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

Citation: *Canada Employment Insurance Commission v. M. S.,* 2016 SSTADEI 346

Tribunal File Number: AD-16-138

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

M. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal Decision

DECISION BY: Shu-Tai Cheng

DECIDED On the Record

DATE OF DECISION: June 30, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 31, 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) did not qualify to receive benefits pursuant to subsections 7(3) and 7(4) of the *Employment Insurance Act* (EI Act). The Respondent attended the teleconference hearing held by the GD with a witness. 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 January 14, 2016. Leave to appeal was granted on March 9, 2016.

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

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

b) The request of the Appellant;

c) The Member has determined that no further hearing is required; and

d) 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 26, 2015, and she applied for regular benefits in July 2015;

b) Her qualifying period was June 29, 2014 to June 27, 2015;

c) She required 910 hours of insurable employment;

d) There were four records of employment (ROE) in her file;

e) The Appellant believes that she had 1045 hours of insurable employment, adding together the hours in the four ROEs;

f) The Commission determined, at the reconsideration stage, that she had 844 hours of insurable employment; and

g) The Commission determined that the Respondent had insufficient insurable hours and could not be paid regular benefits.

[5] The GD found that that taking the four records of employment together, the Respondent had 1045 hours of insurable employment, sufficient to establish a claim for regular benefits.

ISSUES

[6] Whether 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.

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

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

SUBMISSIONS

[11] The Appellant submitted that:

a) The GD erred in fact when it allowed the Respondent's appeal on the issue of insurable hours pursuant to section 7 of EI Act;

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

c) The GD found that the Respondent had accumulated 1045 hours of insurable employment in her qualifying period, and this was an erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it;

d) The GD failed to recognize that ROE W40921056 was an amended version of ROE W37987371; it counted the hours in both ROEs rather than only counting the amended version; and

e) The Respondent did not have sufficient insurable hours to qualify for benefits because she did not accumulate the required 910 hours.

[12] The Respondent did not file submissions.

ANALYSIS

[13] The AD of the Tribunal granted leave to appeal on the issue of whether there was an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, in relation to two ROEs being counted when one may have amended and replaced the other.

[14] The leave to appeal decision stated:

> [12] While the GD stated the legislative provisions relevant to the issues on appeal, the Applicant argues that the GD erred in its findings of fact, namely, that the Respondent had 1045 hours of insurable income. In particular, the Applicant submits that the GD counted two ROEs when only the latter one should have counted, because it amended and replaced an earlier ROE.
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> [13] If the insurable hours in two ROEs were counted when one amended and replaced the other, then this finding of fact would be "made in a perverse or capricious manner or without regard for the material before it". Therefore, the findings of fact - related to the ROEs and the total hours of insurable employment in the Respondent's qualifying period - warrant review.

Standard of Review

[15] The Appellant submits that the applicable standard of review for questions of law is correctness, and the applicable standard of review for questions fact is that of reasonableness.

[16] The Federal Court of Appeal has determined, in *Canada (A.G.) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (A.G.),* 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 (Board) 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 (A.G.) v. Paradis; Canada (A.G.) 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.

[19] The Federal Court of Appeal, in *Maunder v. Canada (A.G.)*, 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*.

[20] In the recent matter of *Hurtubise v. Canada (A.G.)*, 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."

[21] 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.

[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.

Records of Employment

[23] The GD described the four ROEs in the record, as follows:

> [7] On a Record of Employment (ROE), dated July 8, 2015, an employer indicated the Appellant had 285 hours of insurable employment from March 16, 2015 to June 26, 2015. The Appellant was separated from employment due to a shortage of work.
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> […]
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> [9] On a ROE, dated March 18, 2015, an employer indicated the Appellant had 199 hours of insurable employment from January 5, 2015 to March 13, 2015. The Appellant was separated from employment due to a shortage of work.
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> [10] On a ROE, dated December 22, 2014, an employer indicated the Appellant had 350 hours of insurable employment from August 25, 2014 to December 19, 2014. The Appellant was separated from employment due to a shortage of work.

> [11] On a ROE, dated September 8, 2015, an employer indicated the Appellant had 211 hours of insurable employment from December 29, 2014 to March 13, 2015. The Appellant was separated from employment due to a shortage of work.

[24] The two ROEs at issue are the ones described in paragraphs [9] and [11] of the GD decision, relating to ROE W37987371 and ROE W40921056, respectively.

[25] ROE W40921056 (GD3-18) states in box 2 - “serial no. of ROE amended or replaced” - W37987371 (GD3-16).

[26] The significant differences in the two ROEs are:

a) First day worked: 29-12-2014 in ROE W40921056 and 05-01-2015 in ROE W37987371; and

b) Total insurable hours: 211 in ROE W40921056 and 199 in ROE W37987371.

[27] ROE W40921056 includes a period of one week more of insurable hours. It is clearly meant to amend and replace ROE W37987371.

[28] By adding the hours in these two ROEs to calculate the total hours of insurable employment, 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] This is a reviewable error pursuant to paragraph 58(1)(c) of the DESD Act.

[30] Given this error, 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] 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.

Error of the GD and Decision of the AD

[32] The GD concluded that the Respondent had 1045 insurable hours. However, the GD counted 199 hours twice. Therefore, the Respondent had 846 insurable hours.

[33] The Respondent needed 910 hours of insurable employment to qualify for benefits.

[34] As such, the Respondent did not qualify for benefits pursuant to section 7 of the EI Act.

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

[36] 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

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

Shu-Tai Cheng
Member, Appeal Division