated to be a prevailing issue;

c) The information in the file, including the nature of gaps or need for clarification in the information; and

d) The cost-effectiveness and expediency of the hearing choice.

I have considered all of the written materials and the oral submissions of the parties in making the decision in this matter.

STANDARD OF REVIEW

[3] The Appellant asserted that the standard of review to be applied to the General Division decision was one of reasonableness. The Respondent made no submissions on this issue. The leading case on this is *Dunsmuir v. New Brunswick* 2008 SCC 9. In that case, the Supreme Court of Canada concluded that when reviewing a decision on questions of fact, mixed law and fact, and questions of law related to the tribunal's own statute, the standard of review is reasonableness; that is, whether the decision of the tribunal is within the range of possible, acceptable outcomes which are defensible on the facts and the law. The issue to be determined in this appeal is one of mixed fact and law. The appropriate standard of review is that of reasonableness.

ANALYSIS

[4] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 58 of the Act sets out the only grounds of appeal that can be considered (see the Appendix to this decision). In this case, leave to appeal was granted on the basis that the General Division may have erred in fact and in law when it decided that the Respondent had acted reasonably and shown good cause for his delay in applying for EI. For the reasons set out below, I am persuaded, on a balance of probabilities, that the General Division decision was unreasonable and not defensible on the facts and the law.

[5] The Appellant argued that the Respondent did not act as a reasonable person would and had not shown good cause for his delay in applying for EI. In reaching its decision, the General Division acknowledged that the Respondent chose to delay applying for EI as he believed that he would transition to alternate work quickly, he had savings that could be accessed, and he did not wish to burden "the system". The Respondent also testified at the General Division hearing, and argued at the appeal hearing, that after his leukemia diagnosis and job loss, he concentrated on his health, and finding a new job as soon as possible. I accept that the Respondent found himself in very difficult circumstances when his job was terminated in 2012. He is applauded for continuing to seek employment in the face of his significant health situation. However, the evidence does not establish that the Appellant had good cause for not applying for EI prior to

March 2013. It was unreasonable for the General Division to not consider this evidence in making its decision.

[6] In addition, the Appellant argued that there was no evidence that the Respondent was prevented from applying for EI for the entire period of delay, and that he could have applied for Employment Insurance sick benefits which would not have required him to continue to look for work to receive the benefits, but he did not do so. Neither party pointed to any such evidence at the hearing of this appeal. This was also not considered by the General Division.

[7] Finally, the Appellant argued that the General Division decision was unreasonable when it relied on the decision of the Umpire in CUB 17192 as the facts of that case were significantly different than in this case. In that case, the claimant delayed in applying for EI for approximately 5 weeks. There was also evidence that the claimant had attended at an Employment Insurance office but was not told to apply for EI. In contrast, in this case, the Respondent delayed his application by approximately 9 months, a significantly longer period of time. There was also no evidence that the Respondent had attended at an Employment Insurance office or taken other steps to learn of his rights and obligations. For these reasons, I am satisfied that the decision in CUB 17192 was not comparable to this case, and it was unreasonable for the General Division to rely on it in making its decision.

[8] The Respondent also made a number of submissions to support his position that the General Division decision should be upheld on appeal. First, he asserted that when he lost his job in 2012 he believed that he would transition quickly to new employment. It was when he had depleted his funds and realized that he needed financial help that he applied for EI. I appreciate that the Respondent did all that he could to find new work. This argument does not, however, establish good cause for his delay in applying for EI.

[9] The Respondent also argued that the Appellant lacked understanding and focused on denying him benefits, which was contrary to the purpose of Employment Insurance which is to assist those who are separated from work and require assistance. While I understand the Respondent's frustration in this regard, I am unable to consider this argument on appeal. This statement does not establish that the General Division decision contained any error in fact or in

law, or that it did not observe the principles of natural justice. Thus, it has no persuasive value in this appeal.

[10] Finally, the Respondent argued that a technicality (late application) should not prevent someone from receiving benefits. The *Employment Insurance Act* sets out requirements to qualify for benefits, the time period those benefits are payable, and the rate of benefits paid. The Act also contains an antedate provision, which permits a claim to be antedated if certain criteria are met. This Tribunal has no discretion to change those criteria or waive them in a particular case. No matter how tragic the Respondent's circumstances are, the provisions of the Act must be strictly applied to him and all claimants. Consequently, this argument also fails.

CONCLUSION

[11] The appeal is allowed as I find that the decision of the General Division was unreasonable for the reasons set out above.

[12] Section 59 of the *Department of Employment and Social Development Act* sets out what remedies the Appeal Division can give on appeal. In this case, the facts regarding the Respondent's employment, termination from employment and date of application for EI are not in dispute. There are no issues of credibility. Therefore, it is appropriate for the Appeal Division to give the decision that the General Division should have. The Respondent's claim for his EI to be antedated to June 2012 is dismissed.

Valerie Hazlett Parker
Member, Appeal Division

APPENDIX

Department of Employment and Social Development Act

58. (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division 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.

59. (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.