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

Citation: *A. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 306

Tribunal File Number: AD-16-362

BETWEEN:

A. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Shu-Tai Cheng

HEARD: On the Record

DATE OF DECISION: June 14, 2016

REASONS AND DECISION

INTRODUCTION

[1] On January 26, 2016, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Appellant's appeal from a refusal by the Canada Employment Insurance Commission (Commission) to antedate the Appellant's application for employment insurance (EI) benefits. The Appellant sought reconsideration of the Commission's decision, and the Commission maintained its decision by letter dated September 22, 2015.

[2] An application for leave to appeal the GD decision was filed with the Appeal Division (AD) of the Tribunal on February 25, 2016 and leave to appeal was granted on April 19, 2016.

[3] This appeal proceeded on the record for the following reasons:

a) the lack of complexity of the issues under appeal;

b) the AD Member has decided that a hearing is not required; and

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

ISSUE

[4] Whether the GD made erroneous findings of fact in a perverse or capricious manner or without regard for the material before it.

[5] 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

[6] 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.

[7] 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 paragraph 58(1)(c) of the DESD Act.

[8] Subsection 59(1) of the DESD Act sets out the powers of the AD.

SUBMISSIONS

[9] The Appellant submitted that:

a) The GD found that he did not enquire about his rights and responsibilities before June 2014 and based its decision on this finding (paragraphs [12], [15], [18] and [23] of the GD decision), and this finding was erroneous;

b) He has maintained that he did attend at a Service Canada office to inquire about his rights before June 2014 and was told that he could not file an EI claim until he received his record of employment (ROE), and this information is in the documents on file; and

c) Federal Court Appeal decisions A-395-85 and A-172-85 support his position that he has good cause for delay in filing his claim for benefits.

[10] The Respondent submitted that:

a) The AD does not owe any deference to the conclusions of the GD with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the AD must show deference to the GD. It can only intervene if the GD based its decision on an erroneous finding of

fact that it made in a perverse or capricious manner without regard for the material before it;

b) The Appellant did not demonstrate that he had established good cause for the delay in filing his claim at an earlier date. The information on file and presented during the hearing indicates that the Appellant had failed to show that his circumstances were so exceptionable that it prevented him from contacting the Commission with respect to his right to benefits or submitting an application for benefits on the earlier date; and

c) For a finding of fact to be considered as erroneous, it is not enough to bring an appeal. The finding must also be perverse or capricious or without regard for the material before it. The GD weighed all the evidence, arrived at a reasonable finding of fact based on that evidence and decided the case accordingly. The GD appears to have an appreciation of the evidence which was before it, and its conclusions do not appear to be either perverse or capricious.

STANDARD OF REVIEW

[11] 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. Office of the Umpire*, 2015 FCA 50 (paragraph 15).

[12] 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.

[13] 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.

[14] However, in *Canada (AG) v. Paradis; Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of employment insurance decisions rendered by the GD.

[15] The Federal Court of Appeal, in *Canada (AG) v. Maunder*, 2015 FCA 274, referred to *Jean, 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*.

[16] In the recent matter of *Hurtubise v. Canada (AG)*, 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 *Jean, supra*, suggested was not appropriate, but the AD decision was rendered before the *Jean* 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."

[17] There appears to be a discrepancy in relation to the approach that the AD of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the GD, 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.

[18] 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.

ANALYSIS

Background

[19] The Appellant filed an initial claim for employment insurance benefits in June 2014. The Commission had first concluded that the Appellant had insufficient hours in which to qualify for benefits. The Appellant requested reconsideration and during this process the Commission advised the Appellant that a new application and an antedate request would be required.

[20] The Appellant filed a new application in March 2015 and a request to antedate his claim for benefits to July 31, 2013. The Commission reviewed this request and concluded that the Appellant did not show good cause in filing his claim late through the period of the delay. As such, it denied the antedate request pursuant to subsection 10(4) of the *Employment Insurance Act*.

[21] The Appellant made a request for reconsideration on the denial of his antedate request. The Commission maintained the original decision denying an antedate. The GD dismissed the Appellant's appeal finding that "no good cause reason for the delay was provided by the Appellant for applying late."

