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

Citation: *F. M. v. Canada Employment Insurance Commission,* 2016 SSTADEI 259

Tribunal File Number: AD-15-431

BETWEEN:

F. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal Decision

DECISION BY: Pierre Lafontaine

HEARD ON March 15, 2016

DATE OF DECISION: May 17, 2016

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 29, 2015, the General Division of the Tribunal determined that:

> - The Appellant failed to meet the onus placed upon him to demonstrate good cause for the entire period of the delay in making the initial claim for benefits pursuant to section 10(4) of the *Employment Insurance Act* (the "*Act*").

[3] The Appellant requested leave to appeal to the Appeal Division on July 6, 2015. Leave to appeal was granted by the Appeal Division on September 13, 2015.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present at the hearing and was represented by Sarah Eadie. The Respondent was represented by Stephanie Yung-Hing. The interpreter was Sadhu Singh.

THE LAW

[6] 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.

ISSUE

[7] The Tribunal must decide if the General Division erred when it concluded that:

a) The Appellant failed to meet the onus placed upon him to demonstrate good cause for the entire period of the delay in making the initial claim for benefits pursuant to section 10(4) of the *Act*.

ARGUMENTS

[8] The Appellant submits the following arguments in support of his appeal:

- That ignorance of the law, on its own, is not good cause for delay in applying for Employment Insurance benefits;

- The leading case in that area is still *Canada (AG) v Albrecht*, [1985] 1 F.C. 710 (C.A.). The court held that a claimant's ignorance of his rights to Employment Insurance benefits does constitute good cause so as to require antedating if he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*;

- This means that each case must be judged on its own facts and to this extent no clear and easily applicable principle exists; a partially subjective appreciation of the circumstances is involved which excludes the possibility of any exclusively objective test;

- To rely, without careful examination of the Appellant's circumstances, on the general principle that ignorance of the law is no excuse would be a failure to properly implement the subjective analysis of the Appellant's circumstances which is required to determine if the Appellant did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*;

- Of great use in this case is the Federal Court of Appeal case styled as *De Jesus et al v Canada (AG)*, 2013 FCA 264. That case dealt with temporary foreign workers, as this one also does. In the decision, the court holds that boards of referees (as they then were) must, in assessing the existence of good cause for delay, take into account the impact of the work and other conditions of Seasonal Agricultural Workers' Program claimants on their ability to access information about their benefits;

- In the case at bar, the Appellant provided evidence that he had no ability to access information about possible benefits except through one friend and whatever information was available in Punjabi on the internet. He testified that although he sought information about what to do generally through those sources, he never became aware of the existence of the Employment Insurance program;

- While the Appellant's evidence was considered by the General Division, it was wrongly interpreted, as set out in the document accompanying the Leave Application;

- The Court in *De Jesus* goes on to point out that the disadvantages faced by temporary workers are well known, including: "ineligibility for many social

benefits, including most unemployment insurance benefits; exclusion from many statutory protections of workers (including representation by a union); low educational level, functional illiteracy, and lack of knowledge of English or French; social isolation, and lack of access to telephones, computers, and urban centers; long and arduous working schedules with little free time; and fear of employer reprisal and deportation" [at para. 13.While the Court was referring in that paragraph specifically to agricultural workers, most of those disadvantages apply equally to temporary foreign workers working outside the agricultural sector];

- In reviewing the Umpire's decision in *De Jesus*, the Federal Court of Appeal notes, and finds fault with, the Umpire's finding that the claimants' "work conditions and, in some cases, an inability to speak, read or understand English or French, did not prevent them from making some efforts to obtain information about their eligibility for employment insurance benefits" ;

- That type of reasoning happened at the General Division in this case, as well, where the Tribunal Member found that while there was "evidence to support the Claimants working conditions were not ideal and that he experienced barriers similar to that of the SAWP workers," [sic, at para 28], he was, after leaving his employment, "no longer prevented from apprising himself of options that may have existed for him to help him obtain employment or if there was any financial assistance available to him while he has now found himself unemployed," [at para 27; see also para 30];

