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

Citation: *C. B. v. Canada Employment Insurance Commission,* 2016 SSTADEI 40

Appeal No. AD-14-99

BETWEEN:

C. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: January 26, 2016

DECISION: Appeal dismissed

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On November 26, 2013, a General Division member 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 August 27, 2015, a teleconference hearing was held. The Appellant and her representative, 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 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.

[6] Administrative law currently establishes only two standards of review, that of correctness and that of reasonableness.

[7] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett,* 2013 FCA 243, *Chaulk v. Canada (Attorney General),* 2012 FCA

190, and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[8] This appeal concerns whether or not the Appellant had good cause within the meaning of the *Employment Insurance Act* (the Act) to voluntarily leave her employment, and whether or not I may consider new evidence.

[9] In her written submissions the Appellant argued that, contrary to the findings of the General Division member, she had sound health reasons for leaving her employment. She also argues that she needed to take care of her husband, who was very ill at the time. The Appellant submits that her doctor provided a note, which he further clarified subsequent to the General Division hearing, which stated that he advised the Appellant to quit work. The Appellant states that the General Division member made errors in his factual findings and his ultimate conclusion that should be rectified by the Appeal Division. She asks that her appeal be allowed.

[10] The Commission, in their submissions, support the decision of the General Division member. They note that although the Appellant's doctor may have advised the Appellant to leave her job for health reasons (and admit that the later clarification written by the doctor explicitly says so), that is not what the evidence presented to the General Division member (including direct testimony from the Appellant) indicated. As the General Division member can only make a ruling based upon the evidence before him, it cannot be said that he erred by drawing conclusions based upon that evidence even if that evidence turns out to have been wrong.

[11] In his decision, the General Division member reviewed the evidence before him and, at paragraphs 22-25, correctly stated the law. He then determined that the Appellant had voluntarily left her employment for three reasons: for her health, to care for her husband, and to move to a new community. These conclusions were based upon statements

made by the Appellant to the Commission (found at exhibit GD3 – 21) as well as direct evidence provided by the Appellant at the hearing. The member then found that the Appellant had not shown that she had no reasonable alternative to leaving her employment, and dismissed her appeal.

[12] During the hearing before me, the Appellant's representative elaborated upon her grounds of appeal. She candidly admitted that the General Division member "made a decision on the facts that they [the member] were presented but what I am seeing when we go over all of the facts… is that the facts were inaccurate".

[13] In support of her position, the Appellant filed a number of documents with the Tribunal. The first was the above-mentioned note of clarification written by the Appellant's doctor on December 30, 2013, after the General Division decision (labelled exhibit AD4 – 7). The second was a doctor's note attesting to the fact that the Appellant's husband was ill. The third was a series of newspaper articles regarding the Commission.

[14] The Commission, for their part, strenuously objected to admitting into evidence the newspaper articles on the basis that they have no relevance whatsoever to the current appeal. They also noted (much less strenuously) that the doctor's note regarding the Appellant's husband was not material because there was no dispute that he was ill.

[15] I agree with the Commission on these two points. I did not consider these two sets of documents to be relevant, and they did not factor into my decision. I do note, however, that based upon the uncontested evidence before the General Division I fully accept that the Appellant's husband was seriously ill, as did the General Division member.

[16] The first document, the doctor's note of December 30, 2013, confirming that he advised the Appellant to quit her job in January 2013, presents more of an issue.

[17] 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.

[18] 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.

[19] 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).

[20] 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.

[21] 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.

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

[23] 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…

[24] 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 Act was renumbered as s. 120 and then moved from the Act to s. 66 the DESDA, the wording has remained almost identical.

[25] 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.

[26] 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 of referees (the

Board), most members of the General Division are not lawyers and do not have legal training.

[27] 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.

[28] 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.

[29] 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.

[30] 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.

[31] 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)…

[32] 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.

[33] 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.

[34] In this case, the Commission submits that although they agree that new facts are admissible in some circumstances they feel that the new doctor's note does not meet the

test for new facts as set out by the Court. They submit that the new doctor's note is additional information to support a point already raised before the General Division and should not be considered as it could have been prepared for the earlier hearing. They also submit that the new doctor's note would not be decisive in altering the member's decision, because the member also relied upon evidence provided by the Appellant at the General Division hearing.

[35] Considering the positions of the parties and applying the above principles to the facts of this case, I find that the doctor's note of December 30, 2013, does not constitute new facts and should not be admitted. In declining to do so, I note *Rodger*, which (quoting *Chan*) also reaffirmed that a different or more detailed version of the facts or a sudden realization of the consequences of certain facts are not new facts.

[36] I find that the new doctor's note was potentially available at the time of the General Division hearing and would not have a major or decisive effect on the outcome of the case. It represents a clarification of the earlier evidence that was before the General Division, and stands in opposition to the Appellant's earlier comments at the General Division hearing and to the Commission.

[37] I am mindful of the Court's comments in *Chan* (at paragraph 11) that "careless or ill-advised" claimants should not be permitted to attempt to introduce evidence that was "at all relevant times within the personal knowledge" of the Appellant. I have no doubt that the doctor provided the new note to the Appellant upon realizing the consequences of not being explicit that he told the Appellant to quit her job.

[38] In argument before me, the Appellant's representative was unable to explain why the Appellant told the General Division member that her doctor did not advise her to leave her position, except to say that she may have been confused because of the many events happening at that time. While this may be so, it does not explain why the Appellant also told this to the Commission.

[39] There have been cases where I have admitted new facts, either on consent or in the interests of justice, but this is not a case where I believe this is warranted.

[40] Having made the above findings, I turned my mind to the remainder of the appeal and the decision of the General Division member. In her submissions, and again before me, the Appellant's representative explained her view that the General Division member made factual errors in coming to his conclusions.

[41] The role of the General Division is to act as the primary trier of fact. It is the General Division that is best suited to examine the evidence, and it is for that reason that findings of fact or mixed fact and law can only be overturned by the Appeal Division if those findings are unreasonable.

[42] I have carefully reviewed the Appellant's factual arguments, and the conclusions reached by the General Division member. As noted above, I can easily see from the record the basis upon which the member made his factual findings. He relied upon the evidence before him, as he was required to do.

[43] Ultimately, the member was required to determine if the Appellant had shown just cause for voluntarily leaving her employment. To that end, he considered the facts and concluded that she had not. In the absence of a more definitive medical note, he found that she had not shown that she had to leave for health reasons. He also found that the conditions at her work were not so intolerable so as to force the Appellant to quit, and that she did have reasonable alternatives to leaving. These findings were open to him, and were perfectly reasonable.

[44] I have found no evidence to support the grounds of appeal invoked or any other possible ground of appeal. In my view, as evidenced by the decision, the member conducted a proper hearing, weighed the evidence, made reasonable findings of fact, established the correct law, and came to a conclusion that was intelligible and understandable.

[45] There is no reason for the Appeal Division to intervene.

CONCLUSION

[46] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division