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

Citation: *Canada Employment Insurance Commission v. D. G.,* 2017 SSTADEI 153

Tribunal File Number: AD-15-98

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

D. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 12, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Representative of the Appellant	Carole Robillard
Representative of the Respondent's Estate	Arthur Goodick

INTRODUCTION

[1] On February 5, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) allowed the Respondent's appeal where the Appellant (Commission) had refused to antedate his claim, pursuant to subsection 10(4) of the *Employment Insurance Act* (EI Act). The Respondent attended the teleconference hearing held by the General Division. No one attended on behalf of the Appellant.

[2] The Appellant filed an application for leave to appeal with the Appeal Division of the Tribunal on March 6, 2015. Leave to appeal was granted on May 10, 2016.

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

a) The complexity of the issues under appeal; and

b) The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] A teleconference hearing was initially scheduled to take place on September 13, 2016. The Respondent passed away in April 2015, and due to the challenges of estate administration, the estate was given additional time to provide documents about the executorship of the estate. The Tribunal adjourned the hearing to November 22, 2016, when it was heard and completed.

[5] The following facts are not in dispute:

a) The Respondent's last employment ended on November 22, 2012, and he received severance until October 2013;

b) The Respondent filed a claim for regular benefits on March 26, 2014, with a request to antedate his claim;

c) The Appellant denied the request for antedate, as it determined that the Respondent had not shown good cause for a lengthy delay in filing;

d) Although the Appellant now agrees that the Respondent had good cause for delay from November 23, 2013, to October 23, 2013, it takes the position that the evidence fails to support good cause from October 24, 2013, to March 26, 2014;

e) The Respondent's reasons for the delay were that he was receiving severance payments, he had prospects of work with DCL until January 2014, and he did not know that there was a deadline for applying for Employment Insurance (EI) benefits; he spoke to a Service Canada agent in February and applied for EI in March.

[6] The General Division found that the Respondent had shown good cause for delaying his application for EI benefits "throughout the period of delay" and therefore, for antedating his claim, pursuant to subsection 10(4) of the *Employment Insurance Act* (EI Act).

ISSUES

[7] Did the General Division err in law or err in fact and law in making its decision?

[8] Should the Appeal Division dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or confirm, rescind or vary the General Division decision?

LAW

[9] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), 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.

[10] Leave to appeal was granted on the basis that the Appellant had set out reasons that fell into the enumerated grounds of appeal, and that at least one of the reasons had a reasonable chance of success, specifically under paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

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

[12] Relevant provisions of the EI Act include subsection 10(4):

> An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

SUBMISSIONS

[13] The Appellant submitted that:

a) The General Division erred in fact and in law.

b) The legal test for good cause under subsection 10(4) of the EI Act is whether the claimant acted like a reasonable person in their situation would have to satisfy oneself of the rights and obligations under the EI Act.

c) The Federal Court of Appeal has re-affirmed that good cause under subsection 10(4) of the EI Act must apply *throughout* the entire period of delay.

d) On the evidence before the General Division, the Respondent failed to prove that from October 24, 2013, to March 26, 2014, while seeking work, attending one interview, and deciding to seek information concerning retraining, he was prevented

from making any enquiries as to his rights and obligations with regard to filing a claim for benefit.

e) The Federal Court of Appeal confirms that an intention to not claim EI benefits and to seek alternative employment is not good cause for delay.

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

a) The Respondent was employed for 28 years and had not once used the EI system;

b) He did not know the rules or legalities involved;

c) Because he was receiving severance, he did not apply for EI;

d) He did some handyman type work, looked for work, but was never able to find permanent work;

e) Applying for EI was the last thing he would have done; and

f) Only after looking for a job unsuccessfully, he contacted Service Canada and was advised to file for EI.

ANALYSIS

Standard of Review

[15] The Appellant submits that the Appeal Division does not owe any deference to the conclusions of the General Division with respect to questions of law; however, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division.

[16] The Federal Court of Appeal has determined, in *Canada (A. G.) v. Jewett*, 2013 FCA 243, and *Chaulk v. Canada (A. G.)*, 2012 FCA 190, and other cases, that the standard of review for questions of law and jurisdiction in EI appeals from the Board of Referees is correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[17] Until recently, the Appeal Division had been considering a decision of the General Division a reviewable decision by the same standards as that of a decision of the Board.

[18] However, in *Paradis v. Canada (A. G.)*, 2004 FCA 64, and *Canada (A. G.) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the Appeal Division of the Tribunal is reviewing appeals of EI decisions rendered by the General Division.

[19] 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 Appeal Division to decisions of the General Division. The *Maunder* case related to a claim for a disability pension under the *Canada Pension Plan*.

