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

Citation: *Canada Employment Insurance Commission v. B. B.*, 2016 SSTADEI 446

Tribunal File Number: AD-16-125

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON: July 5, 2016

DATE OF DECISION: August 29, 2016

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative of the Appellant	Elena Kitova
Respondent	B. B.

INTRODUCTION

[1] On December 18, 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 he (the claimant) would not receive benefits pursuant to the *Employment Insurance Act* (EI Act) and *Employment Insurance Regulations* (EI Regulations). The Respondent attended the teleconference hearing before the GD. 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 7, 2016. Leave to appeal was granted on March 1, 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 appeal was initially scheduled to be heard on June 9, 2016 and was convened at the scheduled time. A Representative of the Appellant was on the line, but the Respondent was not. As there had been technical difficulties earlier in the day (related to the teleconference system), the Tribunal was not satisfied that the Respondent had a sufficient opportunity to attend the hearing. Therefore, the hearing was adjourned to July 5, 2016, and both the Appellant and Respondent were in attendance on the new hearing date

[5] The following facts are not in dispute:

a) The Respondent filed an initial claim for benefits effective February 8, 2015; he had a period of unemployment during the period of January 2, 2015 to January 26, 2015, and he returned to work on January 27, 2015;

b) He reported earnings in each week of his claim, between February 8 and April 18, 2015, which earnings ranged from $531 to $923;

c) His earnings for the weeks of his claim for benefits were "equal to or greater than 125% of the benefit rate";

d) The Commission advised the Respondent, on May 6, 2015, that the two week waiting period on his claim had not been served;

e) The Respondent's requested reconsideration on the basis of Pilot Projects 18 and 19, among other things; he argued that the 50% deduction provided under these provisions should apply to the waiting period; and

f) The Commission advised that the waiting period is not subject to Pilot Projects 18 and 19, and it maintained its initial decision.

[6] The GD found that that earnings cannot prevent a claimant from serving the waiting period as, pursuant to sections 19(1) of the EI Act and sections 39(1) and 39(2) of the EI Regulations, these earnings are to be deducted from the benefits payable for the first three weeks following the waiting period.

ISSUES

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

[8] 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

[9] 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.

[10] 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.

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

[12] Relevant provisions of the EI Act include section 13 and subsection 19(1)

> **13** A claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.
>
> **19 (1)** If a claimant has earnings during their waiting period, an amount not exceeding those earnings shall, as prescribed, be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.
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> **Marginal note: Earnings in periods of unemployment**
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> **(2)** Subject to subsections (3) and (4), if the claimant has earnings during any other week of unemployment, there shall be deducted from benefits payable in that week the amount, if any, of the earnings that exceeds

- **(a)** $50, if the claimant's rate of weekly benefits is less than $200; or
- **(b)** 25% of the claimant's rate of weekly benefits, if that rate is $200 or more.

Relevant provisions of the EI Regulations include subsections 39(1) and (2):

39 (1) If a claimant has earnings in respect of a period that falls in the claimant's waiting period, an amount equal to those earnings or, if paragraph 19(3)(a) or 152.18(3)(a) of the Act applies in respect of those earnings, the amount required by that paragraph to be deducted, shall be deducted from the benefits payable for the first three weeks for which benefits are otherwise payable.

(2) The maximum amount to be deducted under subsection (1) in respect of a claimant's earnings for any one week in the claimant's waiting period is an amount equal to the claimant's rate of weekly benefits.

SUBMISSIONS

[13] The Appellant submitted that:

a) The applicable standard of review for questions of law is correctness;

b) The requirement to serve a two week waiting period is included in section 13 of the EI Act;

c) Sections 77.95 and 77.9**7** of the EI Regulations clearly specify that Pilot Projects 18 and 19 apply "except for the purpose of section 13" of the EI Act. In other words, the 50% deduction does not apply until such time as the waiting period has been served, and it has never been served in this case;

d) The GD ignored the provisions of section 13 of the EI Act; and

e) The GD erred in law when it relied on section 19(1) of the EI Act and section 39 of the EI Regulations. These sections refer to the allocation of earnings in the waiting period. In the case at hand, because the Respondent did not serve his waiting period, the earnings he reported are not "earnings in the waiting period".

[14] The Respondent did not file submissions but relied on the submissions he had made in previous stages of this matter. During the appeal hearing, he stated that he did not have any submissions to add.

