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

Citation: *Canada Employment Insurance Commission v. R. P.*, 2016 SSTADEI 447

Tribunal File Number: AD-15-1239

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

R. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON: July 27, 2016

DATE OF DECISION: August 30, 2016

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative of the Appellant	Carole Robillard
Respondent	R. P.
Representative of the Respondent	H. P.

INTRODUCTION

[1] On November 3, 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 the Respondent (or claimant) was not available for work pursuant to paragraph 18(a) of the *Employment Insurance Act* (EI Act). The Respondent attended the teleconference hearing held by the GD with her Representative. No one attended on behalf of the Commission.

[2] An application for leave to appeal the GD decision was filed, by the Commission, with the Appeal Division (AD) on November 19, 2015. Leave to appeal was granted on April 7, 2016.

[3] This appeal proceeded by teleconference for the following reasons:

a) The complexity of the issues under appeal; and

b) 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 made a claim for employment insurance (EI) regular benefits effective February 9, 2014;

b) She was out of Canada, from March 13, 2014 to May 13, 2014, to visit her ill mother;

c) She booked her trip on February 13, 2014;

d) She made a claim for benefits each week from February 13, 2014 to May 13, 2014 and did not declare her absence from Canada;

e) The Commission determined that:

   1. The Respondent could not be paid benefits from March 13, 2014 to May 13, 2014 because she was not in Canada; and

   2. She could also not be paid benefits from February 13, 2014 to May 13, 2014 as she could not prove her availability for work;

f) An overpayment resulted from the Commission's decision;

g) The Respondent disputed the amount of the overpayment and requested a reconsideration;

h) The Commission issued a reconsideration decision and maintained its initial decision; and

i) The notice of overpayment included a penalty of $855 which was imposed; the penalty is not an issue in this appeal.

[5] The GD found that the Respondent had not proven her availability for work from February 13, 2014 to May 13, 2014. The GD also found that the Respondent's absence from Canada met the exception to a disentitlement pursuant to paragraph 55(1)(d) of the *Employment Insurance Regulations* (EI Regulations) and, therefore, she was entitled to receive regular benefits for the first seven days of this absence.

ISSUES

[6] Whether the GD erred in law in making its decision, whether or not the error appears on the face of the record.

[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)(b) of the DESD Act.

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

[11] Relevant provisions of the EI act include section 18 and subsection 37(b):

> **18 (1)** A claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the claimant was
>
> **(a)** capable of and available for work and unable to obtain suitable employment;
>
> **(b)** unable to work because of a prescribed illness, injury or quarantine, and that the claimant would otherwise be available for work; or
>
> **(c)** engaged in jury service.
>
> **Marginal note: Exception**

(2) A claimant to whom benefits are payable under any of sections 23 to 23.2 is not disentitled under paragraph (1)(b) for failing to prove that he or she would have been available for work were it not for the illness, injury or quarantine.

37 Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant

(a) is an inmate of a prison or similar institution; or

(b) is not in Canada.

[12] Relevant provisions of the EI Regulations include subsection 55(1):

55 (1) Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada

[…]

(d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;

[…]

SUBMISSIONS

[13] The Appellant submitted that:

a) The GD erred in law when it allowed the Respondent's appeal on the issue of entitlement to a period of benefits while she was outside Canada;

b) While, in particular circumstances, an exemption to a disentitlement may exist under subsection 55(1) of the EI Regulations, the GD erred in applying an exemption under paragraph 55(1)(d) in the present matter;

c) The Respondent failed to show that she was available for work from February 13, 2014, when she booked her ticket to travel outside of Canada, until her return to Canada on May 13, 2014;

d) The Respondent had no bona fide job search for that period, and she stated that she was not available from when she booked her trip until her return; in addition, she stated that

she could not be contacted by her employer or return home within 24 to 48 hours while in India due to her mother's emergency situation;

e) The GD found that the Respondent was not available from February 13, 2014 to May 13, 2014, but then went on to grant a seven day exemption (which exemption required a finding that she was available during those seven days); and

f) The GD erred in law in making its decision to allow the Respondent's appeal in part in that:

    1. It made findings which were contradictory;

    2. It misapplied paragraph 55(1)(d) of the EI Regulations; and

    3. Its interpretation of paragraph 55(1)(d) is contrary to Federal Court of Appeal jurisprudence on the exemption criteria of subsection 55(1) of the EI Regulations.

[14] The Respondent did not file written submissions, but her Representative made oral submissions at the appeal hearing. The Respondent argued:

a) She was not in Canada from March 13 to May 13, 2014; however, she was looking for a job from February 13 to March 13, 2014;

b) Therefore, she was available for work and would have worked for those 4 weeks if she had found work;

c) There was a "miscommunication" between her and the Commission on her availability during those 4 weeks; and

d) She agrees that she owes an amount for overpayment but maintains that she was entitled to EI benefits during those 4 weeks; therefore, the amount of the overpayment should not include the period from February 13 to March 13, 2014.

ANALYSIS

[15] The AD of the Tribunal granted leave to appeal on the issue of whether the GD erred in law in making its decision.

