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

Citation: *R. Z. v. Canada Employment Insurance Commission*, 2017 SSTADEI 123

Tribunal File Number: AD-16-966

BETWEEN:

R. Z.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: February 7, 2017

DATE OF DECISION: March 27, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is allowed and the file is referred back to the General Division for a new hearing by a different member.

INTRODUCTION

[2] On June 20, 2016, the General Division of the Tribunal determined that the Appellant had failed to prove his availability for work pursuant to sections 18 and 50 of the *Employment Insurance Act* (Act) and section 9.001 of the *Employment Insurance Regulations* (Regulations).

[3] On July 26, 2016, the Appellant requested leave to appeal to the Appeal Division, after receiving communication of the decision of the General Division on June 27, 2016. Leave to appeal was granted on August 10, 2016.

TYPE OF HEARING

[4] The Tribunal held a teleconference hearing for the following reasons:

- the complexity of the issue under appeal.
- the fact that the credibility of the parties is not a prevailing issue.
- the information in the file, including the need for additional information.
- the requirement under the *Social Security Tribunal Regulations* to proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

ISSUE

[6] The Tribunal must decide whether the General Division erred when it determined that the Appellant had failed to prove his availability for work pursuant to sections 18 and 50 of the Act and section 9.001 of the Regulations.

ARGUMENTS

[7] The Appellant submits the following arguments in support of the appeal:

- The General Division erroneously relied on his statement of September 8, 2015, in which he had stated that he was not looking for work.

- He was in receipt of (Employment Insurance) EI sickness benefits until October 10, 2015. Therefore, the statement of September 8, 2015, had been made during the time he was in receipt of EI sickness benefits. In fact, he did not renew his claim for regular EI benefits until October 25, 2015.

- This statement made on the telephone was immediately refuted by his written correspondence to Service Canada (GD3-12);

- His entitlement for regular EI benefits starting on October 26, 2015, can be assessed fairly and correctly only if his efforts to find work on and after that date are considered.

- The General Division erred by failing to consider the letter dated September 8, 2015. Alternatively, he submits that the General Division erred by failing to explain in its decision why it had refused to accept as true the letter to Service Canada dated September 8, 2016, and also the sworn testimony that was consistent with the same.

- He submits that, when assessing his availability for employment starting on October 26, 2015, relying on a statement made on September 8, 2015, runs contrary to the principles of natural justice.

- He submits that the decision to deny him regular EI benefits starting on October 26, 2015, had been made before he had a fair and reasonable opportunity to vary his notion of suitable employment. Determining what constitutes a reasonable period of time depends on the particular circumstances involved.

- It is respectfully submitted that he was not given a fair opportunity since he was disentitled a mere 16 days after the last day on which he had received EI sickness benefits.

- He had not determined what he intended to accept or look for as suitable employment as alleged in the General Division's decision (ADI-31); rather, his job search was guided by his medically documented injury, his disability, his qualifications and his work experience.

- He submits that the General Division's decision fails to explain the basis on which his evidence was rejected and how it had determined credibility in light of the contradictory evidence.

- The General Division erred when it concluded that he would prefer to seek work for his experience as a driver but not provide a bona fide job search for work that suited his abilities and restrictions.

- He submits that the assessment of his availability failed to consider his history of working full-time after his injury and the reality that the process of calling employers to inquire about the availability of light duties will inevitably result in being told that, with some prospective employers, light duties are unavailable.

- Specifically, the General Division's decision appears to be based on the number of jobs that he applied to and not on the evidence that he engaged in numerous different activities to find jobs.

- The General Division's decision failed to address the case law that the Appellant had submitted, and this gives rise to the inference that the General Division overlooked said case law when making its decisions.

- It is respectfully submitted that even if he unduly restricted his job search, EI claimants are permitted a reasonable amount of time to restrict their search for employment within the field for which they have been trained, but after a certain period of unemployment, claimants may be expected to search for jobs in other areas and occupations outside the usual field.

- It is respectfully submitted that the fact that he suffers from a medical condition does not mean that he is incapable or unavailable for work. Each claimant with an injury or an illness must be evaluated individually. A claimant who is medically unable to perform his regular work may have an obligation to look for lighter work with another employer. This is exactly what he did.

- It is an error of law to deny a claimant notice and a reasonable period of time to find employment in another type of work.

- An error of law occurred because the General Division inadequately considered the nature of his disability and injury.

[8] The Respondent submits the following arguments against the appeal:

- Availability is established by three factors: the sincere desire to return to the labour market as soon as suitable work is offered, the expression of such desire through job search efforts, and not setting personal conditions that unduly limit the chances of returning to the labour market. Availability is assessed by proof that an individual is capable and available each and every day in a benefit period.

- The General Division applied the correct legal test to the facts and its decision aligns with the legislation and jurisprudence.

- The General Division provided reasoning for its determination that availability had not been proven pursuant to section 18 of the Act. It determined that the Appellant did not want to return to the labour market as soon as a suitable job was offered but preferred to seek work for his experience as a driver, as no bona fide job search was produced that suited his capabilities.

