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

Citation: *S. T. v. Canada Employment Insurance Commission,* 2016 SSTADEI 31

Appeal No. AD-13-414

BETWEEN:

S. T.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: January 25, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] On consent, the appeal is allowed.

INTRODUCTION

[2] On May 21, 2013, a panel of the board of referees (the Board) dismissed the Appellant's appeal against the previous determination of the Commission.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] On October 8, 2015, a teleconference hearing was held. The Appellant and the Commission appeared and made submissions.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (the DESDA), the only grounds of appeal are that:

> (a) the General Division [or the Board] failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) the General Division [or the Board] erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) the General Division [or the Board] 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.

ANALYSIS

[6] This appeal concerns whether or not the Appellant was, if not for her illness, otherwise available for work, and whether or not I may consider new evidence. For the reasons below and on consent, the appeal is allowed.

[7] The day before the hearing before me, the Appellant submitted a document from her former Employer stating that she took sick leave on August 27, 2012. Neither the Board nor the Commission had access to this document previously, and in fact had been told by the Employer that the Appellant did not take sick leave. Based upon that inaccurate information, the Board (and the Commission before them) concluded that the Appellant was not otherwise available if not for her illness and did not qualify for benefits.

[8] Under most circumstances, new evidence cannot be considered by the Appeal Division because a hearing before the Appeal Division is not a hearing *de novo*. It is the role of the General Division to admit evidence and make the findings of fact that flow from that evidence.

[9] That being said, administrative tribunals are not bound by the formal rules of evidence. Additionally, common sense and previous decisions of the Federal Court of Appeal, such as *Rodger v. Canada (Attorney General),* 2013 FCA 222, discuss the admission of new materials or testimony under oath before an umpire (a predecessor Tribunal to the Appeal Division for employment insurance appeals) and have held that some evidence is admissible.

[10] Further, the Appeal Division is entitled according to ss. 59(1) of the DESDA to give the decision that the General Division should have given, which often necessitates making factual findings. It is clear, for example, that evidence of a breach of natural justice which occurred at the General Division is admissible (and that findings of fact must be made regarding that evidence) because otherwise it would be impossible for the Appeal Division to make the determinations it is entitled to make according to ss. 59(1).

[11] It is also clear that there will be times where it will be highly inefficient to force the parties to return to the General Division to evaluate evidence that had been properly submitted to the General Division but where the General Division member did not receive it due to a filing or a postal delivery problem. This will especially be so if this

evidence is not disputed. In these rare cases, it may well be in the interests of justice that the Appeal Division simply accept the evidence and render a decision.

[12] Finally, from time to time one of the parties will attempt to introduce new evidence to the Appeal Division that could have been submitted as part of an application to rescind or amend a General Division decision according to s. 66 of the DESDA. Unfortunately, most claimants are unrepresented and even those who are represented are often completely unaware of that section. As a result, they often (not illogically) simply appeal to the Appeal Division and attempt to present their evidence there instead.

[13] It is this type of new evidence that causes the most issues, and is the focus of this case.

[14] Section 66 requires that new evidence contain "new facts" to be admitted, and in *Canada (Attorney General) v. Chan*, [1994] FCJ No 1916, the Federal Court of Appeal stated at paragraph 10 that new facts are:

> …facts that either happened after the decision was rendered or had happened prior to the decision but could not have been discovered by a claimant acting diligently and in both cases the facts alleged must have been decisive of the issue…

[15] In *Dubois v. Canada (Employment Insurance Commission)*, [1998] FCJ No 768, the Federal Court of Appeal took this a step further and allowed new facts to be introduced before an umpire (now the Appeal Division) even when no rescind or amend application had been brought. The reasoning in *Dubois* has been repeated in a number of other cases, and while s. 86 of the *Employment Insurance Act* (the *Act*) was renumbered as s. 120 and then moved from the *Act* to s. 66 the DESDA, the wording has remained almost identical.

[16] At paragraphs 2 and 3 of *Dubois*, the Court stated that:

> We must express serious reservations about the application by an umpire of formal rules developed for the smooth functioning of the courts. The Umpire is one level in the process of the administration of the

> *Unemployment Insurance Act* [now the *Act*], an eminently social piece of legislation, where claimants usually represent themselves and where the boards of referees [now the General Division] sitting at first instance have no legal training. The principles of justice suggest that submissions by claimants should be accepted very liberally at all levels; in fact, this very liberal approach is required by section 86 of the Act [now s. 66 of the DESDA].
>
> That being said, the fact remains that the fundamental prerequisite for an Umpire accepting new evidence is that the evidence be material in that it is likely to have a major, if not decisive influence on the result of the case.

