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

Citation: *W. A. v. Canada Employment Insurance Commission,* 2016 SSTADEI 77

Appeal No. AD-14-595

BETWEEN:

W. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: February 10, 2016

DECISION: Appeal allowed

Canada

DECISION

[1] On consent, the appeal is allowed. The decision of the General Division is varied in accordance with these reasons.

INTRODUCTION

[2] On October 31, 2014, 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 December 3, 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 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.

ANALYSIS

[6] This appeal appears on the surface to involve the voluntary leaving of employment to return to school. However, it actually concerns the Commission's ability to reconsider decisions according to s. 52 of the *Employment Insurance Act* (the Act) and my ability to consider new evidence.

[7] At the hearing before me, the Commission made a significant concession. During a review of the file to prepare for this appeal, the Commission noticed that during the initial pre-appeal period it had reconsidered an earlier decision to allow the Appellant regular benefits. Although the Commission maintains that it was correct to do so, they did so based upon information that had been available to it previously. According to Commission policy, this meant that the date of disentitlement should not have been applied retroactively as was done here. In the context of this file, it would mean that the assessed overpayment would be drastically reduced if not eliminated entirely.

[8] Because of this, during the hearing the Commission orally offered an agreement to the Appellant that the disentitlement would begin March 2, 2014, a date in compliance with Commission policy. After considering the offer, the Appellant orally accepted.

[9] In order to give effect to this agreement, however, I would have to determine that I had the right to interfere with the decision of the General Division. After considering the matter and noting the agreement of the parties, I find that for the reasons below I do indeed have the right to do so.

[10] The power of the Commission to reconsider determinations on its own initiative is contained within s. 52 of the Act. As s. 52 uses the word "may", this is a discretionary decision of the Commission. Normally, this is done when the Commission realizes that a claimant should not have received benefits. Section 52 is one of the only ways for the Commission to correct the mistaken or erroneous granting of benefits.

[11] To assist Commission employees in determining how to properly exercise their discretion in various circumstances, the Commission has established a series of policies. These policies are not binding upon the Tribunal (or the Commission for that matter) and may or may not accurately reflect the current state of the law, but they are a useful guide to assist claimants in understanding how the Commission generally views its legal obligations.

[12] In this case, the Commission has represented that it did not consider their own policy in exercising its discretion. By this, the Commission is admitting that it failed to properly consider all relevant factors before coming to a determination. It follows that by failing to

do so the Commission failed to exercise its discretion in a judicial manner. As this is a reviewable error, if I accepted this submission I would be obligated to intervene to correct it.

[13] I note that this evidentiary admission was not made to the General Division member. As such, based upon the evidence at his disposal, he made a correct decision. This case therefore hinges on whether or not I am able to accept this new evidence.

[14] 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.

[15] 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.

[16] 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).

[17] 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.

[18] Finally, from time to time one of the parties will attempt to introduce new evidence to the Appeal Division that might otherwise have been submitted as part of an application to rescind or amend a General Division decision according to s. 66 of the DESDA. In this case, a rescind or amend application was not an option because the Commission discovered the new evidence when preparing to respond to the Appellant's appeal.

[19] 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…

[20] 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 of the DESDA, the wording has remained almost identical.

[21] 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.

[22] 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.

[23] 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. This is especially true given that in many cases the new facts are being admitted on consent. 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.

[24] 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.

[25] 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.

[26] 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.

[27] 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)…

[28] 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.

[29] If the Appeal Division were to admit new facts on a regular basis, it would be contrary to the Appeal Division's proper role of 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.

[30] Returning to the facts of this case, as discussed above the Commission has offered new evidence which establishes its own failure to exercise its discretion properly. Having reviewed the pleadings, and noting the agreement of the parties, I agree with them that it would be in the interests of justice to admit this new fact and to render the decision they have proposed.

[31] Therefore, I find that the Commission did not properly exercise its discretion in applying s. 52 of the Act. Had the Commission done so, the proper start date for the disentitlement would have been determined to have been March 2, 2014. The decision of the General Division is therefore varied accordingly.

CONCLUSION

[32] For the above reasons and on consent, the appeal is allowed. The decision of the General Division is varied in accordance with these reasons.

Mark Borer

Member, Appeal Division