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

Citation: *A. Z. v. Canada Employment Insurance Commission*, 2017 SSTADEI 355

Tribunal File Number: AD-17-342

BETWEEN:

A. Z.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] On March 20, 2017, the General Division of the Social Security Tribunal of Canada (General Division) determined that benefits under the *Employment Insurance Act* (Act) were not payable, because the Applicant did not have the minimum number of weeks in his qualifying period. The Applicant filed an application for leave to appeal with the Tribunal's Appeal Division (Tribunal) on June 2, 2017.

ISSUE

[2] The Tribunal must decide whether the appeal has a reasonable chance of success.

DECISION

[3] The appeal has a reasonable chance of success. Leave to appeal is granted.

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[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted," and "The Appeal Division must either grant or refuse leave to appeal."

[5] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[6] According to subsection 58(1) of the 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.

SUBMISSIONS

[7] The Applicant is seeking leave to appeal on the basis that the General Division based its decision on erroneous findings of fact that it had made in a capricious manner, without regard to the material placed before it. He follows this assertion with a number of specific concerns. The first is with reference to paragraph 15 of the decision where it is stated, "The Commission also noted that the qualifying period may be extended in certain circumstances." The Applicant stated that he does not know what those circumstances are but believes that his circumstances "likely comply."

[8] The Applicant also notes that, at paragraphs 23 and 24 of its decision, the General Division references cases from 2008 and 2001. The Applicant claims that "[t]he Employment Insurance had made many changes since 2001."

[9] The Applicant made further reference to paragraph 25 of the General Division's decision and to the General Division's determination that the Tribunal does not have jurisdiction to address the Applicant's concern that he could have acted differently had he been given correct information. The Applicant specifically asks "who does have the jurisdiction?"

ANALYSIS

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove the case.

[11] This means that the Tribunal must, in accordance with subsection 58(1) of the DESD Act, be in a position to determine whether there is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision under review.

[12] The Tribunal will grant leave to appeal if it is satisfied that at least one of the above-mentioned grounds of appeal has a reasonable chance of success.

[13] The only ground of appeal that the Applicant has explicitly raised is in respect of erroneous findings of fact per paragraph 58(1)(*c*) of the DESD Act. He has otherwise failed to articulate how any of his concerns related to any of the enumerated grounds of appeal.

[14] However, this does not necessarily limit his leave to appeal application to that single ground. *Karadeolian* v. *Canada (Attorney General)*, 2016 FC 615, considered a case in which the Appellant had not provided clearly articulated grounds for appeal. The Court noted that, "[…] the Tribunal must be wary of mechanistically applying the language of section 58 of the Act [DESD Act] when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like [the Appellant]."

[15] In light of *Kardeolian*, I consider the Applicant to have also raised concerns that the General Division may have erred in law in respect of undefined changes to the Act, and that the General Division may have erred in refusing to exercise its discretion per paragraph 58(1)(*a*)

[16] The question I must answer is, "Does the Applicant's appeal have a reasonable chance of success?"

Erroneous findings of fact and law

[17] The first ground of appeal that the Applicant has raised is that the General Division made factual errors. More particularly, the Applicant believes that his particular circumstances may permit an extension of his qualifying period.

[18] The General Division states at paragraph 20, "While the qualifying period may be shorter or longer in certain circumstances, there is no evidence before the Tribunal to suggest it was not correctly determined by the Commission."

[19] The qualifying period extensions that the Commission and the General Division referenced are available only in the limited and specific circumstances identified in subsections 8(2), 8(3) and 8(4) of the Act, excerpted below:

> Extension of qualifying period
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> (2) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that throughout the week the person was not employed in insurable employment because the person was

(a) incapable of work because of a prescribed illness, injury, quarantine or pregnancy;
(b) confined in a jail, penitentiary or other similar institution and was not found guilty of the offence for which the person was being held or any other offence arising out of the same transaction;

(c) receiving assistance under employment benefits; or

(d) receiving payments under a provincial law on the basis of having ceased to work because continuing to work would have resulted in danger to the person, her unborn child or a child whom she was breast-feeding.

Extension resulting from severance payments

(3) A qualifying period mentioned in paragraph (1)(a) is extended by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Commission may direct, that

(a) earnings paid because of the complete severance of their relationship with their former employer have been allocated to weeks in accordance with the regulations; and

(b) the allocation has prevented them from establishing an interruption of earnings.

Further extension of qualifying period

(4) A qualifying period is further extended by the aggregate of any weeks during an extension for which the person proves, in such manner as the Commission may direct, that

(a) in the case of an extension under subsection (2), the person was not employed in insurable employment because of a reason specified in that subsection; or,

(b) in the case of an extension under subsection (3), the person had earnings paid to them because of the complete severance of their relationship with their former employer.

[20] There was nothing before the General Division to indicate that the Applicant met the requirements for an extension under section 8 of the Act.

[21] It may have been preferable for the General Division to have identified those circumstances under which a qualifying period might be extended. However, the General Division is not obligated to review and to discount all those legislative provisions that are

inapplicable to the facts of the case. The General Division did not err by failing to identify those circumstances.

[22] I find, therefore, that the Applicant has failed to identify an erroneous finding of fact.

