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

Citation: *J. V. v. Canada Employment Insurance Commission,* 2016 SSTADEI 391

Tribunal File Number: AD-15-908

BETWEEN:

J. V.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: July 21, 2016

REASONS AND DECISION

INTRODUCTION

[1] On July 30, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision of the Canada Employment Insurance Commission (Commission). The Applicant had been denied benefits on a claim she filed in August 2014 and requested be antedated in September 2014, because the Commission had determined that the Applicant had insufficient hours to establish a claim for benefits. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant and her Representative attended the GD hearing, which was held by teleconference on July 22, 2015. The Respondent did not attend.

[3] The GD determined that:

a) The Applicant applied for and received sickness benefits under the Employment Insurance Act (EI Act);

b) She was terminated by her employer while she was on approved sick leave;

c) She immediately applied for regular benefits in October 2013;

d) She requested an antedate of her August 2014 claim and asked for the earlier sickness benefits claim to be converted into a regular claim;

e) On the claim for regular benefits submitted on October 29, 2013, the Applicant had to have accumulated 630 hours during her qualifying period; she had previously accumulated 1834 insurable hours, however these hours were used to establish her claim for sickness benefits; since she was unable to work during her qualifying period, she was unable to accumulate any insurable hours to establish a claim for regular benefits;

f) She did not have the required number of insurable hours to establish a claim for regular benefits;

g) In terms of the antedate request, the Applicant had good cause to delay submission of her claim; however, she would not have qualified to receive benefits on the earlier date because she had insufficient insurable hours; and

h) Therefore, the Applicant did not meet both conditions of subsection 10(4) of the EI Act.

Based on these conclusions, the GD dismissed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 13, 2015, within the 30-day time limit.

[5] The Tribunal requested submissions from the Respondent and the Respondent filed submissions in June 2016.

ISSUE

[6] Whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[7] Pursuant to section 57 of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the 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."

[9] 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."

[10] 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.

Leave to Appeal

[11] The Applicant's grounds of appeal are that GD based its decision on erroneous findings of fact and inaccurate interpretation of those facts and that the GD acted beyond or refused to exercise its jurisdiction. Her submissions can be summarized as follows.

[12] Erroneous findings of facts:

a) She provided evidence that she submitted two EI claims concurrently on October 29, 2013, one for regular benefits and one for sickness benefits; she did this after speaking with Commission agents because her situation was unusual (a person being on employer approved sick leave being terminated);

b) The Commission made a unilateral decision to ignore the claim for regular benefits and to proceed with the claim for sickness benefits;

c) She obtained proof through an access to information request that the Commission had the claim for regular benefits of October 29, 2013 and submitted this to the GD;

d) In the meantime, she submitted a claim in August 2014 for regular benefits; this claim was denied because the Commission determined that she did not have enough insurable hours;

e) The Commission 'used' her insurable hours towards the sickness benefits claim; it had, for a time, asserted that the regular benefits claim filed in October 2013 did not exist;

f) The GD's conclusion that she did not have enough insurable hours led to its conclusion on her request for antedate; because she would not have qualified at an earlier date, she could not qualify for an antedate of the August 2014 claim;

g) It did not take into account the chronology of the EI claims that she had filed.

[13] The GD acted beyond or refused to exercise its jurisdiction:

a) The GD did not consider the unusual circumstances and the fact that she submitted two concurrent EI claims one of which the Commission ignored and denied having; and

b) The GD established a reverse chronological order on her EI claims but should have considered that it was the Commission's decision to move forward on the claim for sickness benefits and ignore the claim for regular benefits in October 2013.

[14] The Respondent's submissions are:

a) The Applicant worked to February 26, 2013 and had accumulated 1834 hours of insurable employment; these hours had been used to establish a claim for benefits effective February 24, 2013;

b) Based on medical information submitted by the Applicant, sickness benefits were allowed effective February 24, 2013 and the Applicant received the maximum 15 weeks of sickness benefits;

c) She filed a new/subsequent claim for benefits and a request to antedate and convert her previous claim from sickness benefits to regular benefits;

d) She had 0 hours of insurable employment related to the claim at issue;

e) Pursuant to subsections 7(2) and section 8(1) of the EI Act, the Applicant did not qualify for benefits;

f) Neither the AD nor the GD of the Tribunal can vary the legislated conditions; and

g) The GD rendered a reasonable decision in accordance with the evidence presented.

[15] After review of the GD decision and the audio recording of the GD hearing, I find that the application for regular benefits in October 2013 is relevant to the August 2014 claim.

[16] The GD hearing started on April 27, 2015 and the GD Member adjourned the hearing to allow the Applicant to find and submit additional documents. The additional documents submitted, on June 19, 2015, were the Applicant's request under the *Privacy Act* for a copy of her October 29, 2013 claim for regular benefits and a copy of that application which was date and time stamped "29-10-2013 02:05".

[17] The teleconference hearing continued on July 22, 2015.

[18] The Applicant presented evidence of her October 2013 claim for regular benefits to the GD, and the GD found that:

a) The Applicant applied for regular benefits on October 29, 2013: paragraphs [15] and [23];

b) She asked for the sickness benefits claim (that she filed on the same date) to be converted into a regular claim: paragraph [14]; and

c) On the claim for regular benefits submitted on October 29, 2013, the Applicant had to have accumulated 630 hours during her qualifying period; she had previously accumulated 1834 insurable hours: paragraphs [23] to [25].

[19] The GD Member, towards the end of the hearing, suggests to the Applicant that now that she had a copy of the document showing that she "actually did apply in October 2013" and that the issue was resolved, as dismissal due to restructuring, with her employer, the Applicant should ask the Commission "can they proceed to process your claim for regular benefits…" The GD Member goes on to state that the issue before the GD is whether the Applicant has sufficient hours to establish a claim for benefits because she "has no hours". Then the GD Member remarks that now that the October 2013 claim for regular benefits is in evidence "how [does] this affect the claim …" The GD Member suggests that "The Commission has either misplaced, disavowed any knowledge of this, and this may be a way for you to jog their memory".

[20] The GD decision does not analyse or determine how the October 2013 claim for regular benefits affects the August 2014 claim, despite the GD Member stating that it is a question to be asked of the Commission and a relevant issue.

[21] The Respondent was asked specifically (by Tribunal request dated May 27, 2016) for submissions as follows:

> Before granting or refusing the above-mentioned Application for Leave to Appeal to the Appeal Division of the Social Security Tribunal of Canada, the Tribunal Member assigned to this file is requesting that the Respondent (Canada Employment Insurance Commission) file submissions on whether leave should be granted or refused.
>
> In particular, the Applicant (J. V.) argues that she submitted two claims to CEIC concurrently and one was ignored by CEIC resulting in only the sickness benefits claim proceeding. Also, the Applicant argues that the GD determined that she had 1834 insurable hours at the time she filed the claims, required 630 hours to establish a claim, but concluded that she did not have the required number of insurable hours to establish a claim for regular benefits.

[22] The Respondent's submissions, of June 13, 2016, relate to the sickness benefits paid to the Applicant (effective February 2013) and to the application for regular benefits filed in August 2014, but they are silent on the claim for regular benefits filed in October 2013 (at the same time as the claim for sickness benefits which was acted upon by the Commission).

[23] In the circumstances, whether the GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction warrants further review.

CONCLUSION

[24] The Application is granted.

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

[26] 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