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

Citation: *Canada Employment Insurance Commission v. E. S.,* 2016 SSTADEI 262

Tribunal File Number: AD-15-69

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

E. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Shu-Tai Cheng

HEARD BY: Teleconference

DATE OF DECISION: May 19, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative for the Appellant (Commission)	Carole Robillard
Respondent	E. S.
Representative for the Respondent	L. S.

INTRODUCTION

[1] On February 4, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal where the Canada Employment Insurance Commission (Commission) had determined that she (the claimant) was not eligible for maternity benefits as she had not accumulated sufficient insurable hours during her qualifying period, pursuant to subsections 6(1) and 22(1) of the *Employment Insurance Act* (EI Act) and section 93 of the *Employment Insurance Regulations* (EI Regulations). The Respondent attended the teleconference hearing held by the GD with her Representative (her mother). No one attended on behalf of the Commission.

[2] An application for leave to appeal the GD decision was filed with the Appeal Division (AD) on February 20, 2015. Leave to appeal was granted on October 19, 2015.

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

a) The complexity of the issues 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.

[4] The following facts are not in dispute:

a) The Respondent's last day of work was June 28, 2014, and she applied for maternity benefits in July 2014, made effective June 29, 2014;

b) Her qualifying period was June 30, 2013 to June 28, 2014;

c) She had 489 insurable hours of employment in her qualifying period (on one record of employment) whereas she required 600 hours;

d) She had two other records of employment for the 52 weeks prior to her qualifying period;

e) The Commission determined that the Respondent had insufficient insurable hours and could not be paid maternity benefits; and

f) It also determined that there were no conditions to extend the qualifying period; therefore, all insurable hours accumulated before June 30, 2013 were not part of the qualifying period.

[5] The GD found that the Respondent met the criteria of subsection 8(2) of the EI Act to extend her qualifying period and that taking the three records of employment together the Respondent had sufficient insurable hours to establish a claim for maternity benefits.

ISSUES

[6] Whether the GD based its decision on an error of law or an error of mixed fact and law.

[7] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the matter to the GD for reconsideration or confirm, rescind or vary the GD decision.

THE LAW

[8] 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.

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

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

SUBMISSIONS

[11] The Appellant submitted that:

a) The GD erred in fact and in law under the applicable standard of review when it extended the claimant's qualifying period according to paragraph 8(2)(a) EI Act and when it allowed her appeal on the issue of insufficient insurable hours under subsections 6(1) and 22(1) of EI Act and subsection 93(1) EI Regulations;

b) The applicable standard of review for mixed questions of fact and law is reasonableness;

c) To extend the qualifying period due to illness, the claimant must have been prevented from being employed in an insurable employment due to illness during the qualifying period; the Respondent's period of incapacity falls outside of her qualifying period;

d) The GD erred in extending the Respondent's qualifying period;

e) The Respondent did not have sufficient insurable hours to qualify for special benefits effective June 29, 2014 because she did not accumulate the required 600 hours;

f) Insurable hours accumulated by a claimant outside of the qualifying period cannot be used to establish a claim for employment insurance benefits; and

g) The GD erred in using insurable hours accumulated by the Respondent outside of her qualifying period.

[12] The Respondent submitted that:

a) She was not physically capable of working past June 28, 2014 due to illness directly related to her pregnancy;

b) She provided a doctor's note, dated on the last day of her qualifying period;

c) Her total insurable hours of employment was 900 hours in the 104 weeks before she was not longer able to work;

d) She tried to work 600 hours in the 52 weeks prior to her claim for benefits, but could not; and

e) The Commission asked for additional records of employment, on September 4, 2014, which the Respondent provided.

ANALYSIS

[13] The AD of the Tribunal granted leave to appeal on the issue of whether there were errors of mixed fact and law in relation to:

a) Whether the Respondent was incapable of working because of a prescribed illness during her qualifying period; and

b) Two additional records of employment being included in the calculation of the total number of insurable hours.

[14] The leave to appeal decision stated:

> [16] While the GD stated the legislative provisions relevant to the issues on appeal, the GD does not appear to make a finding that the Respondent was incapable of working because of a prescribed illness during her qualifying period. It concluded that she met the criteria of subsection 8(2) of the EI Act to extend the qualifying period, but it is arguable whether the findings of fact necessary for this conclusion were made. The

> Applicant argues that the GD's findings under subsection 8(2) of the EI Act were not supported by the evidence.
>
> [17] The GD's decision to extend the qualifying period, under subsection 8(2) of the EI Act, led to the determination that two additional records of employment were included in the calculation of the total number of insurable hours.
>
> [18] 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 two grounds and set out reasons for appeal which fall into the enumerated grounds of appeal.
>
> [19] On the ground that there may be errors of mixed fact and law, made in a perverse or capricious manner or without regard for the material before it, I am satisfied that the appeal has a reasonable chance of success.

Standard of Review

[15] The Appellant submits that applicable standard of review for mixed questions of fact and law is reasonableness based on *Smith v. Alliance Pipe Ltd*., 2011 SCC 7 (paragraph 26) and *Dunsmuir v. New Brunswick*, 2008 SCC 9 (paragraphs 51 and 53).

[16] 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.

[17] 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.

[18] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated 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.

[19] The Federal Court of Appeal, in *Canada (Attorney General) v. Maunder*, 2015 FCA 274, referred to *Paradis, supra* and stated that it was unnecessary for the Court to consider the

issue of the standard of review to be applied by the AD to decisions of the GD. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan*.

