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

Citation: *J. V. v. Canada Employment Insurance Commission,* 2017 SSTADEI 240

Tribunal File Number: AD-15-908

BETWEEN:

J. V.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 19, 2017

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

Appellant	J. V.
Appellant's representative	V. V. (Appellant's husband)

INTRODUCTION

[1] On July 30, 2015, the General Division of the Social Security Tribunal of Canada (Tribunal) determined, among other things, that benefits under the *Employment Insurance Act* (EI Act) were not payable on a claim for regular benefits that the Appellant had filed in August 2014.

[2] An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on August 13, 2015, and leave to appeal was granted on July 21, 2016.

[3] The General Division had determined that the claimant (Appellant) did not have the required number of insurable hours to establish a claim for regular benefits, and although she had good cause to delay submitting this claim, she did not meet the conditions to have her claim antedated because she had insufficient insurable hours to establish a claim on the antedate date.

[4] The Appellant's main argument throughout this appeal relates to her application for Employment Insurance (EI) regular benefits filed in October 2013. She filed two applications on the same date in October 2013: one for regular benefits and another for sickness benefits under the EI Act. The Respondent never issued a decision relating to the October 2013 application for regular benefits.

[5] In a letter dated May 27, 2016, the Tribunal asked the Respondent for submissions on whether leave to appeal should be granted or refused, and specifically noted:

> In particular, the Applicant (J. V.) argues that she submitted two claims to CEIC concurrently and one was ignored by CEIC resulting in only the sickness benefits claim proceeding. Also, the Applicant argues that the

> GD determined that she had 1834 insurable hours at the time she filed the claims, required 630 hours to establish a claim, but concluded that she did not have the required number of insurable hours to establish a claim for regular benefits.

[6] The Respondent filed submissions on June 13, 2016, but these submissions were silent on the Appellant's reason for appeal—that she had submitted two claims to the Respondent in October 2013 and that one had been ignored, resulting in only the sickness benefits claim proceeding. The Respondent submitted that her pre-October 2013 hours of insurable employment had been used in relation to her October 2013 claim for sickness benefits and, therefore, that she had zero hours when she applied for regular benefits in August 2014.

[7] Leave to appeal was granted on the grounds that the General Division may have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction—paragraph 58(1)(*a*) of the *Department of Employment and Social Development Act* (DESD Act).

[8] When the Appeal Division granted leave to appeal, the parties were asked to make written submissions on, among other things, the merits of the appeal.

[9] The Appellant filed written submissions. The Appellant noted that "the primary issue remains that my original EI claim, from October 2013, which was submitted regularly, on time and, with more than enough insurable hours, was basically ignored by [the Respondent]. All subsequent debate and confusion is a direct result of their negligence or inappropriate unilateral decisions, made in this initial stage."

[10] The Respondent filed written submissions on August 2, 2016. These submissions were silent on the Appellant's October 2013 application for regular benefits.

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

a) The complexity of the issues under appeal;

b) The information in the file, including the need for additional information; and

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

[12] The Respondent advised in writing that it would not attend the Appeal Division hearing.

ISSUES

[13] Did the General Division fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction?

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

THE LAW

[15] According to subsection 58(1) of the DESD Act, the following are the only grounds of appeal:

> 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.

[16] Leave to appeal was granted on the basis of the General Division's possible failure to observe a principle of natural justice or the General Division having acted beyond or having refused to exercise its jurisdiction:

> [19] The GD Member, towards the end of the hearing, suggests to the Applicant that now that she had a copy of the document showing that she "actually did apply in October 2013" and that the issue was resolved, as dismissal due to restructuring, with her employer, the Applicant should ask the Commission "can they proceed to process your claim for regular benefits…" The GD Member goes on to state that the issue before the GD is whether the Applicant has sufficient hours to establish a claim for

> benefits because she “has no hours”. Then the GD Member remarks that now that the October 2013 claim for regular benefits is in evidence “how [does] this affect the claim …” The GD Member suggests that “The Commission has either misplaced, disavowed any knowledge of this, and this may be a way for you to jog their memory”.

[17] The General Division decision does not analyse or determine how the October 2013 claim for regular benefits affects the August 2014 claim, despite the General Division Member stating that it is a question the Commission (Respondent) should be asked and a relevant issue.

[18] The Respondent was asked specifically (by the Tribunal on May 27, 2016) for submissions as follows:

> Before granting or refusing the above-mentioned Application for Leave to Appeal to the Appeal Division of the Social Security Tribunal of Canada, the Tribunal Member assigned to this file is requesting that the Respondent (Canada Employment Insurance Commission) file submissions on whether leave should be granted or refused.
>
> In particular, the Applicant (J. V.) argues that she submitted two claims to CEIC concurrently and one was ignored by CEIC resulting in only the sickness benefits claim proceeding. […]

[19] The Respondent’s submissions of June 13, 2016, relate to the sickness benefits the Applicant received (effective February 2013) and to the application for regular benefits filed in August 2014, but they are silent on the claim for regular benefits filed in October 2013 (at the same time as the claim for sickness benefits, which the Commission acted upon).