[16] The leave to appeal decision stated:

> [12] The GD concluded that the claimant was entitled to benefits for 7 days while she was outside of Canada to visit a seriously ill immediate family member despite failing to prove she was available and looking for work during this period.
>
> [13] Paragraph 55(1)(d) of the EI Regulations states:
>
> > Subject to section 18 of the Act, a claimant who is not a self-employed person is not disentitled from receiving benefits for the reason that the claimant is outside Canada
> >
> > …
> >
> > (d) for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured;
>
> [14] While the GD stated the legislative provisions relevant to the issues on appeal, the Applicant argues that the GD erred in law in that it found that the claimant failed to prove she was available and looking for work for the period February 13, 2014 to May 13, 2014 (paragraphs [25], [33] and [47] of the GD decision) but also determined that she is to be paid benefits for a period of the first 7 days of her absence from Canada, which were March 13, 2014 to March 19, 2014 (paragraph [25] of the GD decision).
>
> [15] The GD does not appear to have taken into consideration the first part of paragraph 55(1)(d) of the EI Regulations which states "subject to section 18 of the Act". It determined that the Respondent was disentitled pursuant to section 18 of the EI Act but also determined that she was eligible for benefits for 7 days. Therefore, the matter warrants review.

Standard of Review

[17] The Appellant submits that the applicable standard of review for questions of law is correctness.

[18] 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

is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[19] 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.

[20] 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.

[21] 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*.

[22] 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."

[23] 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.

[24] 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.

Not in Canada and Availability

[25] The GD stated that the Federal Court of Appeal has confirmed the principle that EI benefits are not payable to those persons not in Canada except as specifically prescribed by the EI Regulations. Paragraph 37(b) of the EI Act is the legislative basis for this principle.

[26] Paragraph 55(1)(d) of the EI Regulations states that subject to section 18 of the EI Act, a claimant is not disentitled from receiving benefits for the reason that the claimant is outside Canada for a period of not more than seven consecutive days to visit a member of the claimant's immediate family who is seriously ill or injured.

[27] Section 18 of the EI Act relates to a disentitlement for non-availability. A claimant is not entitled to be paid benefits for a working day for which the claimant fails to prove that on that day the claimant was capable of and available for work and unable to obtain suitable employment.

[28] The GD applied the *Faucher* decision (*Faucher v. Canada (Employment and Immigration Commission),* A-56-96) of the Federal Court of Appeal and found that the Respondent was not available for work for the period February 13, 2014 to May 13, 2014.

[29] The Appellant submits that the evidence supports the GD's finding of non-availability and, also, that this is consistent with subsequent Federal Court of Appeal decisions on the factors to consider when assessing availability (such as *Canada (AG) v. Leblanc*, 2010 FCA 60).

[30] The Respondent submits that she was available from February 13, 2014 to March 13, 2014. On this issue, the Respondent sought to re-argue the facts and arguments that she asserted before the GD.

[31] The GD is the trier of fact, and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[32] It is not my role, as a Member of the AD of the Tribunal on this appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine if a reviewable error set out in subsection 58(1) of the

DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case anew.

[33] The GD found, based on the evidence before it, that the Respondent was not available for work for the period February 13, 2014 to May 13, 2014, because she:

a) Did not demonstrate the desire to return to the labour market as soon as a suitable job was offered; and

b) Failed to demonstrate her desire to work through her efforts to find a suitable job and there was no evidence of a bona fide job search by the Appellant from February 13, 2014, when she booked her flight, during the period while she was outside of Canada and throughout the period until she returned to Canada on May 13, 2014.

[34] The GD did not base this conclusion an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. Its finding - that the Respondent was not available for work for the period February 13, 2014 to May 13, 2014 - was based on the documentary and oral evidence. The GD also did not err in law in arriving at this conclusion.

[35] The GD considered paragraph 55(1)(d) of the EI Regulations to determine whether she was exempted from disentitlement (for being out of Canada) for a period of not more than seven days to visit a member of her family who is seriously ill or injured. The GD analyzed this issue before it considered the issue of availability for work. It concluded that the Respondent was exempted from disentitlement "for a period of the first 7 days of her absence from Canada".

[36] In so doing, the GD misinterpreted subsection 55(1) of the EI Regulations which states "Subject to section 18 of the Act …". The GD did not take into consideration section 18 of the EI Act when it interpreted paragraph 55(1)(d) of the EI Regulations.

[37] This is a reviewable error pursuant to paragraph 58(1)(b) of the DESD Act.

[38] 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.

[39] 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

[40] The GD found that the Respondent was not available for work for the period February 13, 2014 to May 13, 2014. Therefore, she was not available for work, which is a requirement to be entitled to benefits pursuant to section 18 of the EI Act.

[41] As such, the Respondent did not qualify for exemption to disentitlement under paragraph 55(1)(d) of the EI Regulations since this exemption is "subject to section 18 of the Act".

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

[43] 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

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

Shu-Tai Cheng
Member, Appeal Division