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

Citation: *J. C. v. Canada Employment Insurance Commission,* 2018 SST 45

Tribunal File Number: AD-17-432

BETWEEN:

J. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: January 18, 2018

Canada

REASONS AND DECISION

INTRODUCTION

[1] On April 27, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant could not obtain an extension of more than three weeks to her qualifying period under subsection 8(2) of the *Employment Insurance Act* (Act). As a result, the General Division agreed with the Commission that she would not have the minimum number of hours to access special benefits under subsection 93(4) of the *Employment Insurance Regulations* (Regulations), even if her claim were antedated as she had requested. Thus, the General Division found that the Commission was right to deny the antedating and it ultimately found that the Applicant did not have sufficient hours to qualify for benefits under subsection 7(2) of the Act and section 93 of the Regulations.

[2] The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on June 3, 2017.

ISSUE

[3] Does the appeal have a reasonable chance of success?

THE LAW

[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 be brought only 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 leave 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 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.

SUBMISSIONS

[7] The Applicant argues that the General Division failed to consider evidence that she was too ill to work for additional weeks. Specifically, she argues that the General Division did not consider her Record of Employment for the period from February 10, 2015, to May 19, 2016 (at GD3-19). That Record of Employment demonstrated on its face that there were an additional four weeks in which she had no earnings. These were identified as the weeks numbered 2, 8, 9, and 14.

[8] The Applicant notes that subsection 8(2) of the Act is concerned with whole-week periods. For a number of specified reasons, including illness, the Act allows for the extension of the qualifying period by one week for any week in which a claimant is unable to work for the entire week. At the same time, subsection 93(4) of the Regulations is concerned with day-long periods, disentitling a claimant from special benefits for each day that they fail to prove that they are unable to work for a reason such as illness.

[9] The Applicant submits that this inconsistency of approach is "ambiguous" and that the General Division failed to observe a principle of natural justice (presumably by making its decision with reference to weeks instead of days).

[10] Finally, the Applicant argues that the Commission was obligated by subsection 8(2) of the Act to direct her as to how she could prove she was not employed throughout a week because of her illness. The Applicant argues that the Commission did not do this, nor did the General Division, and she argues that this is an error of law.

ANALYSIS

[11] In relation to the first ground of appeal raised by the Applicant, she argues that the three weeks she was on bed rest were not the only weeks in her qualifying period in which she was unable to work due to illness, and she argues that the General Division failed to appreciate this.

[12] The Applicant testified that the 13 ½ particular days that she had indicated were only the days that she could document she had lost due to her illness. These were the days in which she had to cancel actual work that had already been booked. She said this did not include work that she had been offered, but that she declined. I reviewed the audio recording from the hearing and found that the Applicant had testified that there had been other days where, if her morning sickness was bad, she would book the next day off because "her boss didn't like it when [the Applicant] was getting calls in the morning and not being able to accept it because [the Applicant] was still getting sick." She also testified that she did not have specific dates for the additional days that she had to decline work.

[13] The General Division noted that a claimant must prove that *throughout a week*, the person was not employed because of illness or pregnancy. Because the longest consecutive period from the 13 ½ days was only four days, none of the days she provided could be used to extend her qualifying period.

[14] The Applicant argues that the General Division ignored the Record of Employment that demonstrated that there were certain pay periods with no earnings; however, the presence of weeks of no earnings does not establish that the Applicant was unable to work in those weeks by reason of illness.

[15] Nevertheless, the Applicant testified that there were days in which she had followed her employer's instruction that she indicate that she would not be able to accept work that might otherwise be offered. The General Division does not evaluate this evidence or even refer to it. It is not obvious whether the General Division considered the possibility that the Applicant may not have been worked the entire working week for one or more weeks, as a result of the Applicant's request that no work be assigned, or due to some combination of cancelled work

days that had been scheduled and other days that she asked not to be assigned work because she was ill or she anticipated illness.

[16] Furthermore, the four consecutive days of lost work from February 16 to February 19, 2016, which were acknowledged by the General Division, fall within a short work week. The only other day in that week is February 15, 2016, which I take notice is Family Day in Alberta, and a day that schools are closed. The Applicant testified to working exclusively for the Elk Island School Division in Alberta.

[17] This could mean that the Applicant was unable to work in each working day of that particular week, and that it might have been reasonable to consider extending her qualifying period by one more week. The General Division did not consider the effect of a short work week on the eligibility of that week for consideration within the context of the subsection 8(2) extension, and it did not consider whether that one additional week would give her the additional five hours she would need to meet the 600-hour requirement of subsection 93(1) of the Regulations.

[18] I find that the General Division may have erred in failing to consider the Applicant's evidence of additional days she could not work due to illness, or its effect on the number of weeks by which her qualifying period might be extended. I also find that the General Division may have erred in failing to consider whether the short work week—in which she did not work at all—should be counted in calculating an extended qualifying period.

[19] I therefore find that the General Division may have 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 per subsection 58(1) of the DESD Act.

[20] The Applicant has a reasonable chance of success on appeal.

[21] The Applicant also raised concerns about the manner in which the Act and Regulations are drafted and/or interpreted, and the extent to which the General Division is obligated to assist the Applicant in making her case.

[22] As a result of the decision in *Mette v. Canada (Attorney General)*, 2016 FCA 276, it is not necessary that I consider each of the individual grounds of appeal raised by the Applicant. The Court in *Mette* noted that "[subsection 58(2)] does not require that individual grounds of appeal be dismissed. Indeed, individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave."

CONCLUSION

[23] The Application is granted.

[24] The Applicant is free to argue any or all the grounds of appeal at the hearing of the appeal on the merits of the case.

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

Stephen Bergen
Member, Appeal Division