- The Appellant failed to make any significant efforts to seek work after the date of his disentitlement, October 26, 2015. By limiting his job search and not looking for employment for which he had medical restrictions or for which he lacked experience, he limited his chances of returning to work.

- The General Division decision is one of the reasonable outcomes, given the facts before it. There is no evidence that the General Division erred in law or made an erroneous finding of fact in a perverse or capricious manner.

STANDARD OF REVIEW

[9] The Appellant failed to make any representations regarding the applicable standard of review.

[10] The Respondent submits that the Appeal Division does not owe any deference to the General Division for its conclusions with respect to questions of law, regardless of whether the error appears on the face of the record. However, for questions of mixed fact and law

and questions of fact, the Appeal Division must show deference to the General Division. It can intervene only if the General Division based its decision on an erroneous finding of fact that it – *Pathmanathan v. Office of the Umpire,* 2015, FCA 50

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015, FCA 242, indicates in paragraph 19 of its decision that "[w]hen it 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."

[12] The Federal Court of Appeal further indicated the following:

> Not 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 […].

[13] The Court concluded that "[w]here it 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."

[14] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015, FCA 274.

[15] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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

[16] In accordance with paragraph 18(1)(*b*) of the Act, a claimant who proves that he or she is incapable of work by reason of prescribed illness, injury or quarantine, and who otherwise would be available for work, shall not be disentitled to benefit for reason of being unavailable. However, once sickness benefits end, a claimant is not automatically entitled to regular benefits and will be so entitled only if he or she proves his or her availability.

[17] Paragraph 18(1)(*a*) of the Act provides clearly that a claimant is not entitled to be paid benefits for any working day in a benefit period 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.

[18] Availability is established by three factors: the sincere desire to return to the labour market as soon as suitable work is offered, the expression of such desire through job search efforts, and not setting personal conditions that unduly limit the chances of returning to the labour market. Availability is assessed by proof that an individual is capable and available each and every day in a benefit period – *Faucher v. Canada (Attorney General)*, A-56-96.

[19] In the present case, the Appellant was paid 15 weeks of sickness benefits from June 28, 2015, to October 10, 2015. The Respondent determined that there was no work possible for the Appellant and that he was to be considered sick and paid sickness benefits (Exhibit GD3-19).

[20] A renewal claim for regular EI benefits was made effective October 25, 2015 (Exhibit GD3-3 to GD3-11). He was then reminded that for that type of benefit, he was required to be capable of and available for work, as well as being unable to obtain suitable employment. In addition, the Appellant was informed that he needed to be actively searching for and accepting offers of suitable employment.

[21] The General Division found that the Appellant's entitlement to receive EI regular benefits, following the exhaustion of his sickness benefits, could not be established because

he had failed to show his availability for work, under paragraph 18(1)(*a*) of the Act, as of October 26, 2015.

[22] The Appellant argues that his entitlement for regular EI benefits starting on October 26, 2015, can be assessed fairly and correctly only if his efforts to find work on and after that date are considered. The General Division erroneously relied on his statement of September 8, 2015, in which he had stated that he was not looking for work. He was in receipt of EI sickness benefits until October 10, 2015. Therefore, the statement of September 8, 2015, was made during the time he was in receipt of EI sickness benefits. In fact, he did not renew his claim for regular EI benefits until October 25, 2015.

[23] He submits that the General Division erred by failing to consider his letter dated September 8, 2015. Alternatively, he submits that the General Division erred by failing to explain in its decision why it had refused to accept as true his letter to Service Canada dated September 8, 2016, as well as the sworn testimony that aligned with the same.

[24] The Tribunal reviewed the General Division decision carefully and agrees with the Appellant that the General Division relied erroneously on his September 8, 2015, statement while he was receiving sickness benefits to determine his non-availability for regular benefits as of October 25, 2015. More precisely, the Tribunal finds that the General Division erred when it considered said statement in analyzing the criteria set forth in *Faucher*, precited.

[25] Furthermore, the General Division did not give any consideration to the Appellant's argument that he had not been given proper warning regarding his availability as of October 25, 2015.

[26] Finally, it is well established that the General Division must analyze all of the evidence and, if it decides to dismiss certain evidence or to not assign it the probative value that this evidence appears to reveal or convey, it must explain clearly why – *Bellefleur v. Canada (Attorney General)*, 2008 FCA 13. In the present matter, the General Division failed to explain why it had disregarded the Appellant's rebuttal letter regarding his September 8, 2015, statement (Exhibit GD3-12).

[27] For the abovementioned reasons, the appeal is allowed and the file is referred back to the General Division for a new hearing by a different member.

CONCLUSION

[28] The appeal is allowed and the file is referred back to the General Division for a new hearing by a different member.

[29] The decision of the General Division dated June 20, 2016, is to be withdrawn from the file.

Pierre Lafontaine
Member, Appeal Division