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

[TRANSLATION]

Citation: *Y. K. v. Canada Employment Insurance Commission*, 2017 SSTADEI 154

Tribunal File Number: AD-16-1246

BETWEEN:

Y. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: April 6, 2017

DATE OF DECISION: April 12, 2017

Canada

REASONS AND DECISION

DECISION

[1] The Tribunal allows the appeal, grants an extension of time to file an appeal before the General Division and refers the matter back to the General Division so that a hearing can be held on the issue.

INTRODUCTION

[2] On September 22, 2016, the Tribunal's General Division determined that it would not be appropriate to grant the Appellant an extension of time to file an appeal before the General Division.

[3] The Appellant filed an application for leave to appeal before the Appeal Division on October 31, 2016, after having received notice of the General Division decision on October 3, 2016. Leave to appeal was granted on November 9, 2016.

FORM OF HEARING

[4] The Tribunal decided to hold this appeal by teleconference for the following reasons:

- the complexity of the issue(s);
- the credibility of the parties was not a prevailing issue;
- the cost-effectiveness and expediency of the hearing choice; and
- the requirement to proceed as informally and quickly as possible, while observing the rules of natural justice.

[5] The Appellant attended the hearing and was represented by Mr. Richard Alexandre-Laniel. The Respondent did not attend, despite having received the notice of hearing.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to 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

[7] The Tribunal must decide whether the General Division erred by determining that it would not be appropriate to grant the Appellant an extension of time to file an appeal before the General Division.

SUBMISSIONS

[8] The Appellant submitted the following arguments in support of his appeal:

- The confusion created by conflicting information communicated by the Respondent to the Appellant is a sufficient ground for granting an extension of time to contest the Respondent's decision.

- A Record of Employment displaying a balance of $11,490.93 dated November 28, 2015 (GD2-8), led him to believe that the administrative review was in his favour. This supposition is all the more reasonable because the Record from October 24, 2015, was $26,548.53. The significant reduction therefore led him to believe that the administrative review had been favourable.

- In light of the foregoing, it is clear that there was a continuing intention to appeal the Respondent's decision.

- Federal Court of Appeal case law is clear and specifies that the Respondent's decision-making process is completed only when the claimant is notified of the amount being claimed. The General Division member should have set the deadline as January 5, 2016.

- As the application for leave to appeal to the General Division was sent to the General Division on January 29, 2015, within 30 days of the Respondent's receipt of the final notice, the Appellant respected paragraph 52(1)(*a*) of the Act.

- Although the General Division alluded to *Canada (Attorney General) v. Larkman*, 2012 FCA 204, its analysis did not take into account the interest of justice, because it refused to grant the extension of time to file the appeal.

- Considering the importance assigned to the interest of justice, a "mechanically-made" application of the *Gattellaro* criteria constitutes an error of law justifying a reconsideration of the decision being reviewed.

- The General Division's decision was punctuated by numerous factual errors, which in more than one way make the General Division's decision patently unreasonable, as is stated in paragraph 58(1)(*c*) of the Act.

[9] The Respondent made no submissions against the Appellant's appeal.

STANDARDS OF REVIEW

[10] The Appellant argued that the applicable standard of review for issues of law is correctness, and that the applicable standard of review for questions of mixed fact and law is reasonableness—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] The Respondent made no submissions regarding the applicable standard of review.

[12] The Tribunal notes that the Federal Court of Appeal, in *Canada (Attorney General) v. Jean*, 2015 FCA 242, mentions in paragraph 19 of its decision that, when the Appeal Division "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."

[13] The Federal Court of Appeal further indicated:

> 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 […].

[14] The Federal Court of Appeal concludes by emphasizing 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."

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

[16] 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

[17] On November 30, 2015, the Respondent denied the Appellant the 30-day extension provided for submitting a reconsideration request under the terms of section 112 of the Act and section 1 of the *Reconsideration Request Regulations*.

[18] On January 29, 2016, after the anticipated legal delays, the Appellant appealed the Respondent's decision to the General Division.

[19] However, the law confers upon the General Division the discretionary power to extend the time for appeal.

[20] In this case, the General Division concluded that the Appellant had failed to meet three of the criteria for which an additional extension may be granted. According to the General Division, the Appellant had not demonstrated a continuing intention to pursue the appeal, did not have an arguable case and had not provided a reasonable explanation for his delay.

[21] For the appeal to be allowed, the Appellant must demonstrate that the General Division inappropriately exercised its discretionary power when it refused to grant an extension of time. An improper exercise of discretion occurs when a member gives insufficient weight to relevant factors, proceeds on a wrong principle of law, erroneously misapprehends the facts, or where an obvious injustice would result.

[22] The Tribunal finds that the General Division did not appropriately exercise its discretion in the present case. The General Division gave insufficient weight to relevant factors and erroneously misapprehended the facts. Furthermore, the denial of the extension resulted in an obvious injustice.

[23] The General Division needed to determine only whether it would agree to grant an extension to the Appellant to file an appeal before it.

[24] In this case, the Respondent's decision to refuse to extend the 30-day timeline to reconsider its decision of December 31, 2014, was communicated to the Appellant on November 30, 2015.

[25] The Appellant almost simultaneously received a Record of Employment dated November 28, 2015, displaying a total balance of $11,490.93 (GD2-8), which led him to believe that the administrative review was favourable. A prior Record of Employment dated October 24, 2015 (GD7-10), shows a balance of $26,548.53. The significant reduction in the amount therefore led him to believe that the administrative review had been positive.

[26] However, he takes note of a new Record of Employment around January 5, 2016 (GD6-2), which shows an adjustment reinstating the amount owing, namely $25,097.67 (GD2-9). That was when he understood that he had to appeal the General Division's decision. He therefore sent his application for appeal to the General Division on January 29, 2016. He was therefore within the 30-day timeline for filing his appeal before the General Division.

[27] For the Tribunal, this constitutes a reasonable explanation why the appeal before the General Division was not filed within the prescribed legal timeframes. Given the above-mentioned points, the General Division could not reasonably determine that the Appellant had not shown a continuing intention to pursue the appeal.

[28] In reading the General Division's decision, the Tribunal finds that the General Division erroneously misapprehended the facts and gave insufficient weight to the relevant factors. It erroneously repeated the facts pertaining to the period preceding the application for appeal before the General Division, without genuinely considering the Appellants grounds justifying his delay before the General Division.

[29] The Appeal Division reiterated that the factors in *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, must not be applied mechanically by the General Division. The determining factor is always the interest of justice – *X (Re)*, 2014 FCA 249 (CanLII); *Grewal v. Minister of Employment and Immigration* [1985] 2 F.C. 263 (F.C.A.). In this case, it would certainly not be in the interest of justice for a claimant's

appeal to be dismissed due to a delay of less than a month, further to the confusion created by conflicting documents communicated by the Respondent.

[30] For the above-mentioned reasons, the appeal will be allowed, the time extension for appealing to the General Division will granted, and the matter will be referred back to the General Division so that a hearing on the matter can be held.

[31] The Tribunal will not accept the Appellant's request to include before the General Division the record concerning the pay, the penalty and the violation notice (GD3-12 to GD3-15). It is first up to the Appeal Division to decide whether the Respondent judicially exercised its discretionary power in refusing to extend the 30-day period to submit a reconsideration request under section 112 of the Act.

CONCLUSION

[32] The Tribunal allows the appeal, grants the extension of time to file an appeal before the General Division and refers the matter back to the General Division so that a hearing can be held on the issue.

Pierre Lafontaine

Member, Appeal Division