- In suggesting there was nothing preventing the Appellant from making inquiries, the Tribunal Member failed to consider the Appellant's evidence about his complete inability to communicate in English, his fear of reprisals, his almost entire social isolation, and his low level of education and awareness of rights available even to Canadian citizens here in Canada;

- In *De Jesus*, the Court found that the Umpire's failure to properly "take into account the general barriers facing SAWP workers in claiming employment

insurance benefits, and those affecting Mr. Cruz de Jesus in particular, constituted an error of law" [at para 36];

- In the present case, while the Tribunal Member mentioned the test set out in *Albrecht* and the paragraphs of *De Jesus* which had been argued before her by the Appellant's counsel , the numerous errors of fact in the decision demonstrate her inability to fully appreciate the enormity of the barriers facing the Appellant;

- The decision of the General Division contains numerous errors of fact, made without proper regard for the evidence before the decision maker; Further, the Appellant submits that the Tribunal Member's failure to fully appreciate the impact of the Appellant's circumstances, together with her having made an adverse finding of credibility against the Appellant on the basis of a difficulty with translation at the SST – General Division hearing, lead to an inevitable apprehension of bias which taints the proceeding.

[9] The Respondent submits the following arguments against the appeal:

- The General Division committed no error in law when it found that the Appellant's ignorance of the law was not good cause for his delay in applying for benefits (paragraph [45]);

- Case law has maintained that a claimant cannot simply claim his unawareness of the EI program or of his entitlement to benefits. He has an obligation to seek out information as to the rights and obligations under the EI *Act*;

- In the present case, the Appellant took no steps to determine his rights and obligations under the *Act*; he therefore did not act as a reasonable person and failed to establish good cause throughout the entire period of the delay in applying for benefits;

- Filing a late claim for benefits because of ignorance of the law or not understanding one's legal rights and obligations under the legislation does not in itself equate to "exceptional circumstances" for antedating a claim;

- It is also submitted that in order to demonstrate good cause, it is not necessary for a claimant to show that there were circumstances over which he had no control and which prevented him from making a claim at an earlier date. The correct test is whether the claimant can demonstrate that he did what a reasonable person would have done to satisfy themselves as to their rights and obligations under the *Act*, in the same circumstances;

- Furthermore, the proper application of the legal test for good cause to the facts of this case leads to the reasonable conclusion that the Appellant has not met the onus of proving good cause throughout the delay in filing between July 5, 2012 and June 21, 2014 because he was not prevented from making a claim for benefits; and because he did not take prompt steps to apprise himself of his entitlement to EI benefits;

- In dismissing the appeal, the Tribunal concluded that the Appellant did not act as a reasonable and prudent person would have done in the same situation. The Tribunal applied the correct legal test to the facts of this case and made findings which were consistent with the evidence it accepted. It is also submitted that the Tribunal's conclusion that the Appellant's reasons for the approximately two year delay in applying for benefits, did not constitute "good cause" under section 10(4) of the *Act* during the whole period, was a reasonable one which conforms to the *Act*, as well as the established case law;

- There is nothing in the General Division's decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant submits that the applicable standard of review on issues of natural justice is correctness and that the applicable standard of review on mixed questions of fact and law is reasonableness. The Respondent submits that the applicable standard of review

for mixed questions of fact and law is reasonableness - *Smith v. Alliance Pipeline Ltd*, 2011 SCC 7, *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that when the Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court.

[12] The Federal Court of Appeal further indicated that not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal.

[13] The Court concluded that when the Appeal Division hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that *Act*.

[14] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada*, 2015 FCA 274.

[15] Unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[16] On June 25, 2014 the Appellant made a claim for employment insurance. On August 8, 2014 the Respondent denied the Appellant benefits because he failed to show he had good cause for the delay in applying for benefits between July 5, 2012 and June 21, 2014. On August 25, 2014 the Appellant made a request for reconsideration. On October

17, 2014 the Respondent maintained its original decision and the Appellant appealed to the General Division of the Social Security Tribunal of Canada. On May 29, 2015, the General Division dismissed the appeal of the Appellant.