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:

> [13] While the GD stated the legislative provisions relevant to the issues on appeal, the Applicant argues that the GD's findings ignored the requirements of section 13 of the EI Act and transgressed the provisions of subsection 19(1) of the EI Act and subsection 39(2) of the EI Regulations.
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> [14] The GD's determination that the Respondent's earnings should not have prevented him from serving his waiting period led to the determination that the only provision that applies is Regulation 39(2) which clearly instructs the Commission to deduct waiting period earnings in "an amount equal to the claimant's rate of weekly benefits".
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> [15] The primary issue on appeal is related to interpretation of the legislation, in particular section 13 and subsection 19(1) of the EI Act and subsection 39(2) of the EI Regulations.
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> [16] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal.
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> [17] On the basis that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.

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.

Waiting Period

[25] Section 13 of the EI Act states that a claimant is not entitled to be paid benefits in a benefit period until, after the beginning of the benefit period, the claimant has served a two week waiting period that begins with a week of unemployment for which benefits would otherwise be payable.

[26] Therefore, to be entitled to be paid benefits a claimant must:

a) Be in his/her benefit period;

b) Have served a two week waiting period; and

c) That waiting period would have begun with a week of unemployment for which benefits would otherwise be payable.

[27] The waiting period usually occurs at the very beginning of the benefit period, and it must begin with the first weeks for which benefits would otherwise be payable to the claimant.

[28] The GD found that:

a) The claimant (Respondent) was not entitled to be paid benefits in a benefit period until a two week waiting period has been served;

b) The waiting period should have been served the week beginning February 8, 2015, and the week beginning February 15, 2015;

c) Earnings cannot, in accordance with the legislation, prevent the claimant from serving the waiting period because when interpreted together with sections 19(1) of the EI Act and 39(1) and 39(2) of the EI Regulations, the earnings are to be deducted dollar for dollar in the first three weeks following the waiting period;

d) It is unclear how the Commission came to the conclusion that earnings during the waiting period can prevent the waiting period from being served;

e) Subsection 19(1) of the EI Act deals with earnings in the waiting period and 19(2) deals with earnings in any other week (i.e. any week other than the waiting period); and

f) The only provision that applies is Regulation 39(2) which clearly instructs the Commission to deduct waiting period earnings in "an amount equal to the claimant's rate of weekly benefits"; and Pilot Project 18 and 10 do not apply.

[29] On this basis, the GD concluded:

a) The Respondent showed that the earnings in the waiting period should not have prevented him from serving his waiting period in accordance with section 13 of the EI Act;

b) The treatment of the earnings in the waiting period, from the claim commencement date, should be deducted in accordance with Regulation 39; and

c) The appeal is allowed in part.

[30] Earnings can prevent a claimant from serving the waiting period, in certain circumstances. The GD erred in law when it concluded that "earnings cannot, in accordance with the legislation, prevent the claimant from serving the waiting period."

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

[32] 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.

[33] 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

[34] The GD concluded that the Respondent's earnings during the initial period of his claim period cannot prevent him from serving his waiting period. As stated above, this conclusion was an error in law, specifically in the interpretation of section 13 of the EI Act.

[35] In order to begin to serve his waiting period, the Respondent was required to be in his benefit period and have a week of unemployment for which benefits would otherwise be payable.

[36] Benefits would not otherwise have been payable to the Respondent the week beginning February 8, 2015, and the week beginning February 15, 2015 (or in any week of his claim, between February 8 and April 18, 2015) because:

a) The Respondent's benefit rate is $411 per week;

b) His allowable earnings are 25% of his benefit rate, pursuant to section 19(2) of the EI Act;

c) The amount allocated to each week of his claim was greater than 125% of his benefit rate;

d) Therefore, no benefit is payable to the Respondent when his earnings for a week equal or exceed $514.00; and

e) In each week of his claim, between February 8 and April 18, 2015, his earnings were greater than $514.00.

[37] When the amount allocated to a relevant week is equal to or greater than 125% of the benefit rate, the waiting period is deferred until the claimant has "a week of unemployment for which benefits would otherwise be payable". In the present circumstances, the Respondent's waiting period was necessarily deferred in each week of his claim.

[38] As such, the Respondent could not (and did not) serve his waiting period pursuant to section 13 of the EI Act, and he was, therefore, not entitled to be paid benefits on the claim he filed effective February 8, 2015.

[39] 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.

[40] 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

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

Shu-Tai Cheng
Member, Appeal Division