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

Citation: *A. Z. v. Canada Employment Insurance Commission*, 2018 SST 90

Tribunal File Number: AD-17-342

BETWEEN:

A. Z.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: December 19, 2017

DATE OF DECISION: January 31, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

A. Z., Appellant
W. Z., Representative for the Appellant

INTRODUCTION

[1] On March 20, 2017, the General Division of the Social Security Tribunal of Canada determined that benefits under the Employment Insurance Act (EI Act) were not payable, because the Claimant did not have the minimum number of weeks in his qualifying period. The Claimant filed an application for leave to appeal with the Tribunal's Appeal Division on June 2, 2017, and leave to appeal was granted on October 12, 2017.

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

a) The fact that the credibility of the parties is not a prevailing issue;

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 quickly as circumstances, fairness, and natural justice permit.

ISSUE

[3] Did the General Division fail to observe a principle of natural justice, act beyond or fail to exercise its discretion, or otherwise err in fact or law?

THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act* (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

[5] The Claimant submitted that he required only 630 insurable hours to qualify for Employment Insurance benefits, and not the 665 hours that the Canada Employment Insurance Commission (the Commission) required of him. This is a reference to his original application for benefits and the Commission's denial dated April 13, 2016 (First Decision), at which time he had 642 insurable hours.

[6] The Claimant reiterated his concern that at the time of his first application, agents of the Commission had told him to go out and get another 25–30 hours over the "next while" and then come back and apply. When he came back with additional hours, he claims he was told "everything was okay" but instead, he received a decision dated August 17, 2016, denying his claim (Second Decision). He explained that he could have obtained the few hours he still required to reach the 665-hour total within a short time if he had known that he had little time in which to do so.

[7] The Commission provided written submissions only. In those submissions, the Commission maintained that the Claimant had accumulated only 147 of the 630 hours in the qualifying period preceding the Claimant's second application or reapplication for benefits, which was denied by the Commission in the Second Decision.

[8] The Commission maintains that the reconsideration decision was in respect of the Second Decision only. The reference to an "August 10, 2016" decision in the reconsideration decision was a clerical error and should have been a reference to the August 17, 2016, decision. The Commission indicates that it had had conducted an administrative review of the Second Decision only. The Commission further indicates that it now intends to conduct a review of the First Decision.

ANALYSIS

Standard of Review

[9] The Commission's reference to the reasonableness of the General Division decision suggests that it considers a standard-of-review analysis to be appropriate. However, the Commission does not specifically argue that I should apply the standards of review, or that reasonableness is the appropriate standard.

[10] I recognize that the grounds of appeal set out in subsection 58(1) of the DESD Act are very similar to the usual grounds for judicial review, and this suggests that the standards of review might also apply here. However, there has been some recent case law from the Federal Court of Appeal that has not required that the standards of review be applied, and I do not consider it to be necessary.

[11] In *Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal stated that it was not required to rule on the standard of review to be applied by the Appeal Division, but it indicated in *obiter* that it was not convinced that Appeal Division decisions should be subjected to a standard-of-review analysis. The Court observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference. Furthermore, the Court noted that an administrative appeal tribunal does not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal on judicial review.

[12] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93, the Federal Court of Appeal directly engaged the appropriate standard of review, but it did so in the context of a decision rendered by the Immigration and Refugee Board. In that case, the Court found that the principles that guide the role of courts on judicial review of administrative decisions have no application in a multi-level administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[13] The enabling statute for administrative appeals of Employment Insurance decisions is the DESD Act, and the DESD Act does not provide that a review should be conducted in accordance with the standards of review.

[14] Other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review (such as *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; and *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167). Nonetheless, the Federal Court of Appeal does not appear to be of one mind on the applicability of such an analysis within an administrative appeal process.

[15] I agree with the Court in *Jean*, where it referred to one of the grounds of appeal set out in subsection 58(1) of the DESD Act and noted, "There is no need to add to this wording the case law that has developed on judicial review." I will consider this appeal by referring only to the grounds of appeal set out in the DESD Act, and without reference to "reasonableness" or the standard of review.

Merits of Appeal

[16] In granting leave to appeal, I found that the Claimant had not identified an erroneous finding of fact, or identified any error of law. However, I also found that there was a reasonable chance of success in relation to the General Division's failure to exercise its discretion. This was in connection with my understanding that the reconsideration decision may have been addressed to both the First Decision and the Second Decision. The General Division refused to address any issues arising from the First Decision—the April 13, 2016, decision.

