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

[TRANSLATION]

Citation: *S. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 364

Tribunal File Number: AD-15-1270

BETWEEN:

S. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 21, 2016

DATE OF DECISION: July 12, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the matter is referred back to the Tribunal's General Division (Employment Insurance Section) for a new hearing

INTRODUCTION

[2] On October 23, 2015, the Tribunal's General Division found that:

> - The Appellant was disentitled from receiving employment insurance benefits because she had not filed her report card within the time limits set out in sections 10 and 50 of the *Employment Insurance Act* ("the *Act*") and section 26 of the Employment Insurance Regulations ("the Regulations").

[3] The Appellant filed an application for leave to appeal to the Appeal Division on November 26, 2015 after receiving the General Division's decision on October 27, 2015. The application for leave to appeal was granted on December 8, 2015.

FORM OF HEARING

[4] The Tribunal determined that this appeal would proceed by teleconference for the following reasons:

- the complexity of the issue or issues;
- the fact that the parties' credibility was not one of the main issues;
- the cost-effectiveness and expediency of the hearing choice; and
- the need to proceed as informally and quickly as possible while complying with the rules of natural justice.

[5] The Appellant was present at the hearing with her representative, Hugo Marquis, counsel. The Respondent was represented by Elena Kitova.

THE LAW

[6] Pursuant to subsection 58(1) of the Department of Employment and Social Development 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 or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order 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 issue is as follows:

- Did the General Division err in fact and/or in law in finding that the Appellant was disentitled from receiving employment insurance benefits because she had not filed her report card within the time set out in sections 10 and 50 of the Act and section 26 of the Regulations?

ARGUMENT

[8] The Appellant's arguments in support of her appeal are as follows:

- Although the General Division headed in the right direction in law, it apparently limited its analysis to basic principles when the case herein dictated a more detailed analysis of the finer points at issue when the Respondent or one of its representatives provides erroneous information;

- The Federal Court of Appeal has confirmed that erroneous information need not necessarily originate with the Respondent for it to generate reasonable grounds

for delay. Needless to say, such reasonable grounds are all the more relevant when the erroneous information truly originates with the Respondent.

- However, on reading the judgement rendered by the General Division, it seems that this complaint is levelled more squarely at the Appellant: for failing to question or refusing to believe information provided by the Respondent;

- Certain courts have examined situations in which erroneous information originates with the Respondent. The General Division appears to have completely disregarded the relevant case law, and to have limited its comments to a few landmark decisions while criticizing the Appellant for not taking more extensive steps;

- The General Division erred in law by choosing a far too narrow interpretation of the principles underlying the definition of a good cause for late filing, which amounts to placing a burden on the Appellant that exceeds that established by the case law.

- The General Division erred in applying the law to the facts by overemphasizing the officer's status and omitting to consider relevant factors that would lead a reasonable person to conclude that he or she was not entitled to Employment Insurance;

- The General Division erred in writing at paragraph 15 of its decision that the conversation had left the Appellant with the impression that she was "probably" not entitled to benefits, considering that the uncontested evidence shows that the Appellant was simply not entitled to the said benefits;

- Paragraph 16 of the decision contains a similar error, where the General Division writes that the Appellant allegedly stated that she had been informed by the officer that she "might" not have enough hours. However, the uncontested evidence shows that the officer told her simply that she had not accumulated enough hours;

- In this case, the question of entitlement was based exclusively on the number of hours worked. On May 18, 2012, an employee of the Respondent contacted the Appellant and, during their conversation, having the file on hand as well as the exact number of hours worked, the officer informed the Appellant that she was not entitled to benefits;

- The officer did not tell the Appellant that she [translation] "might qualify because the final decision is up to someone else and only a letter of refusal can provide confirmation." Instead, she said that she did not have enough hours, but should wait to receive the letter of refusal before applying for social insurance. The General Division failed to make this important distinction;

- The General Division obviously placed great importance on the letter of May 31, 2012, especially the sentence that mentioned the importance for claimants to [translation] "complete their report cards." However, this sentence, and the entire letter for that matter, is obviously intended for claimants who are entitled to benefits. The General Division erred in stating that the wording of the letter created an obligation for the Appellant to question the information she had received from the Respondent, even though the said letter contains not the slightest indication that the officer was mistaken and that, after all, the Appellant was entitled to benefits;

- The General Division erred when it complained at paragraph 33 of the decision that the Appellant should have contacted the Respondent [translation] "if she had doubts." Precisely, in all of the evidence presented before the General Division, there was never any mention of a doubt in the Appellant's mind.

- The General Division based its decision on the false assumption that the Appellant was in doubt, and that she should therefore have taken further steps, when such was definitely not the case;

- The Appellant submits that she acted as a reasonable person would after being informed by one of the Respondent's employees that she was not entitled to benefits, particularly since she has suspected she was not entitled from the outset.

