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

Citation: ***Canada Employment Insurance Commission v. D. G.*****, 2016 SSTADEI 62**

Date: February 4, 2016

File number: AD-13-1164

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

D. G.

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

Heard by Teleconference on October 1, 2015

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant	Joanne Davis
Respondent (Claimant)	D. G.

INTRODUCTION

[1] On May 23, 2013, the Board of Referees (Board) allowed the claimant's appeal where the Canada Employment Insurance Commission (Appellant) had determined that the claimant (Respondent in this appeal) had insufficient hours of insurable employment to qualify for benefits effective February 10, 2013.

[2] An application for leave to appeal the Board decision was filed with the Appeal Division of the Tribunal on June 11, 2013, and leave to appeal was granted on July 24, 2015.

[3] This appeal proceeded by teleconference for the following reasons:

a) The lack of complexity of the issue(s) under appeal;

b) The information in the file, including the need for additional information; and

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[4] The Appeal Division of the Tribunal must decide:

a) Whether the Board made an error of law in arriving at its decision; and

b) Whether it should dismiss the appeal, give the decision that the Board should have given, refer the case to the General Division for reconsideration or confirm, rescind or vary the decision of the Board.

THE LAW

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) 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] For our purposes, the decision of the Board is considered to be a decision of the General Division.

[7] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraph 58(1)(b) of the DESD Act.

[8] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division.

SUBMISSIONS

[9] The Appellant submitted that the applicable standard of review for questions of law is correctness.

[10] The Appellant submitted that the Board erred in law in that:

a) The only issue before the Board was whether the claimant had sufficient insurable hours to establish a claim for benefits as of February 10, 2013 pursuant to section 7 of the *Employment Insurance Act* (EI Act);

b) The Board found that the claimant's current claim should have been considered as an extension of his prior claim pursuant to section 10 of "the Law". However, it is

unclear to what law the Board was referring. Section 10 of the EI Act allows for an extension of the benefit period in specific cases, none of which apply to claimant's situation;

c) The claimant did meet the criteria to extend his qualifying period pursuant to section 8 of the EI Act. However, after extending his qualifying period, he does not qualify for benefits as of February 10, 2013 because he had accumulated 0 of the required 630 insurable hours needed to be paid regular EI benefits in accordance with paragraph 7(2)(b) of the EI Act.

d) The qualifying requirements under 7(2)(b) of the EI Act allow for no discrepancy or discretion.

[11] The Respondent submitted that:

a) The Commission assumed he was filing a new claim, when he was not;

b) His old claim was based on disability;

c) He was on disability until he returned to the workforce;

d) The Commission says that he did not accumulate enough hours, but he could not accumulate the hours because he could not work;

e) He agrees with the Board's decision; and

f) The Commission should have continued the claim based on the hours remaining in his previous claim.

STANDARD OF REVIEW

[12] The Federal Court of Appeal has determine, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[13] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 CAF 242 (CanLII), 2015 FCA 242, the Federal Court of Appeal recently suggested that this approach is not appropriate when the Appeal Division of the Tribunal is reviewing appeals of employment insurance decisions rendered by the General Division.

[14] I am uncertain how to reconcile this seeming discrepancy. Since the current matter relates to an appeal from a Board of Referees decision, and not from a General Division decision, I will proceed on the basis that the Umpires did: that the applicable standard of review is dependent upon the nature of the alleged errors involved.

[15] Here errors of law are alleged.

ANALYSIS

[16] The Board's decision does not refer to any jurisprudence. It refers to "Article 10 of the Law" but does not state whether "the Law" is the EI Act or another law. It is likely that the Board meant subsection 10(10) of the EI Act with its reference to "Article 10 of the Law" and "extension of the current file".

[17] Subsection 10(10) of the EI Act states:

> (10) A claimant's benefit period is extended by the aggregate of any weeks during the benefit period for which the claimant proves, in such manner as the Commission may direct, that the claimant was not entitled to benefits because the claimant was
>
> (a) confined in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the claimant was being held or any other offence arising out of the same transaction;
>
> (b) in receipt of earnings paid because of the complete severance of their relationship with their former employer;
>
> (c) in receipt of workers' compensation payments for an illness or injury; or
>
> (d) in receipt of payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the claimant, her unborn child or a child whom she was breast-feeding.

