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

Citation: *J. F. v. Canada Employment Insurance Commission*, 2016 SSTADEI 134

Date: March 9, 2016

File number: AD-15-1281

APPEAL DIVISION

Between:

J. F.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

Decided on the record on March 9, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance Commission (Commission) for regular benefits and an antedate in January 2015. She had last worked in January 2009 and had taken an elderly care leave of absence until her resignation in January 2014.

[2] In May 2015, the Commission informed the Appellant that she could not be paid benefits as she had not accumulated any insurable hours in her qualifying period from January 19, 2014 to January 17, 2015, and required 910 insurable hours to qualify to receive benefits. She requested that the Commission reconsider its decision explaining that she had provided care for her mother for seven years and needed assistance until she could find work. On July 8, 2015, the Commission advised her that the earlier decision was maintained.

[3] The Appellant appealed to the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) on August 23, 2015. The Tribunal informed the Appellant of its intention to summarily dismiss the appeal by letter dated September 10, 2015 and invited her to send in written submissions. The Appellant did not provide further submissions.

[4] On October 16, 2015, the GD dismissed the appeal summarily on the basis that the *Employment Insurance Act* (EI Act) does not allow for any discretion with respect to the insurable hours of a claimant and even if an antedate were granted, she would still not receive EI benefits.

[5] The Appellant filed an application to appeal to the Appeal Division (AD) of the Social Security Tribunal, on November 30, 2015, giving notice that she wished to appeal the decision of the GD on the following basis:

a) According to her understanding of the rules and regulations surrounding EI benefits, `she cannot apply for compassionate care EI benefits now that her mother is deceased; also, she has no other options;

b) She would like $250-$300 a month for six to eight months to get a starting income while she is trying to find employment;

c) Her sister is assisting her right now but that might take a toll; and

d) A monetary EI benefit would only be temporary, as she intends to get back to the workplace soon.

[6] The Respondent filed written submissions which state that:

a) The GD failed to apply the correct legal test for "good cause" in accordance with subsection 10(4) of the EI Act;

b) It found that the Appellant would not be entitled to benefits due to her unavailability for work which is the not relevant question on the issue of antedate;

c) However, the Appellant did not show good cause for the six-year period of delay in submitting a claim for benefits;

d) The AD should give the decision that the GD should have given on the issue of antedate and the issue of qualifying conditions, which is to dismiss the appeal on both issues; and

e) Alternatively, the matter should be returned to the GD for redetermination on the antedate issue.

[7] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity of the issue under appeal; and

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

ISSUE

[8] The AD must decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD, confirm, reverse or modify the decision.

LAW AND ANALYSIS

[9] The Appellant appeals a decision dated October 16, 2015 of the GD, whereby it summarily dismissed her appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[10] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the GD. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

[11] The powers of the AD include but are not limited to substituting its own opinion for that of the GD. Pursuant to section 59(1) of the DESD Act, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

[12] The Appellant does not dispute any of the factual findings made by the GD. Rather, she relies on her particular circumstances to request temporary financial assistance through EI benefits.

Standard of Review

[13] The Respondent submits that the applicable standard of review for questions of law is correctness, and the applicable standard of review for questions of mixed fact and law is that of reasonableness: *Pathmanathan v. Canada (AG)*, 2015 FCA 50 (paragraph 15).

[14] The Federal Court of Appeal has determined, 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.

[15] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[16] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of EI decisions rendered by the GD.

[17] I am uncertain how to reconcile this seeming discrepancy. The appropriate standard(s) of review seemed to be enunciated in earlier Supreme Court of Canada decisions such as *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (para. 26) and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (paras. 51 and 53-54).

[18] In *Dunsmuir, supra*, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law, jurisdiction or natural justice, generally, are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. When applying the correctness standard, a reviewing body will not show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[19] I also note that, overall, the Supreme Court of Canada appears to be leaning towards reasonableness in most cases unless the statutory scheme provides otherwise: *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, and *CBC v. SODRAC 2003 Inc.*, 2015 SCC 57.

[20] The statutory scheme of the Tribunal does not state the internal standard of review when the AD is reviewing a decision rendered by the GD.

[21] Given that the Federal Court of Appeal has held, in numerous cases, that correctness is the standard to apply for issues of law, I will review the GD decision on the basis of correctness on the law and reasonableness on the facts or issues of mixed fact and law.

[22] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

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.

Legal Test for Summary Dismissal

[23] Although neither party questioned the appropriateness of the summary dismissal procedure, I will address that issue before I assess the decision of the GD.

[24] Subsection 53(1) of the DESD Act allows the GD to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[25] If the GD failed to identify the test for summary dismissal or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would require that the Appeal Division make its own analysis and substitute its own opinion: *Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33 (CanLII) at para. 8.

[26] Here, the GD correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraphs 5 and 17 of its decision.

[27] However, it is insufficient to simply recite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act, without properly applying it. After identifying the legislative basis, the GD must correctly identify the legal test and apply the law to the facts.

[28] The GD asked the question “Is the General Division of the Social Security Tribunal satisfied that this appeal has no reasonable chance of success?” at paragraph 20 of its decision.

[29] Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and has been the subject of previous decisions of the AD.

[30] The GD decision does not state what legal test was applied to arrive at its conclusion to summarily dismiss the appeal.