[20] In the 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 Appeal Division that had dismissed an appeal from a General Division decision. The Appeal Division had applied the following standard of review: correctness on questions of law, and reasonableness on questions of fact and law. The Appeal Division had concluded that the General Division decision was "consistent with the evidence before it and is a reasonable one…" The Appeal Division applied the approach that the Federal Court of Appeal in *Jean*, *supra*, suggested was not appropriate, but the Appeal Division 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."

[21] There appears to be a discrepancy in relation to the approach that the Appeal Division of the Tribunal should take on reviewing appeals of EI decisions rendered by the General Division, and in particular, whether the standard of review for questions of law and jurisdiction in EI appeals from the General Division differs from the standard of review for questions of fact and mixed fact and law.

[22] 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.

Good Cause for Delay

[23] Federal Court of Appeal jurisprudence has held that claimants have a duty to enquire about their rights and obligations and the steps that should be taken, or to show that there were exceptional circumstances that prevented them from doing so.

[24] The General Division stated, at pages 6 and 7 its decision:

> [33] The Claimant must prove the existence of a good cause throughout the entire period of the delay by showing that he acted as a reasonable and prudent person in the same circumstances/situation would have acted to ensure compliance with her rights and obligations under the Act.
>
> [34] The Tribunal finds that from November 22, 2012 to October 24, 2013, the Claimant was receiving monies from his employer and paying EI premiums as supported by the Claimants T4-slip. As a result the Tribunal finds that it is reasonable for the Claimant to assume he is not eligible for benefits during that time period.
>
> [35] The Tribunal finds it to be reasonable that given the Claimant's job search efforts immediately following his income ceasing from his employer, that the Claimant felt that he would be able to become employed based on his employment opportunity with DCL for which he was made aware in January 2013 that he was not the successful candidate. As a result the Tribunal finds that it is reasonable for the Claimant to delay his application for benefits during that time period.
>
> [36] The Tribunal finds that the Claimant explored retraining opportunities in February and applied for an antedate of his EI claim in March 2014 based on the advice of the Service Canada representative in his area. As a result the Tribunal finds that it is reasonable for the Claimant to delay his application for benefits during that time period as he sought assistance which included Service Canada.
>
> [37] The Tribunal would like to make mention that this decision is regarding the antedate only.
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> [38] The Tribunal finds that the Claimant has proven the existence of a good cause throughout the entire period of the delay by showing that he acted as a reasonable and prudent person in the same circumstances/situation would have acted to ensure compliance with his rights and obligations under the Act.

> [39] As a result of the evidence submitted by the Claimant and the Commission, the Tribunal finds in favor of the Claimant.

[25] On the basis of these findings, the General Division allowed the Respondent's appeal.

[26] While the General Division cited the legal test applicable to "good cause for delay"—whether the claimant acted as a reasonable and prudent person in the same circumstances or situation would have acted to ensure compliance with their rights and obligations under the EI Act—the Appellant argues that the General Division based its decision on an incorrect application of the law and did not consider applicable Federal Court of Appeal decisions.

[27] The General Division decision did not refer to any Federal Court of Appeal decisions.

[28] In *Canada (A. G.) v. Kaler*, 2011 FCA 266 and *Kamgar v. Canada (A. G.)*, 2013 FCA 157, in addition to other cases, the Federal Court of Canada held that the legal test for good cause under subsection 10(4) of the EI Act is whether the claimant did what a reasonable person in his situation would have done to satisfy himself of the rights and obligations under the EI Act.

[29] In *Canada (A. G.) v. Dickson*, 2012 FCA 28, the Federal Court of Appeal affirmed that good cause under subsection 10(4) of the EI Act must apply throughout the entire period of delay.

[30] In *Howard v. Canada (A. G.)*, 2011 FCA 116, the Federal Court of Appeal affirmed an Umpire's ruling that delay in applying based on the expectation of finding employment or a good faith reliance on one's own resources does not constitute "good cause." The Court also stated that while the Board took into account the Appellant's unfortunate "extenuating circumstances," there was no evidence in the record suggesting that these circumstances explained the entire period of delay.

[31] There is also no dispute that the Respondent had good cause for the initial period of delay covered by the separation monies, namely November 23, 2012, to October 23, 2013.

[32] The Appellant is only appealing the General Division's conclusion that the Respondent had good cause for delay between October 24, 2013, and March 26, 2014 (the relevant period).

[33] The General Division found that the Respondent "felt he would become employed," "was made aware in January 2013 that he was not the successful candidate," and "explored retraining opportunities in February and applied for an antedate of his EI claim in March 2014 based on the advice of the Service Canada representative in his area,". The General Division found that it was reasonable for the Respondent to delay his application for benefits during the relevant period as he had sought assistance from Service Canada.