Leave to Appeal

[22] The decision granting leave to appeal noted:

> [13] The GD decision found that the Applicant did not inquire about his rights and responsibilities before June 2014. The Applicant argues that he did make inquiries at Service Canada in Richmond Hill before June 2014 and that this information was in the file before the Tribunal. However, the GD decision notes that the Applicant's representative confirmed that the Applicant did not previously consult with a Service Canada representative during the entire time to enquire about his rights and responsibilities regarding his claim for benefits.
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> [14] Not every erroneous finding of fact will fall within the terms of paragraph 58(1)(c) of the DESD Act. An erroneous finding of fact upon which the GD does not base its decision would not be caught, nor would one that is not made in a perverse or capricious manner or without regard for the material before the Tribunal.
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> [15] The GD decision was based on the finding that the Applicant did not enquire about his rights and responsibilities regarding benefits prior to June 2014.
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> [16] I have listened to the audio recording of the GD hearing. Early on in the hearing, the Applicant's representative refers to the Applicant having spoken to Service Canada and being told that, to submit a claim, he needed his ROE. It is not clear from this statement what the time frame of this communication with Service Canada was (i.e. whether it was prior to June 2014 or not). Then at about 25 minutes into the hearing, the Applicant's representative stated that after she called the employer in June 2014, the Applicant "returned to Service Canada". Also, I did not hear, in the audio recording, the Applicant's representative confirm that "the Applicant did not previously consult with a Service Canada representative during the entire time to enquire about his rights and responsibilities regarding his claim for benefits."

> [17] The GD's finding at paragraph [15] of its decision that the Applicant's representative confirmed that the Applicant did not previously enquire about his rights and responsibilities regarding his claim for benefits seems contrary to the representative's statement that, in June 2014, he "returned to Service Canada".
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> [18] The GD's summary of the evidence in the file that the Applicant "advised that he had not previously [before June 2014] contacted Service Canada to enquire about his rights and responsibilities". This is contrary to the Applicant's assertion that he has maintained and there is evidence in the documents that he did enquire about his rights before June 2014 and was told that he needed his ROE in order to file a claim.
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> [19] The GD decision is based on the finding that the Applicant did not inquire about his rights and responsibilities before June 2014. In arriving at this finding, the GD found that the Applicant advised of this and the Applicant's representative confirmed this fact. However, this appears to be incorrect based on the record of appeal.
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> …
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> [21] … Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal, specifically under subparagraphs 58(1) (c) of the DESD Act, as described in paragraphs [15] to [19] above.
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> [22] On the ground that the GD may have 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, I am satisfied that the appeal has a reasonable chance of success.

Errors of the GD

[23] Having reviewed the appeal record and the recording of the GD hearing, I find that the following findings of fact in the GD decision were erroneous:

a) that the Appellant did not inquire about his rights and responsibilities before June 2014; and

b) that the Appellant's representative confirmed that the Appellant did not previously consult with a Service Canada representative during the entire time to enquire about his rights and responsibilities regarding his claim for benefits.

[24] The GD based its decision on these findings of fact at paragraphs [12], [15], [23] and [24].

[25] These findings of fact were made in a perverse or capricious manner or without regard to the material before it, as the Appellant's representative did not confirm the statement that the GD took as an admission in paragraph [15] of its decision and the Appellant has maintained that he had enquired about his rights before June 2014. If the GD was making a finding contrary to the evidence the Appellant had given, then it had a duty to explain why it preferred other evidence over the Appellant's.

[26] Therefore, I do not agree with the Respondent's submissions that the GD did not base its decision on an erroneous finding of fact, that the GD weighed all the evidence and that it arrived at a reasonable finding of fact based on the evidence.

[27] Whether the Appellant made enquiries about his rights and responsibilities before he filed his first claim in June 2014 is relevant to the issue of "good cause" for the antedate request.

[28] For these reasons, I find that the GD 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.

[29] As this matter will require the parties to present evidence, a hearing before the General Division is appropriate. Considering the submissions of the parties, my review of the GD's decision and of the appeal file, I allow the appeal.

CONCLUSION

[30] The appeal is allowed. The case will be referred to the General Division of the Tribunal for reconsideration in accordance with these reasons.

Shu-Tai Cheng
Member, Appeal Division