[17] The Appellant takes the position that 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. More particularly, the Appellant argues that the decision contains erroneous findings of fact, relating to facts critical to a proper understanding of the Appellant's arguments before the General Division. He submits that had the General Division appreciated the evidence before it, the decision would have likely been different. A breakdown of the alleged factual errors was given to the Tribunal by the Appellant to support his appeal (AD5-1 to AD5-5).

[18] In view of the above position of the Appellant, the Tribunal considers important to reproduce the findings of the General Division when it dismissed the appeal of the Appellant:

> "[43] The Tribunal must apply the legal principals in the case of *Canada (A.G.) v. Albrecht* FC 170 where it states the claimant's ignorance of the law constituted good cause; however the Tribunal does not see how the reason of ignorance of the law can be justified and applied in this case. *Albrecht* states when a claimant has not filed his claim in a timely manner and his ignorance of the law is ultimately the reason for his failure he ought to be able to satisfy the requirement of good cause when he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and responsibilities under the *Act*.
>
> [44] The question before The Tribunal is did the Claimant have good cause for the delay throughout the entire period and did he do what a reasonable person in his situation would have done.
>
> [45] In this case the Tribunal finds the Claimant has not proven he acted like a reasonable person in his situation to satisfy himself as to the his rights and responsibilities under the *Act* and he has not shown good cause for the delay throughout the entire periods therefore an argument of ignorance of law is not valid and cannot be justified.
>
> [46] The Tribunal finds that the Claimant waited almost two years to file a claim for employment insurance which was long after he had endured the abuse of his previous employer. The Tribunal finds from the evidence on the file that prior his termination the Claimant demonstrated he was able to make his own travel

arrangement, retain the services of an accountant to prepare his income tax over several years, and obtain a credit card. The Tribunal finds following the dismissal, the Claimant was able to live off his savings and seek the services of an Immigration Counselor, Employment Standards and TFW office, which his diligence have resulted in a Statement of Claim against his employer. He was also able to study and travel to Saskatchewan to write an English exam, along with researching to obtain his Red Seal certificate.

[47] The Tribunal finds the evidence does not support the Claimants situation was one of exceptional circumstances once he left his employer. The Tribunal finds the evidence supports the Claimant made a personal decision to rely on his Uncle for assistance, and during this time focused on pursuing legal action against his previous employer and only was it during this process he learned of the employment insurance program. The Claimant also made a personal choice to live off his savings and continue to look for other employment.

[48] The Tribunal cites *Canada (A.G.) v. Scott* 2008 FCA 145 which states It is worth noting that subsection 10(4) of the *Act* is not the product of a mere legislative whim. It contains a policy, in the form of a requirement, which is instrumental in the sound and efficient administration of the *Act*. On the one hand, this policy helps "to assure the proper administration and the efficient processing of various claims" and "to enable the Commission to review constantly the continuing eligibility of a claimant to whom benefits are being paid": see CUB 18145, June 29, 1999, by Umpire Joyal, and CUB 23893, June 27, 1994, by Umpire Rouleau. Antedating the claim for benefits may adversely affect the integrity of the system, in that it gives a claimant a retroactive and unconditional award of benefits, without any possibility of verifying the eligibility criteria during the period of retroactivity: see CUB 13007, December 12, 1986, and CUB 14019, August 7, 1987, by Umpire Joyal.

[49] The Tribunal sympathies with the situation the Claimant endured while employed however there is no evidence to support that there were exceptional circumstances that existed that would have prevented the Claimant from acting like a reasonable person in his situation during the entire period of the delay. Jurisprudence clearly indicates that ignorance of the law cannot suffice to excuse having waited almost two years to submit an application for benefits.