[21] The legislative provision relating to a claimant’s appeal of a decision of the Respondent is section 113 of the EI Act, which states: “A party who is dissatisfied with a decision of the Commission made under section 112, including a decision in relation to further time to make a request, may appeal the decision to the Social Security Tribunal.” “A decision of the Commission made under section 112” is a reconsideration decision made by the Respondent.

[22] The Appeal Division’s powers include but are not limited to substituting its own opinion for that of the General Division. Pursuant to subsection 59(1) of the DESD Act, the Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any

directions that the Appeal Division considers appropriate or confirm, rescind or vary the General Division's decision in whole or in part.

SUBMISSIONS

[23] The Appellant submits that the General Division failed to observe a principle of natural justice or acted beyond or refused to exercise its discretion. Her arguments can be summarized as follows:

a) The principle issue on appeal relates to her original claim for EI regular benefits in October 2013.

b) The Respondent misled her and the Tribunal by failing to acknowledge that she had, in fact, filed a claim for EI regular benefits in October 2013.

c) At first, the Respondent denied it had received a claim for EI regular benefits in October 2013; she had to make an application under the *Privacy Act* to obtain a copy of the October 2013 claim as it was filed with the Respondent.

d) She followed up with the Respondent's agents regarding her 2013 claim for regular benefits, was told it was not on file and was advised to file a new claim for regular benefits in 2014. That is why she made a claim for regular benefits in August 2014.

e) The Respondent's answer to the August 2014 claim that she had zero insurable hours of work was unfair and misleading, as it was the Respondent who "spent" or "used up" all her pre-October 2013 insurable hours on the claim for sickness benefits in October 2013 instead of reviewing it in conjunction with her claim for regular benefits filed earlier the same day.

f) Even after there was proof that the Respondent had received the October 2013 claim for regular benefits and had ignored it, it failed to answer for its unilateral decision to proceed with her October 2013 claim for sickness benefits rather than, or in addition to, her claim for regular benefits.

g) The General Division was satisfied with the Appellant's evidence to the effect that the Respondent had ignored this claim and had misled the Tribunal, but it failed to account for this evidence or its implications in its decision.

h) She seeks a proper decision on the October 2013 claim for regular benefits.

[24] The Respondent submits that the Appellant has not proven grounds for appeal under subsection 58(1) of the DESD Act and that the Appeal Division should dismiss the appeal. Its arguments are as follows:

a) The matter relates to a claim for regular benefits filed in August 2014 with a request for an antedate to May 2014.

b) The relevant qualifying period is from August 4, 2013, to August 2, 2014.

c) Under subsection 10(4) of the EI Act, to allow an antedate of her claim, the Appellant would need to show good cause for delay and that she qualified for benefits on the earlier date (in May 2014).

d) As of May 2014, the Appellant had zero hours of insurable employment and, therefore, could not qualify for benefits on that date.

e) This decision is not discretionary and the legislation requires that the Respondent apply these requirements to all claimants.

f) The Tribunal does not have the discretion to do what might be seen as fair or just unless, in doing so, it is applying the law to the fact situation before it.

g) The General Division's findings were reasonable and compatible with the evidence; it applied the relevant provisions of the legislation and the case law to the facts and there is nothing in the General Division's decision to suggest that it was biased against the Appellant or that it did not act impartially, nor is there any evidence to show that there was a breach of natural justice.

[25] I note that the Respondent's submissions do not refer to or acknowledge the Appellant's claim for regular benefits in October 2013; neither did its submissions regarding leave to appeal. By declining to attend the Appeal Division hearing, the Respondent effectively ignored the Appellant's arguments based on the October 2013 claim altogether and provided the Appeal Division with no information from the Respondent's perspective in this regard.

[26] At the hearing, the Appellant expressed extreme frustration at the Respondent's absence and its conduct towards her since October 2013. She noted that she became ill in February/March 2013 and did not apply for sickness benefits as she planned to return to work within a short period of time, but there were problems with her employer. It was only in October 2013 that she made two EI claims because of the specific situation and her uncertainty about how to make an EI claim; a Commission agent called to advise her that both claims would be reviewed, starting with sickness benefits. She followed up with the Commission during the process and in June or July 2014, when the legal process with her employer was finalized, she contacted the Commission again and was told they could not find an application for regular benefits filed in 2013. She was told to file another application, which is how the August 2014 application for regular benefits with a request for antedate started.

[27] The Appellant confirmed that the Respondent never made a decision on her October 2013 application for regular benefits and that this is the source of her ongoing frustration with the Respondent and the EI process. The real issue, as the Appellant sees it, is that the Respondent has not taken responsibility for failing to review her October 2013 application for regular benefits, lost or ignored it, advised her to file another application in 2014 and ruled on the 2014 application without regard to the consequences to her.

STANDARD OF REVIEW

[28] The Respondent submits that for questions of law, the Appeal Division does not owe any deference to the General Division's conclusions. However, for questions of mixed fact and law, the Appeal Division must show deference to the General Division and can intervene only if 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.