[18] The Board found, at pages 2 and 3 of its decision, that: "[the current inquiry] should not be considered as a new inquiry but rather as an extension of the current file. Article 10 of the Law should have been applied in the claimant's case. He was sick and this was confirmed. Therefore, the claimant could still be entitled to benefits at least until February 4, 2013."

[19] Subsection 10(10) of the EI Act allows for an extension of the benefit period but only in cases where the claimant was confined in jail, in receipt of workers' compensation payments, in receipt of a preventive withdrawal payment, or in receipt of separation payments resulting in an allocation of earnings.

[20] In this case, the Respondent was not subject to any of the conditions listed in subsection 10(10) of the EI Act. He was in receipt of disability insurance payments but not workers' compensation payments. The claimant confirmed at the Appeal Division hearing that he did not receive workers' compensation.

[21] Subsection 10(10) of the EI Act could not properly apply to the Respondent's claim. No other subsection of section 10 of the EI Act on extension of benefits could properly apply to the Respondent's situation.

[22] As such, I find that the Board erred in law.

[23] Therefore, the Appeal Division is required, under the correctness standard, to make its own analysis and decide whether it should dismiss the appeal, give the decision that the Board should have given, refer the case to the General Division, confirm, reverse or modify the decision.

[24] The issue is whether the claimant had sufficient hours of insurable employment to qualify for benefits effective February 10, 2013.

[25] The facts are not in dispute. They can be summarized as follows:

a) The Respondent established a claim for sickness benefits effective March 29, 2011 and was paid the maximum of 15 weeks of sickness benefits;

b) He applied for regular EI benefits on February 12, 2013;

c) He had not worked for any employer since March 2011;

d) He received payments through his employer's disability plan from May 29, 2011 to February 9, 2013;

e) He had no insurable employment during the period February 12, 2012 to February 9, 2013 (his qualifying period as established by the Commission); and

f) He had zero (0) insurable hours between March 27, 2011 and February 9, 2013; and

g) The EI Act, subsection 7(2), required 630 hours in his qualifying period.

[26] The Respondent maintains that he was unable to work because he was disabled, so he could not accumulate the hours. It was not his fault that he could not work. His claim should have been continued from his previous claim, and he should be paid EI benefits.

[27] The Appellant concedes that the Respondent satisfies the requirements under section 8 of the EI Act in order to extend his qualifying period. However, even using the extended qualifying period, because he had accumulated 0 of the required 630 insurable hours, he could not be paid regular EI benefits.

[28] The Respondent had accumulated 0 insurable hours from March 27, 2011 to February 9, 2013. Therefore, his claim for regular EI benefits effective February 10, 2013, with an extended qualifying period, was based on 0 insurable hours. Clearly, the Respondent had insufficient hours of insurable employment to qualify for benefits.

[29] The Respondent maintains that it was not his fault that he could not work and, therefore, could not obtain insurable hours of employment. In essence, he argues that he had to pay into the employment insurance fund and he should be paid from it when he could not work.

[30] While the Respondent's frustration is understandable, Federal Court of Appeal jurisprudence is clear. The qualifying requirements under subsection 7(2) of the EI Act do

not allow any discrepancy and provide no discretion: *Canada (AG) v. Levesque*, 2001 FCA 304 at paragraph [2].

[31] As stated earlier, I find that the Board's decision was not correct. The correct decision would have been to dismiss the Respondent's appeal before the Board.

[32] Considering the submissions of the parties made during the teleconference hearing, my review of the Board's decision and the appeal file, I allow the appeal. Further, because this matter does not require new evidence or a hearing before the General Division, I am giving the decision that the Board should have given.

CONCLUSION

[33] The appeal is allowed.

Shu-Tai Cheng
Member, Appeal Division