



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. G. v. Canada Employment Insurance Commission*, 2016 SSTADEI 247

Tribunal File Number: AD-16-338

BETWEEN:

B. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal and Appeal Decision

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 5, 2016

REASONS AND DECISION

INTRODUCTION

[1] On January 21, 2016, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing in this matter. It determined that the claimant (Appellant) did not have good cause for delay in filing his claim for employment insurance (EI) benefits and was not entitled to have his claim antedated pursuant to subsection 10(4) of the *Employment Insurance Act* (EI Act). It also determined that the claimant had not proven that he qualified for EI benefits pursuant to subsection 7(2) of the EI Act. Therefore, the Appellant's appeal was dismissed.

[2] The Appellant was present at the GD hearing held by teleconference. The GD decision was rendered on January 25, 2016, and it was communicated to the Appellant by letter of the January 26, 2016.

[3] The Appellant received the GD decision on February 1, 2016 and filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal, on February 23, 2016, within the 30 day time limit.

[4] On April 14, 2016, the AD of the Tribunal requested submissions from the Respondent on whether leave should be granted or refused.

[5] The Respondent filed written submissions, on April 18, 2016, stating that the Appellant has grounds for appeal under paragraph 58(1)(b) of the *Department of Employment and Social Development Act* (DESD Act) and asking that leave to appeal be granted and the matter be referred back to the GD of the Tribunal.

ISSUE

[6] If the appeal is determined to have a reasonable chance of success, the AD must decide whether to 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.

LAW AND ANALYSIS

[7] Pursuant to subsections 57(1) and (2) of the DESD Act, an application for leave to appeal must be made to the AD, in the case of a decision made by the GD Employment Insurance Section, 30 days after the day on which it is communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the 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”.

[9] 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”.

[10] 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;
- (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.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division. It states: The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

Leave to Appeal

[12] The AD of the Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success,

before leave can be granted.

[13] The Application does not refer to the grounds of appeal in subsection 58(1) of the DESD Act. It does, however, set out reasons for appeal which can be summarized as follows:

a) The GD made errors related to:

1. The Appellant's knowledge that he had four (4) weeks after becoming eligible for EI benefits to apply (see paragraph [40] GD decision); this is incorrect because he only learned of the 4 week period after reading the GD decision;
2. The GD found that he was ineligible to apply for benefits prior to May 8, 2015 and that he applied on June 2, 2015 (paragraphs [39] and [40]); therefore, he applied for benefits within 4 weeks after becoming eligible; and
3. The GD should not have gone back to the date of the original loss of employment to calculate the 4 week period; the 4 week period should be counted from the date he became eligible to EI benefits.

[14] The Respondent was not present at the GD hearing, although it did file written representations for the GD's consideration.

[15] The GD decision concluded that the Appellant did not have good cause for delay and that he did not qualify for EI benefits because he had not accumulated the required number of insurable hours of employment in the qualifying period.

[16] The Respondent submits that:

- a) While the GD decision stated the correct legal test for good cause, paragraphs [37], [38] and [39] suggest that the Applicant had established good cause for delay and paragraphs [40] and [41] suggest that he did not prove good cause for delay;
- b) The Applicant had requested an antedate to June 13, 2014, but the decision of the GD appears to be focused on the period from May 9, 2015 to June 2, 2015;

- c) Therefore, the GD misapplied the law to the incorrect period of time and other facts under appeal and based its decision on an error of law with respect to the issue of antedate;
- d) The findings on whether the Applicant had sufficient hours to qualify for benefits are moot points until the primary issue, that of the antedate request, has been determined; and
- e) This matter should be returned to the GD to be heard as a case *de novo*.

[17] The Applicant's grounds of appeal are that there were errors in the findings of fact. The Respondent's submits that the GD based its decision on an error of law.

[18] In terms of the findings of fact that the Applicant asserts were erroneous, I note that the GD did not find that he was ineligible to apply for benefits prior to May 8, 2015 but rather that he had good cause for delay in making his application from May 29, 2014 to May 8, 2015 (paragraph [39]). Since this is the basis of the Applicant's reasons for appeal, the appeal does not have a reasonable chance of success under subsection 58(1)(c) of the DESD Act.

[19] The Respondent's arguments that the GD based its decision on a misapplication of the law, however, warrant further review.

[20] Given the circumstances of this case, the Respondent's submissions that the GD decision was based on an error of law, and that an error of law may be a ground for appeal whether or not the error appears on the face of the record, I am satisfied that the appeal has a reasonable chance of success.

[21] Considering the above and my review of the GD decision and the file, I grant the application for leave to appeal based on 58(1)(b) of the DESD Act.

Appeal on the Merits

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

- a) The lack of complexity of the issue(s) under appeal;
- b) The AD Member has determined that no further hearing is required; and
- c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[23] Based on my review of the GD decision, I find that:

- a) Paragraphs [37], [38] and [39] of the GD decision suggest that the Applicant had established good cause for delay and paragraphs [40] and [41] suggest that he did not prove good cause for delay;
- b) The conclusion of the GD at paragraphs [40] and [41] focused on the period from May 2015 to June 2, 2015; and
- c) The GD decision was based on a misapplication of the legal test which is an error of law.

[24] Given all of the above, I allow the appeal. Because this matter will require the parties to present evidence, a hearing before the GD is appropriate.

CONCLUSION

[25] The application for leave to appeal is granted.

[26] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng
Member, Appeal Division