[20] In the recent matter of *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the AD which had dismissed an appeal from a decision of the GD. The AD had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The AD had concluded that the decision of the GD was "consistent with the evidence before it and is a reasonable one…" The AD applied the approach that the Federal Court of Appeal in *Paradis, supra,* suggested was not appropriate, but the AD decision was rendered before the *Paradis* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[21] There appears to be a discrepancy in relation to the approach that the Appeal Division of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction in employment insurance appeals from the GD differs from the standard of review for questions of fact and mixed fact and law.

[22] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[23] 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.

Extension of Qualifying Period

[24] Section 8(2)(a) of the EI Act states:

> A qualifying period mentioned in paragraph (1)(*a*) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that throughout the week the person was not employed in insurable employment because the person was
>
> (a) incapable of work because of a prescribed illness, injury, quarantine or pregnancy …

[25] The GD found that the Respondent met the criteria of paragraph 8(2)(a) of the EI Act at paragraph [23] of its decision. However, did the GD make the necessary findings of fact prior to concluding that the Respondent met the criteria and did it correctly apply the criteria?

[26] The GD needed to be satisfied that the Respondent had proved she was incapable of work because of a prescribed illness during the qualifying period.

[27] The GD decision noted that the qualifying period for this claim was June 30, 2013 to June 28, 2014 (paragraph [10]) and that the Respondent was unable to work after June 28, 2014 due to her pregnancy (paragraph [16]). It did not consider in any detail whether the period that she was incapable of work was during the qualifying period. It also did not enumerate the number of weeks that the qualifying period should be extended.

[28] The GD did not apply the criteria set out in paragraph 8(2)(a) of the EI Act properly. It failed to apply the words "during the qualifying period". It also failed to enumerate the weeks in the qualifying period to be extended.

[29] Not applying the applicable legal test is an error of law, which is a reviewable error pursuant to paragraph 58(1)(b) of the DESD Act. Applying the legal test erroneously based on an error in the finding of facts (or not making a necessary finding of fact) is an error of mixed fact and law, which is a reviewable error pursuant to paragraphs 58(1)(b) and (c) of the DESD Act.

[30] Given these errors, 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 matter back to the GD, confirm, rescind or vary the decision: subsection 59(1) of the DESD Act.

[31] The Respondent submits that the Commission directed that she provide a medical note (which she did), that she was incapable of work because of her pregnancy, that this was during her qualifying period (in that the medical note was dated on the last date of her qualifying period), and that the Commission requested that she provide records of employment for the 104 weeks prior to her last date of work (which she did). Therefore, she met the conditions set out in section 8(2)(a) of the EI Act and her qualifying period was extended by the GD.

[32] The Appellant does not dispute that the Respondent was incapable of work from June 28, 2014. It also agrees that June 28, 2014 (the date of the medical note) falls within the qualifying period, therefore this one day could potentially extend the qualifying period. However, the Appellant noted that the legislation is based on weeks, not days or one day. The Appellant submits that the Respondent's qualifying period cannot be extended under a correct application of paragraph 8(2)(a) of the EI Act.

[33] As for the Respondent's reference to being directed to provide a medical note and records of employment within a period of 104 weeks, the Appellant noted that the September 2014 Commission letter requesting further information does not change the legislation. The Appellant's Representative stated that information relating to 104 weeks prior to the benefit period is requested in order to evaluate the claimant's hours of employment in the "near qualifying period" and the claimant's possible eligibility for regular benefits. If a claimant does not qualify for parental benefits, the Commission looks at regular benefits and the near qualifying period is relevant to the hours required in the qualifying period. After receiving the Respondent's further information, the Commission notified the Respondent that only one of the three records of employment fell in her qualifying period.

[34] In order to extend the qualifying period under section 8(2)(a) of the EI Act, the Respondent must prove that throughout the week(s) she was not employed, she was incapable of work because of a prescribed illness during the qualifying period. If this is established, then her qualifying period is extended by the aggregate of any weeks that she was incapable of work during her qualifying period.

[35] Is the AD able to give the decision that the GD should have given on this issue? I find that it is, as the facts necessary to make this decision are not in dispute and no further evidence is required from the parties.

[36] The Respondent was incapable of working because of a prescribed illness. However, she was incapable of working for one day during her qualifying period, the last day. She did not prove that she was incapable of work throughout a week (or weeks) during the qualifying period, and the evidence in the record does not establish this. In the circumstances, her qualifying period cannot be extended under paragraph 8(2)(a) of the EI Act.

[37] While I am sympathetic to the Respondent's circumstances, as a Member of the AD of the Tribunal, I do not have discretion to extend or otherwise vary the clear wording in the legislation, no matter how compelling the circumstances.

Additional Records of Employment

[38] Only one of the Respondent's records of employment shows insurable hours of employment in the qualifying period (GD3-18 to GD3-19). The other two records of employment used by the GD to calculate insurable hours related to employment preceding, and not during, the qualifying period.

[39] Therefore, the two additional records of employment (GD3-20 to GD3-23 and GD3-24) cannot be counted in the insurable hours of employment during the qualifying period.

[40] The Respondent had 489 hours of insurable employment in her qualifying period and she required 600 hours under subsections 6(1) and 22(1) of the EI Act and subsection 93(1) of the EI Regulations.

Errors of the GD

[41] Considering the submissions of the parties, my review of the GD's decision and the appeal file, I conclude that the GD erred in law and erred in fact and law in making its decision, and I allow the appeal.

[42] In the circumstances, I am able to give the decision that the GD should have given (which was the dismissal of the Respondent's appeal before the GD).

CONCLUSION

[43] The appeal is allowed, and the GD decision is rescinded.

Shu-Tai Cheng
Member, Appeal Division