[9] The Respondent's arguments against the Appellant's appeal are as follows:

- The General Division did not err in law or in fact and it properly exercised its jurisdiction;

- Subsection 10(5) of the *Act* states that: "A claim for benefits, other than an initial claim for benefits, made after the time prescribed for making the claim shall be regarded as having been made on an earlier day if the claimant shows that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the claim was made";

- The case law has established that, in order to establish good cause for a delay in applying for benefits, claimants must demonstrate that they have promptly taken steps to enquire as to their eligibility for benefits and that ignorance of the law or lack of experience with the Employment Insurance system will not constitute good cause for a delay in applying for benefits;

- The case law has established that the Board of Referees (now the General Division) is the trier of fact in assessing the evidence and that an Umpire (the Appeal Division) is not justified in intervening unless the General Division makes an error of law or fails to consider an important part of the evidence or its decision is contrary to the evidence;

- The General Division's decision is consistent with the legislation and the case law in this area and is reasonably consistent with the facts on file. The General Division relied on all the evidence brought before it and explained its findings in coherent and consistent reasoning.

STANDARDS OF REVIEW

[10] The Appellant made no submissions to the Tribunal concerning the standard of judicial review applicable to the General Division's decision.

[11] The Respondent submits that the standard of judicial review applicable to questions of law is correctness and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[12] The Tribunal notes that in *Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal states at 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."

[13] The Federal Court of Appeal proceeded to note that:

> [N]ot 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.

[14] The Federal Court of Appeal concludes by stating 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."

[15] The mandate of the Appeal Division of the Social Security Tribunal described in *Jean* was subsequently confirmed by the Federal Court of Appeal in *Maunder v. Canada (A.G.)*, 2015 FCA 274.

[16] Therefore, unless the General division failed to observe a principle of natural justice, erred in law or 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

[17] The Tribunal notes that this case is back before the Appeal Division for a second time on the same grounds at the first appeal.

[18] The Tribunal tried to obtain a copy of the audio recording of the General Division hearing. The General Division informed it that the recording was not available.

[19] In the absence of the recording, the Tribunal will accept the Appellant's version unless there is reason to doubt the Appellant's credibility. Such is not the case herein.

[20] The Appellant underscored that she testified before the General Division that a representative of the Respondent had clearly told her during a telephone call on May 18, 2012 that she did not have enough hours and that she was not entitled to benefits. She also told the Appellant to wait for the letter of refusal before applying for social insurance.

[21] The Appellant also disputes the summary of the conversation between the Respondent's officer whereby she informed the Respondent that she "might not" be entitled to benefits (Exhibit GD2-37). She therefore did not wait for the letter of May 31, 2012 because she had already been informed of the Respondent's negative decision by telephone. She said that the Respondent's officer had misled her.

[22] This version by the Appellant is provided in the appeal form she submitted to the General Division (Exhibit GD2-18), in the application to antedate (Exhibit GD2-36) and in her application for a hearing before a board of referees (Exhibit GD2-38).

[23] Despite the General Division's acknowledgement that the Appellant may have been misled during the telephone conversation of May 18, 2012, the General Division erred in applying the law to the facts by emphasizing the status of the Respondent's officer rather than considering whether the erroneous information provided to the Appellant had indeed generated a reasonable cause for delay.

[24] Moreover, the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner when it found that:

> [Translation}
> [29] The officer then informed her that a letter of confirmation would follow shortly.…

[25] This crucial finding of fact in support of the General Division's decision conflicts with the Appellant's testimony at the hearing that the officer had plainly stated that she did not have sufficient hours and was not entitled to benefits, and that she should wait for the letter of refusal before applying for social assistance.

[26] The Tribunal therefore finds 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. The decision obviously contradicts the evidence presented.

[27] It is helpful to bear in mind that when the General Division confronts conflicting evidence, it cannot ignore such evidence. It must consider it. If it decides that the evidence should be dismissed or assigned little or no weight, it must explain the reasons for the decision (*Bellefleur v. Canada (AG)*, 2008 FCA 13, *Parks v. Canada (AG*), A-321-97).

[28] Since the General Division is the trier of fact and capable of deciding the question of credibility, the Tribunal refers the matter back to the General Division (Employment Insurance Section) for a new hearing by a Member.

CONCLUSION

[29] The Tribunal allows the appeal and refers the matter back to the Tribunal's General Division (Employment Insurance Section) for a new hearing by a Member.

[30] The Tribunal orders that the General Division's decision dated October 23, 2015, be removed from the file.

Pierre Lafontaine

Member, Appeal Division