Did the General Division fail to exercise its jurisdiction in not considering the Commission's reconsideration decision as one which addressed the First Decision?

[17] At the Appeal Division hearing, the Claimant had little to add in terms of the General Division's failure to address issues arising from the First Decision. Instead, the Claimant took issue with the General Division's understanding of the number of insurable hours he required to quality at the time of the First Decision.

[18] The Claimant referenced a table at GD4-5, which showed the required number of insurable hours to be 630 hours for an unemployment rate of 7–8%. He appeared to be seeking to challenge the General Division's reliance on a requirement that the Claimant obtain 665 hours. However, the General Division's decision addressed the Second Decision, which had not relied on 665 hours. It accepted that 630 hours was the required number of insurable hours for a

region with an unemployment rate of 7.7 percent (paragraph 22). 7.7 percent was said to be the unemployment rate in the region *for the period from August 7, 2016, to September 10, 2016,* which was the period relevant to the appeal of the Second Decision only.

[19] Because the General Division restricted its review to the Second Decision, it made no attempt to determine the unemployment rate for the period that would have been relevant to the First Decision. Nor did it consider the number of insurable hours that would have been required (based on the unemployment rate at that time) or whether the Claimant had obtained the required number of hours when he first applied. Although the Claimant is arguing that only 630 hours were required, he is arguing this in respect of the First Decision. The unemployment rate may well have been different at the time of the First Decision, and the insurable hours requirement may well have been greater.

[20] I will turn now to the Commission's argument that the General Division properly considered the Second Decision only. The Claimant's request for reconsideration appears to have sought a reconsideration of both decisions. In asking, "Which Employment Insurance decision or decisions would you like to have reconsidered?" the reconsideration request form clearly contemplates that an appellant may request a reconsideration of more than one decision in the same application. In answer to this question, the Claimant referred to "Attachment #1." This was a copy of the First Decision included with the request. However, he also indicated in response to the next two questions that the decision was communicated to him on "2016-08-23" and sent to him on "2016-08-23," which were probably references to the Second Decision.

[21] In fact, the Commission recognizes that the Claimant had submitted copies of both the First and Second decisions with his application. In addition, the Commission concedes that it should have considered two separate appeals under section 112 of the EI Act. It therefore appears that the accepts that the Claimant's request for reconsideration addressed both the First Decision and the Second Decision. I find that the Claimant did apply for reconsideration of both the First and Second Decisions in the same request.

[22] I agree with the Commission's submission that a clerical error that does not cause prejudice is not fatal to a decision. The fact of a clerical error is not the problem in this case; the problem is that the clerical error concerned the date that actually identified the decision under

reconsideration. This clerical error, taken together with the relatively generic content of the reconsideration decision and its “boilerplate” ambiguity as to whether it is addressing a single decision or multiple decisions, means that the decision or decisions actually reconsidered cannot be discerned from the face of the reconsideration decision itself.

[23] The Commission now asserts that the reconsideration decision pertained to the Second Decision only. The Commission’s reconsideration file contains information that relates to both decisions. The commentary, analysis, and even telephone log conversations found in the file are of such a generic nature that they are just as likely to apply to one decision as the other, or to both.

[24] Even if it could be established that the Commission did not actually perform an administrative review of the First Decision, I find that it was obligated to do so, and that the Claimant was entitled to treat the reconsideration decision as responsive to his request for reconsideration, including his request to have the First Decision reconsidered. This is based on the request for reconsideration itself, as well as the nature of the concerns that the Claimant had communicated to the Commission and to the General Division. Some of those concerns related to the manner in which his original application had been processed and the advice he had received in connection with the First Decision.

[25] I find that the reconsideration decision of September 1, 2016, was, in effect, a reconsideration decision of both the First Decision and the Second Decision. I therefore find that the General Division failed to exercise its jurisdiction by focusing exclusively on the Second Decision without considering or determining the issues arising from the First Decision. This is an error under paragraph 58(1)(*a*) of the DESD Act.

[26] I appreciate the Commission’s assurance that it will now issue a reconsideration decision responsive to the request to reconsider the First Decision. However, having found as I have, I am not at liberty to dismiss the appeal on the basis of this assurance.

CONCLUSION

[27] The appeal is allowed. The matter is remitted to the General Division for reconsideration.

Stephen Bergen
Member, Appeal Division