[50] The Tribunal finds that the Claimant failed to show that he did what any reasonable person would have done in the same situation to fulfill his obligations and assert his rights. Therefore, even though he seemed to meet the benefit entitlement conditions on July 5, 2012 he did not have good cause under subsection 10(4) of the *Act* to delay making his claim for benefits."

[19] To establish good cause under section 10(4) of the *Act*, a claimant must be able to show that he did what a reasonable person in his situation would have done to satisfy

himself as to his rights and obligations under the *Act*. The Federal Court of Appeal re-affirmed on numerous occasions that claimants have a duty to enquire about their rights and obligations and the steps that should be taken to protect a claim for benefits - *Canada (AG) v. Kaler*, 2011 FCA 266; *Canada (AG) v. Dickson*, 2012 FCA 8.

[20] The Appellant does not contest in appeal that ignorance of the law, on its own, is not good cause for delay in applying for Employment Insurance benefits. He pleads that the leading case in this area is still *Canada (AG) v Albrecht*, [1985] 1 F.C. 710 (C.A.). In said case, the Court held that a claimant's ignorance of his rights to Employment Insurance benefits does constitute good cause so as to require antedating if he is able to show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the *Act*.

[21] The Appellant relies heavily on the recent case of *De Jesus v. Canada (AG)*, 2013 FCA 264, to support his position that, in exceptional circumstances, inaction can constitute good cause for delay.

[22] In *De Jesus*, the Court agreed with the finding of the Board of Referees that the isolation of SAWP workers prevented them from accessing government agencies to find out their employment insurance rights and responsibilities. It considered the circumstances of SAWP workers to be exceptional circumstances in which inaction and submissiveness was understandable. The Board found as a fact that *De Jesus* was severely hindered from finding out and understanding his rights and obligations regarding benefits because:

1) He was unable to read, write or comprehend English.

2) He feared losing his employment.

3) He did not have the time to access the information due to his heavy work schedule.

4) His employer did not readily issue an ROE [record of employment] unless requested and did not explain the deductions taken from his paycheck.

[23] The General Division, recognizing that the above mentioned circumstances might have existed during the period of employment, concluded from the evidence that there no longer existed exceptional circumstances once the Appellant left his employer in July 2012 that would explain his delay of two years in applying for EI benefits.

[24] The General Division concluded from the evidence that the Appellant waited almost two years to file a claim for employment insurance which was long after he had endured the abuse of his previous employer. The General Division concluded that the Appellant, far from being secluded, had the opportunity to rely on his Uncle for assistance and to seek the services of an Immigration Counselor, Employment Standards and TFW office. It determined that the Appellant had focused on pursuing legal action against his previous employer. The General Division considered that the Appellant was also able to study and travel to Saskatchewan to write an English exam, along with researching to obtain his Red Seal certificate.

[25] The Tribunal finds that the circumstances of the *De Jesus* case involving SAWP workers are very different to the present circumstances. In the present case, the Appellant who had been working in Canada since 2008 before applying for EI benefits in 2014 had is Uncle to rely on, had access to telephones, computers, internet, and government agencies and was not severely hindered from finding out and understanding his rights and obligations regarding benefits after he was fired from his employer.

[26] When considering in its entirety the evidence submitted to the General Division, the Tribunal finds that the General Division did not err when it concluded the Appellant did not act as a reasonable and prudent person would have done in the same situation to satisfy himself of his rights and obligations and taken the steps required to protect his claim for benefits under the EI *Act*. The Tribunal is of the view that the General Division properly applied the subjective-objective test established in *Albrecht*.

[27] The Tribunal is also not convinced that the General Division was biased against the Appellant in any way, or that it did not act impartially. There is no evidence to show there was a breach of natural justice present in this case.

[28] After considering all the evidence, the docket of appeal, the decision of the General Division, the submissions of the parties, the applicable legislation and the relevant jurisprudence, the Tribunal finds that there is no evidence to support either of the grounds of appeal invoked by the Appellant or any other possible ground of appeal.

[29] The Tribunal must therefore dismiss the appeal.

CONCLUSION

[30] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division