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

Citation: *Canada Employment Insurance Commission v. F. A.*, 2016 SSTADEI 120

Tribunal File Number: AD-15-77

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

F. A.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 2, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on February 5, 2015. The GD allowed the Respondent's appeal where the Commission had refused to antedate his claim, pursuant to subsection 10(4) of the *Employment Insurance Act* (EI Act).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 25, 2015. The Application was filed within the 30 day time limit.

[3] The grounds of appeal stated in the Application are that the GD erred in fact and in law as follows:

a) The Respondent filed a claim for regular benefits with a request to antedate his claim;

b) The Applicant denied the request for antedate as it determined that he had not shown good cause for an eight month delay in filing;

c) The GD found that the Respondent, not being aware of the EI program, had acted in a reasonable manner and that non awareness is not the same as ignorance of the law;

d) A reasonable person in his circumstances would not have waited eight months to make enquiries as to his course of action;

e) The Federal Court of Appeal has held that claimants have a duty to enquire about their rights and obligations and that there must be exceptional circumstances for not doing so; and

f) There were no exceptional circumstances in this case.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (DESD) *Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[6] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[7] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

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

[8] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[9] The Tribunal notes that the Respondent was present and testified at the hearing before the GD, but the Applicant chose not to attend.

[10] The GD found, at pages 5 and 6 of its decision, that:

> [24] The Tribunal finds that the Claimant was credible during the hearing in that he was open and consistent in his comments and answers to questions, while under oath.
>
> [25] The Tribunal finds that the Claimant did have good cause for delaying his application for EI benefits because he was a relative newcomer to Canada, and unfamiliar with the EI program, because such programs did not exist in the other countries where he had lived. The Claimant stated that had he known of the EI program, he would have applied as soon as he became unemployed.

> [26] Although the legislation does not define "good cause for delay" jurisprudence has described it as whether the claimant did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations. It is not enough for a claimant to rely on his ignorance of the law as a claimant is generally expected to take positive steps to ascertain his entitlement under the Act.
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> **Canada (AG) v. Albrecht, A-172-85; Canada (AG) v. Carry, 2005 FCA 367; Canada (AG) v. Scott, 2008 FCA 145; Canada (AG) v. Beaudin, 2005 FCA 123; Canada (AG) v. Somwaru, 2010 FCA 336; Canada (AG) v. Innes, 2010 FCA 341**
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> [27] Jurisprudence has confirmed that inexperience with the EI program can be sufficient to establish good cause (**CUB 17601**).
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> [28] The Tribunal finds that the Claimant did act in a reasonable manner since he was not aware of the EI program, hence good cause. The Tribunal finds that non awareness of the EI program is not the same as ignorance of the law, which is not good cause.
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> [29] The Tribunal finds that the Claimant did have good cause for delaying his application for EI benefits from November 16, 2013 to July 12, 2014 and therefore for antedating his claim, pursuant to subsection 10(4) of the Act.

[11] On the basis of these findings, the GD allowed the Respondent's appeal.

[12] While the GD cited Federal Court of Appeal cases for the legal test applicable to "good cause for delay" – whether the claimant did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations – it applied a CUB decision to find good cause.

[13] The GD did not seem to appreciate that Federal Court of Appeal decisions are precedents while CUB decisions are not (although they can be persuasive).

[14] In addition, in *Howard v. Canada (AG)*, 2011 FCA 116, the Federal Court of Appeal affirmed an Umpire's ruling that delay in applying based on the expectation of finding employment or a good faith reliance on one's own resources does not constitute "good cause". The Court also stated that while the Board took into account the unfortunate "extenuating circumstances" experienced by the applicant, there was no evidence in the record suggesting that these circumstances explained the entire period of delay.

[15] Whether the GD based its decision on incorrect application of case law warrants review.

[16] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[17] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[18] The Application is granted.

[19] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[20] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division