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

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

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

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

[33] In *Hurtubise v. Canada (A.G.)*, 2016 FCA 147 and *Canada (A.G.) v. Peppard*, 2017 FCA 110, the Federal Court of Appeal considered applications for judicial review of Appeal Division decisions 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 (or of mixed fact and law). The Appeal Division decision in *Hurtubise* was rendered before the *Jean* decision, and in *Peppard*, it was rendered after the *Jean* decision. While the Federal Court of Appeal did not comment specifically on the standard of review that the Appeal Decision should apply to General Division decisions, it affirmed the Appeal Division decisions and found them to be reasonable.

[34] There appears to be a discrepancy in relation to the approach that the Tribunal's Appeal Division should take on reviewing appeals of EI decisions that the General Division has rendered 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.

[35] I am uncertain how to reconcile this apparent discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[36] Consequently, I will consider whether the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

ANALYSIS

[37] The General Division's decision acknowledged that the Appellant submitted an application for regular benefits to the Respondent on October 29, 2013. However, the decision makes no other mention of that application or of any consequences of the Respondent's failure to review it.

[38] The audio recording of the General Division hearing shows that the General Division Member, towards the end of the hearing, suggests to the Appellant that now that she had a copy of the document showing that she "actually did apply in October 2013" and that the issue with her employer was resolved (she was dismissed due to restructuring), the Appellant should ask the Commission whether it "can […] proceed to process [her] claim for regular benefits…" The General Division Member goes on to state that the issue before the General Division is whether the Appellant has sufficient hours to establish a claim for benefits because she "has no hours." Then the Member remarks that now that the October 2013 claim for regular benefits is in evidence "how [does] this affect the claim …"? The General Division Member suggests that "[t]he Commission has either misplaced, disavowed any knowledge of this, and this may be a way for you to jog their memory."

[39] When asked at the Appeal Division hearing about the General Division Member's suggestion—to ask the Respondent to proceed with the October 2013 claim for regular benefits—the Appellant replied that this is the subject of her appeal to the Appeal Division: she has repeatedly asked the Respondent about the existence of this claim and it has repeatedly denied or ignored it.

[40] A copy of the Appellant's October 2013 claim for regular benefits as filed with the Respondent is in the record (as produced by the Appellant after obtaining a copy through an access to information request under the *Privacy Act*).

[41] A copy of the Appellant's October 2013 claim for sickness benefits and the Respondent's reconsideration file relating to it are not in the appeal record.

[42] The Respondent has produced only the reconsideration file relating to the 2014 application for regular benefits and request for antedate.

[43] The only reconsideration decision before the General Division relates to the application for EI benefits that the Appellant made on August 9, 2014. It is the Respondent's decision made under section 112 of the EI Act that is the subject of the Appellant's appeal pursuant to section 113 of the EI Act. It is the only reconsideration decision that General Division could review, because no other reconsideration decision had been appealed.

[44] The General Division did not have jurisdiction to review either of the Appellant's October 2013 EI applications, because the Appellant had not challenged the decision relating to sickness benefits through the reconsideration process and the Respondent had not reviewed (or rendered a decision) relating to the 2013 application for regular benefits.

[45] Therefore, the General Division did not refuse to exercise its jurisdiction, as the Appellant argues. The General Division did not have jurisdiction over the October 2013 application for regular benefits.

[46] I stated at the Appeal Division hearing that the legislation relating to EI appeals requires that a request for reconsideration be made to the Respondent and be ruled on before it can be appealed to the Tribunal. That is my interpretation of sections 112 and 113 of the EI Act.

[47] The Appellant argued that the October 2013 application for regular benefits is linked to the August 2014 application and, therefore, the Tribunal has jurisdiction to compel the Respondent to do the right thing, i.e. to process the October 2013 application for regular benefits and review her situation as at October 2013 before the Respondent "used up" all her insurable hours. She pointed to the unfairness of the situation: the Respondent did not issue a

decision, so there is no reconsideration to appeal, and the Respondent has never had to answer for its conduct.

[48] While I am sympathetic to the Appellant's frustration and I am dissatisfied with the Respondent's lack of responsiveness, even in the face of direct questions relating to the October 2013 application for regular benefits, I find that the Tribunal does not have the jurisdiction to rule on it. The Respondent did not render a decision on that application. Therefore, there is no reconsideration decision to form the basis of an appeal under sections 112 and 113 of the EI Act.

[49] Therefore, the General Division did not make a reviewable error in failing to deal with the October 2013 application for regular benefits in its decision and I am, unfortunately, unable to interfere with that decision.

[50] I note that what the Appellant is seeking is a writ of *mandamus*, that is, an order that compels the Respondent to make a decision on her October 2013 application for regular benefits (on the basis of the situation as at that date).

[51] The Federal Court of Canada has the jurisdiction to rule on an application for judicial review requesting a writ of *mandamus* against the Respondent, pursuant to section 18 of the *Federal Courts Act*, but this Tribunal does not.

CONCLUSION

[52] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division