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

Citation: *Canada Employment Insurance Commission v. D. G.*, 2016 SSTADEI 253

Tribunal File Number: AD-15-98

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

D. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 10, 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 March 4, 2015. The GD allowed the Respondent's appeal where the Applicant (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 March 6, 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 the Respondent had not shown good cause for a lengthy delay in filing;

c) The Applicant agrees that the Respondent had good cause for delay from November 23, 2013 to October 23, 2013;

d) However, the evidence fails to support good cause for the delay in filing a claim from October 24, 2013 to March 26, 2014;

e) A reasonable person would not have delayed four months to enquire about his course of action; and

f) In view of the Federal Court of Appeal decisions in *Canada v. Dickson*, 2012 FCA 8 and *Howard v. Canada* (AG), 2011 FCA 116.

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;
>
> (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:

> [31] The Claimant submitted that he was being paid by his employer and paying EI premiums until the end of October 2013, and that he felt that he could obtain employment based on his conversations and interview with DCL. The Claimant further

submits that upon notification that the employment he was seeking was no longer an option. The Claimant explored retraining possibilities and applied for an antedate of his claim based on the advice of the Service Canada representative.

[32] The Commission position is that the Claimant did not demonstrate that he acted as any reasonable person in the same situation would have done, to satisfy himself as to his rights and obligations under the Act, and as a result has not shown good cause throughout the entire period of the delay.

[33] The Claimant must prove the existence of a good cause throughout the entire period of the delay by showing that he acted as a reasonable and prudent person in the same circumstances/situation would have acted to ensure compliance with her rights and obligations under the Act.

[34] The Tribunal finds that from November 22, 2012 to October 24, 2013, the Claimant was receiving monies from his employer and paying EI premiums as supported by the Claimants T4-slip. As a result the Tribunal finds that it is reasonable for the Claimant to assume he is not eligible for benefits during that time period.

[35] The Tribunal finds it to be reasonable that given the Claimant's job search efforts immediately following his income ceasing from his employer, that the Claimant felt that he would be able to become employed based on his employment opportunity with DCL for which he was made aware in January 2013 that he was not the successful candidate. As a result the Tribunal finds that it is reasonable for the Claimant to delay his application for benefits during that time period.

[36] The Tribunal finds that the Claimant explored retraining opportunities in February and applied for an antedate of his EI claim in March 2014 based on the advice of the Service Canada representative in his area. As a result the Tribunal finds that it is reasonable for the Claimant to delay his application for benefits during that time period as he sought assistance which included Service Canada.

[37] The Tribunal would like to make mention that this decision is regarding the antedate only.

[38] The Tribunal finds that the Claimant has proven the existence of a good cause throughout the entire period of the delay by showing that he acted as a reasonable and prudent person in the same circumstances/situation would have acted to ensure compliance with his rights and obligations under the Act.

[39] As a result of the evidence submitted by the Claimant and the Commission, the Tribunal finds in favor of the Claimant.

[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 – the Applicant argues that the GD based its decision on incorrect application of the law and did not consider applicable Federal Court of Appeal decisions.

[13] The GD decision did not refer to any Federal Court of Appeal decisions.

[14] 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] In *Canada v. Dickson*, 2012 FCA 8, the Federal Court of Appeal overturned a decision of an Umpire where there was no evidence to explain the last five months of the delay in the claimant’s claim for benefits under the EI Act.

[16] The Applicant argues that in the current matter, there was no evidence to explain the last five months of delay in filing of the Respondent’s claim for EI benefits.

[17] The GD found that the Respondent “explored retraining opportunities in February and applied for an antedate of his EI claim in March 2014 based on the advice of the Service Canada representative in his area”. The GD found that it was reasonable for the Respondent to delay his application for benefits during that time period as he had sought assistance with included Service Canada.

[18] The GD found that it was reasonable for the Respondent to delay his application for benefits during the time period that he believed he would be employed with DCL. The GD decision refers to January 2013 as the date when he was made aware that he was not the successful candidate: paragraph [35]. However, earlier in the decision, the GD noted that in October 2013, the Respondent felt he could obtain employment with DCL. Then there is reference to “February” in the following paragraph. It is unclear, on my reading of the GD

decision and the record, whether “February” refers to February 2013 or February 2014 at paragraph [36]. It is also unclear whether “January 2013” might be January 2014.

[19] The time line and the events in that time line may have an impact on the circumstances of the Respondent during the period of October 24, 2013 (the day after his separation monies from his employer were payable) to March 26, 2014 (the day he filed for benefits).

[20] 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.

[21] 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

[22] The Application is granted.

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

[24] 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