[34] The General Division decision refers to January 2013 as the date when the Respondent was made aware that he was not the successful candidate: paragraph 35. However, earlier in the decision, the General Division noted that in October 2013, the Respondent felt he could obtain employment with DCL. Then there is reference to "February" in the following paragraph. It is unclear, on my reading of the General Division decision and the record, whether "February" refers to February 2013 or February 2014 at paragraph 36. It is also unclear whether "January 2013" might be January 2014.

[35] The time line and the events in that timeline may have an impact on the Respondent's circumstances during the relevant period: October 24, 2013 (the day after his separation monies from his employer were payable), to March 26, 2014 (the day he filed for benefits).

[36] At the hearing, the time line was clarified. The parties agreed that the Respondent tried to find work after the separation monies had been paid (October 23, 2013), was made aware in January 2014 that he was not successful with DCL, and explored retraining opportunities in February 2014.

[37] The issue of whether the General Division erred in law or erred in fact and law relates only to its conclusion that the Respondent had good cause for delay between October 24, 2013, and March 26, 2014. The General Division based this conclusion on the finding that the Respondent sought other work until January 2014, explored retraining opportunities in February 2014, and applied for an antedate of his EI claim in March 2014, based on the advice

of the Service Canada representative in his area. Essentially, the General Division concluded good cause during this period due to the Respondent's efforts to obtain other employment (DCL) and to explore retraining opportunities.

[38] In the *Howard* case, the Federal Court of Appeal held that the expectation of finding employment or a good faith reliance on one's own resources does not constitute "good cause." Therefore, the General Division's conclusion that the Respondent's expectation of finding employment (first at DCL, and then by exploring retraining opportunities) constitutes "good cause" is contrary to the *Howard* case and an error of law.

[39] The General Division misinterpreted the jurisprudence when it concluded that the Respondent had good cause for delay in the relevant period.

[40] This is a reviewable error pursuant to paragraphs 58(1)(*b*) and (*c*) of the DESD Act.

[41] Given this error, the Appeal Division is required to make its own analysis and decide whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division, confirm, rescind or vary the decision: subsection 59(1) of the DESD Act.

[42] Is the Appeal Division able to give the decision that the General Division 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 General Division and Decision of the Appeal Division

[43] The General Division found that the Respondent:

a) Applied for EI benefits on March 26, 2014;

b) In the period from October 24, 2013, to March 2014, had tried to get a job and had explored retraining opportunities; and

c) Then contacted Service Canada and was told he should make an EI claim and request an antedate, which he did in March 2014.

[44] The Appellant argues that in the relevant period, the Respondent failed to prove that he was prevented from making any enquiries as to his rights and obligations with regard to filing a claim for benefits.

[45] The Respondent's representative argues that the Respondent was not aware of the rules and regulations relating to EI, and although he paid into the EI system for 28 years, he had not once (before his March 2014 application) applied for EI benefits.

[46] In *Canada (A. G.) v. Somwaru*, 2010 FCA 336, the claimant was forced to retire because the factory in which he was employed shut down and he filed a claim for EI benefits three months later. The claimant believed that he could not receive EI benefits in his particular situation. When a friend told him otherwise, he applied for benefits. In light of the claimant's lack of knowledge of the EI legislation and regulations, the Federal Court of Appeal framed the issue as "whether a claimant who took no positive steps to verify his beliefs can rely on his ignorance of the law and good faith in claiming 'good cause' under subsection 10(4)" and it found that:

> [B]arring exceptional circumstances, a prospective claimant in the respondent's position is expected to "take reasonably prompt steps" to understand his obligations under the Act. Because the respondent took no such steps, it was unreasonable for the Umpire to conclude that his belief he could not apply for benefits … constituted good cause for his delayed application. It cannot be said that the circumstances in this case were "exceptional."

[47] The *Somwaru* case confirms that a claimant is expected to take reasonably prompt steps to understand his obligations under the EI Act, and that there must be exceptional circumstances, taking into consideration all factors, to find that a claimant had good cause for delay.

[48] The issue here is analogous to that in the *Somwaru* case: whether a claimant who took no positive steps to verify his beliefs can rely on his ignorance of the EI program (i.e. legislation and regulations) and good faith in claiming "good cause" under subsection 10(4) of the EI Act.

[49] Barring exceptional circumstances, a claimant is expected to take reasonably prompt steps to understand his obligations under the EI Act. I note that the General Division did not make a finding that the Respondent's situation was exceptional. Taking into account all the factors in the Respondent's situation, there were no "exceptional circumstances" to find that he had good cause for delay in the relevant period.

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

[51] In the circumstances, I am able to give the decision that the General Division should have given (which was the dismissal of the Respondent's appeal before the General Division).

CONCLUSION

[52] The appeal is allowed, and the General Division decision is rescinded.

Shu-Tai Cheng
Member, Appeal Division