[17] Essentially, *Dubois* held that as an administrative tribunal designed to adjudicate a benefits regime, evidence should be admissible before an umpire in the least formal manner possible so as to further the interests of justice and to allow the tribunal to use its resources most effectively. I note that although all Tribunal members receive extensive training and every member of the Appeal Division is a lawyer, much like the Board, most members of the General Division are not lawyers and do not have legal training.

[18] If the Tribunal was to dismiss an appeal to the Appeal Division and force an appellant to file a new application to rescind or amend, it would be at a substantial cost of time and resources. This would result in Tribunal members resolving fewer cases than they would otherwise and would not advance the interests of justice in any way, especially given that in many cases the Commission has no objections to the new facts being admitted. I also observe that in some cases a rescind or amend application might not be possible due to the one-year time limit to submit such an application.

[19] It was one of these situations that was addressed by the Federal Court of Appeal in *Canada (Attorney General) v. Shahid*, 2013 FCA 145. In that case, the Court stated at paragraph 3 that:

> Before the Board of Referees there was insufficient evidence as to the first condition [the entitlement to the Canada Child Tax Benefit]. That deficiency was cured by new documentary evidence that [the appellant] presented to the Umpire. It would have been preferable for the Umpire to refer the new evidence to the Board for reconsideration of their previous decision. However, given that the new evidence is conceded to establish [the appellant's] entitlement to the CCTB for the relevant time, we are not inclined to set aside the Umpire's decision on that procedural ground.

[20] I note that the Court had no objection to the acceptance of new evidence that might not even have qualified as new facts, and that the Court refers to any challenge to the evidence not being sent back to the Board as a "procedural ground" of appeal.

[21] In a general sense this approach has been codified in the *Social Security Tribunal Regulations*, which states that:

> 3.(1) The Tribunal
>
> (a) must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit; and
>
> (b) may, if there are special circumstances, vary a provision of these Regulations or dispense a party from compliance with a provision.
>
> …
>
> 4. A party may request the Tribunal to provide for any matter concerning a proceeding…by filing the request with the Tribunal.

[22] Leaving issues of new evidence aside for the moment, there can be no doubt that parliament intended the Tribunal to oversee the administration of the *Act* in a manner compatible with the sentiments expressed by the Court in *Dubois* and *Shahid*. Indeed, on the topic of procedural fairness the Federal Court expressed similar views in *Bossé v. Canada (Attorney General)*, 2015 FC 1142, at paragraph 33 (translated):

> The purpose of the Act, the nature of the rights concerned, the Tribunal's operational constraints, the Tribunal's specific clients, and all other relevant factors must be taken into account in order to identify the extent of the rules of procedural fairness. Given the high volume of cases heard by the Tribunal, the Tribunal must be allowed a certain amount of administrative flexibility, without compromising the objective of excellence that it has established along with other equally laudable objectives (accessibility, efficiency and speed)…

[23] It is important to note, however, that the Federal Court of Appeal has also been very clear that the introduction of new facts should be a rare occurrence. I repeat once

again that it is not our role to conduct a *de novo* appeal or to re-hear the appeal on the merits. Only where the new facts would have a major impact on the outcome should they be admitted.

[24] If the Appeal Division were to admit new facts on a regular basis, it would be contrary to the Appeal Division's proper role overseeing and providing guidance to the General Division. It would also render the process unmanageable because of the deluge of documents that would no doubt result.

[25] In this case, the Commission accepts that the document provided by the Appellant is a new fact that should be considered. Further, they concede that with this new document the Appellant has proven that she was otherwise available except for her illness, and that her appeal should be allowed.

[26] Having reviewed the document, and noting the consent of the Commission, I find myself in agreement with the parties that it would be in the interests of justice to admit the new facts and to render a decision. I find that as the Appellant has now shown that she was otherwise available except for her illness, this appeal must succeed.

CONCLUSION

[27] For the above reasons and on consent, the appeal is allowed.

Mark Borer

Member, Appeal Division