Decision of the GD

[31] While the GD did not state the legal test applied, it did explain the basis upon which it summarily dismissed the appeal:

> [21] The Tribunal finds that the Respondent, in their submissions, clearly identified the reason why the Appellant is entitled to Employment Insurance benefits and the relevant legislation that applies in this case.
>
> [22] The Appellant filed a claim for Employment Insurance benefits effective January 20, 2015.
>
> [23] The Appellant accumulated 0 hours of insurable employment between January 19, 2014 to January 17, 2015 and she needed 910 hours of insurable employment to qualify for benefits.
>
> [24] The Appellant submitted that she wishes the five year leave of absence period to be disregarded in the calculation of her claim because she was taking care of her mother.
>
> [25] Unfortunately, the Respondent and the Tribunal have no power to amend the law and allow benefits outside the parameters of the Act.
>
> [26] The Federal Court of Appeal re-affirmed the principle that adjudicators are not permitted to re-write legislation or interpret it in a manner that is contrary to its plain meaning. *Canada* (AG) v. *Knee*, 2011 FCA 301.
>
> [27] Furthermore, in the Federal Court of Appeal in *Granger* (A-684-85), Justice Pratte J.A. stated: “It is beyond question that the Commission and its representatives have no power to amend the Act, and that therefore the interpretation which they may make of the Act does not by itself have the force of law.”

> [28] Of the issue of antedate, even if the Appellant's antedate request was allowed back to when she stopped working in January 2009, she would still not receive any Employment Insurance benefits for the length of her claim because she was on a leave of absence and she was not available for work while caring for her mother. The Tribunal finds that the Appellant does not qualify to receive benefits on the earlier day.

[32] Because the GD member did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts, the GD decision is based on an error of law.

[33] The legal test applicable to a summary dismissal is the first question that needs to be answered. Whether there was an error in law on the specific issues (of antedate and qualifying conditions) would follow.

[34] Given the error of law on the preliminary question of the legal test applicable to summary dismissal, the AD is required to make its own analysis and decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD, confirm, reverse or modify the decision: *Housen v. Nikolaisen, supra*, and section 59(1) of the DESD Act.

Application of Legal Test for Summary Dismissal

[35] Despite having erred in not identifying and applying the applicable legal test, paragraphs [22], [23] to [25] of the GD decision are correct, and I agree with the findings stated in them.

[36] There appear to be three lines of cases in previous decisions of the AD on appeals of summary dismissals by the GD:

a) Examples AD-13-825 (2015 SSTAD 715), AD-14-131 (2015 SSTAD 594), AD-14-310 (2015 SSTAD 237), AD-15-74 (2015 SSTAD 596): the legal test applied was: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 1, and *Breslaw v. Canada (AG)*, 2004 FCA 264;

b) Examples AD-15-236 (2015 SSTAD 974), AD-15-297 (2015 SSTAD 973), AD-15-401 (2015 SSTAD 1178): the AD has applied a differently articulated legal test: Whether there is a "triable issue" and whether there is any merit to the claim using the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it; and

c) Example AD-15-216 (2015 SSTAD 929): the AD did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

Qualifying Conditions

[37] I find that the application of the two tests cited in paragraph [36] of this decision leads to the same result in the present case as it relates to qualifying conditions – the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a "weak case" but an "utterly hopeless" one, as it does not involve assessing the merits of the case or examining the evidence.

[38] It is clear from the record that the Applicant does not have any insurable hours in her qualifying period from January 19, 2014 to January 17, 2015, and requires 910 insurable hours to qualify to receive benefits. Regardless of the evidence or arguments that could be presented at the hearing, the appeal on this issue is bound to fail.

Antedate

[39] On the issue of antedate, the GD found that:

a) "… even if the Appellant's antedate request was allowed back to when she stopped working in January 2009, she would still not receive any Employment Insurance

benefits for the length of her claim because she was on a leave of absence and she was not available for work while caring for her mother"; and

b) "… the Appellant does not qualify to receive benefits on the earlier day."

[40] There are 2 requirements under subsection 10(4) of the EI Act: 1) the person qualified to receive benefits on the earlier day and 2) there was good cause for the delay. The GD Member addressed the first part of the test but did not address the second part of the test. Since both conditions must be met, the GD did not have to address the second condition once it found that the first condition had not been met.

[41] The Respondent submits that the GD failed to apply the correct legal test for "good cause", that of what a reasonable person in the Appellant's situation would have done to satisfy herself as to her rights and obligations: *Canada (AG) v. Burke*, 2012 FCA 139.

[42] I agree with the Respondent that the GD did not deal with good cause, but it did not have to once it found that the Appellant did not qualify to receive benefits on the earlier day.

[43] However, in order to determine if the Appellant qualified to receive benefits on the earlier day, the GD needed to analyze some of the evidence. The result was not plain and obvious on the face of the record, regardless of the evidence or arguments that could be presented at a hearing. (Applying the alternate legal test on summary dismissal: To determine this issue did involve assessing the merits of the case or examining the evidence.) Therefore, the GD could not properly proceed by way of summary dismissal.

[44] Further, the Respondent's submissions state that the Appellant would qualify to receive benefits at the earlier date. The result on this issue was, therefore, not plain and obvious or manifestly clear.

[45] On the issue of antedate it is not plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. Also, this issue may require the parties to present evidence. Therefore, a hearing before the GD is appropriate.

[46] After reviewing the appeal of the Appellant, the GD record and decision, the previous decisions of the AD relating to summary dismissals, and by applying the legal test applicable to a summary dismissal to the facts in this matter, I allow the appeal as it relates to the issue of antedate. However, I dismiss the appeal as it relates to the issue of qualifying conditions.

CONCLUSION

[47] The appeal is allowed in part. The case will be referred back to the General Division of the Tribunal for reconsideration on the issue of antedate.

Shu-Tai Cheng
Member, Appeal Division