Error of Law

[23] The Applicant also noted that Employment Insurance legislation had changed since the date of the legal authorities that the General Division cites at paragraphs 23 and 24. He appears to be suggesting that those authorities may no longer be good law. However, the Applicant failed to identify any current legislative provision—or any higher or more recent case authority—that would undermine or supersede the principles for which the General Division cited case law or that would render them inapplicable. There is no error of law apparent.

Acted beyond or refused to exercise its discretion

[24] The Applicant's jurisdictional concern appears to be addressed primarily to the initial decision of April 13, 2016 (the "First Decision"), and to the decision-related communications that flowed between himself and the Commission agents. At the time of First Decision, the Applicant was 23 hours shy of the 665 hours he needed to qualify based on the hours he had accumulated in the qualifying period from March 29, 2015, to March 26, 2016. He understood, from his communications with the Commission, that if he could get some additional hours, his claim would be accepted.

[25] The Applicant accumulated an additional 147 hours and reapplied for benefits on August 15, 2017, with the result that he was denied again in another initial decision of August 17, 2016 (the "Second Decision"). In the Second Decision the Commission advised him he had accumulated only 147 hours of the 630 then required, with a qualifying period calculated from August 9, 2015, to August 6, 2016.

[26] At paragraph 25, the General Division notes that the Applicant asserted that "[…] had he been given proper advice after he submitted ROE# 2 in April 2015(sic), he would have made a different job search and been able to qualify for benefits shortly thereafter. The Tribunal further notes that the [Applicant] stated the Commission has never acknowledged these errors."

The General Division found that it had no jurisdiction to address "these matters," which the Tribunal takes to be whether the Commission provided incorrect information that could have caused the Applicant to act according to his own prejudice or whether, with proper advice, the Applicant might have qualified for benefits.

[27] The Applicant believes that the General Division should have given some consideration to the issue of whether the Commission had misled the Applicant and the effect, if any, of that misrepresentation on his ability to qualify for benefits. The gist of his jurisdictional concern is that the General Division was unable to determine these matters, because of its refusal to take jurisdiction over the First Decision, and the issues arising from that decision.

[28] It is correct that the General Division refused jurisdiction over the issues from the First Decision At paragraph 5 of its decision, the General Division describes the import of the April 13, 2016, decision, but then concludes "This decision is not in issue in this appeal." At paragraph 18 of its decision it states, "The only issue under appeal is whether the Appellant qualified for benefits further to his initial claim for benefits on August 15, 2016."

[29] The only decision that was before the General Division is the September 1, 2017, reconsideration decision (the "Reconsideration"). The Reconsideration purported to address a Commission decision of August 10, 2016. I have examined the Commission's reconsideration file and I am unable to discover an August 10, 2016, decision. The General Division may have had similar difficulties because it made no reference to the "August 10, 2016," decision date, despite the fact that this is the date identified by the reconsideration decision.

[30] It is quite possible that the August 10, 2016, date is a clerical error. However, because of this error, the reconsideration decision is not especially helpful as to what it was that it "reconsidered" and, therefore, what issues were properly before the General Division.

[31] The substance of the Reconsideration itself is no more illuminating, saying little more than that the Commission has not changed its decision regarding the issue of "Benefit Period Not Established." In the reconsideration file, there is one reconsideration application and one reconsideration decision. However, there are two initial decisions; the First Decision dated April 13, 2016, and the Second Decision dated August 17, 2016. The text of the September 1,

2016, letter might describe either or both, as both decision letters could be said to be concerned with the Applicant's failure to establish a benefit period.

[32] Given that the reconsideration decision itself is inconclusive, I turn to the actual **application** for reconsideration that the Applicant filed and that is dated August 25, 2016. The application appears to refer to both decisions in some fashion. Question 1 of Section 2 of the reconsideration application asks, "Which Employment Insurance decision **or decisions** would you like to have reconsidered?" To that question, the Applicant had responded: "As per Attachment #1." Turning to Attachment #1, I note that it is the First Decision of April 13, 2016. On the face of it, this would suggest that the Reconsideration is a reconsideration of the First Decision.

[33] However, Questions 2 and 3 of the application ask the Applicant when the decision was verbally communicated to him and when the decision letter was sent to him. To both of those questions he responded "August 23, 2016." Because these communications were shortly after the Second Decision had been issued, the responses to Questions 2 and 3 might plausibly be seen to be a reference to the Second Decision.

[34] Whatever the Commission intended by its Reconsideration, it is possible that the Applicant had been seeking a reconsideration of either the First Decision, the Second Decision, or both.

[35] At paragraphs 5 and 18 of its decision, the General Division simply refuses jurisdiction over the First Decision, and thereby refuses jurisdiction over any issues arising from that decision. It provides neither an analysis nor findings that would justify such a refusal.

[36] I therefore find that the General Division may have erred in refusing jurisdiction over the First Decision of April 13, 2016, decision or, alternatively, that it failed to observe a principle of natural justice by not providing its reasons for restricting the scope of its appeal to the issues arising from the Second Decision of August 17, 2016, decision. Both would be considered errors under paragraph 58(1)(*a*).

[37] If either error is found, the decision under review may have to be set aside. I find that the appeal has a reasonable chance of success.

CONCLUSION

[38] The Application is granted.

[39] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division