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

Citation: *D. C. v. Canada Employment Insurance Commission*, 2018 SST 192

Tribunal File Number: AD-16-1184

BETWEEN:

D. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: January 9, 2018

DATE OF DECISION: February 27, 2018

Canada

REASONS AND DECISION

PERSONS IN ATTENDANCE

D. C., **Appellant**

Elena Kitova, **Representative for the Respondent, the Canada Employment Insurance Commission**

DECISION

[1] The appeal is dismissed in relation to the General Division's determination that the Appellant (Claimant) left his employment without just cause in June 2015.

[2] The appeal is allowed in connection with the General Division's failure to exercise its jurisdiction to consider whether the disqualification extended to benefits associated with a benefit period that was established for the initial claim and prior to the disqualifying event.

[3] Having considered whether the Claimant should be disqualified from benefits associated with the initial claim benefit period, I will give the decision that the General Division should have given. I find that the disqualification extends by law to include benefits that might otherwise have been payable in the initial claim benefit period.

INTRODUCTION

[4] On September 2, 2016, the General Division of the Social Security Tribunal of Canada determined that the Claimant did not have just cause for leaving his employment in June 2015 and that he was disqualified from benefits under the *Employment Insurance Act* (Act). The General Division also found that the Claimant did not have sufficient hours to qualify when he was subsequently laid off in September 2015. An application for leave to appeal the General Division decision was filed with the Tribunal's Appeal Division on September 27, 2016, and leave to appeal was granted on October 19, 2017.

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

a) The complexity of the issue(s) under appeal;

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

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

ISSUE

Did the General Division err in law or in fact or fail to observe a principle of natural justice in finding that the Claimant did not have just cause for leaving his employment in June 2015 (and was there therefore an error in disqualifying him from receiving benefits using insurable hours from that employment)?

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), 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 Claimant submitted that the General Division decision was contradictory. He states that the General Division accepted that he had a pattern of taking leave to visit family in Romania and that this was the reason for his separation from employment. He also notes that the General Division agreed that he had a right to visit his family. According to the Claimant, these findings are inconsistent with the conclusion that he did not have just cause for leaving his employment.

[8] The Claimant also argued that the General Division failed to consider whether he was entitled to any benefits from a prior benefit period that had been established effective February 1, 2015. He asserted that this prior "claim" was still "open" throughout the period from February 10, 2015, to June 27, 2015, when he was employed.

[9] The Respondent (Commission) submitted that the General Division made no error. It submitted that the Claimant voluntarily left his employment to visit his family and this is not "just cause." Because he was disqualified for having voluntarily left his employment without just cause on June 27, 2015, the Commission could not take into account any of the Claimant's hours of insurable employment prior to the disqualification. The Claimant did not have sufficient hours of insurable employment after the disqualification.

[10] The Commission submits that its initial determination on October 23, 2015, as well as the December 7, 2015, reconsideration decision both contemplated that the disqualification was applicable to any benefits that might still have been available from his earlier application for benefits and within the previously established benefit period. It argues that the General Division took into account the Claimant's entitlement to benefits from the benefit period established as at February 1, 2015.

ANALYSIS

Standard of Review

[11] The Commission's reference to the reasonableness of the General Division decision and its comment respecting the application of standards of review 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.

[12] I recognize that the grounds of appeal set out in subsection 58(1) of the DESDA 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.

[13] 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.

[14] 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.

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

[16] 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.

[17] 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 DESDA 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 DESDA, and without reference to “reasonableness” or the standard of review.

Merits of the Appeal

Did the General Division err in law or in fact or fail to observe a principle of natural justice in finding that the Claimant did not have just cause for leaving his employment in June 2015 (and was there an error therefore in disqualifying him from receiving benefits using insurable hours from that employment)?

[18] The General Division did not err in concluding that the Claimant did not have just cause for leaving his employment in June 2015.

[19] The Claimant applied to the Commission for benefits after a layoff from a very short period of employment in September 2015. In adjudicating his entitlement to benefits as at September 2015, the Commission reviewed the insurable hours in the qualifying period leading up to his layoff. The Claimant did not work between June 27, 2015, when he left his prior job to visit his family in Europe, and his September 2015 employment. However, the qualifying period would have extended to include a portion of the time prior to June 27, 2015, when he was working for the previous employer.

[20] The Claimant might have had a sufficient number of hours to qualify for benefits in September if the Commission had accepted all of the insurable hours that the Claimant had worked within his qualifying period, including those hours with the previous employer. However, the Commission refused to consider the hours from that employment because it found that he had left that earlier employment without just cause. The Commission accepted only those insurable hours that the Claimant had accumulated in his brief employment in September 2015.

[21] The Claimant's first concern with the General Division's conclusion was that the conclusion was inconsistent with its statement that the Claimant's evidence was "accepted" and with its acknowledgement of his "right" to visit his family in Europe. While it is true that the General Division accepted the Claimant's evidence that he voluntarily left his employment to visit his family in Europe (paragraph 28), this means only that the General Division believed the Claimant when he said that this was his reason for leaving. It does not mean that the General Division accepted that the Claimant met the requirements of the Act for the payment of benefits.

[22] The General Division did not find that the Claimant had a "right" to visit his family. Rather, the General Division acknowledged that it was the Claimant's position or argument that

he had a right to visit his family (paragraph 35). It is not the purpose of the Employment Insurance Act to *prevent* anyone from leaving their job or from leaving the country, for whatever reason. The Claimant is entitled to visit his family, but he is not necessarily entitled to visit his family without the visit affecting his Employment Insurance benefit entitlement.

[23] Section 30 of the Act stipulates that a claimant who voluntarily leaves their employment must establish that they had "just cause" for doing so. The legal test for just cause is whether the claimant had no reasonable alternative to leaving, having regard to all the circumstances.

[24] The Claimant has not argued that the General Division made a legal error or that it ignored or misunderstood his circumstances or the reasons he left his employment, and I accept that the General Division properly considered those circumstances before determining that the Claimant had reasonable alternatives to leaving his employment in June 2015, including altering (or postponing) his travel arrangements until he was actually laid off. The finding that the Claimant had reasonable alternatives is not inconsistent with the evidence or the General Division's other findings of fact.

[25] In finding that the Claimant did not have just cause for leaving his employment on June 27, 2015, the General Division neither failed to observe a principle of natural justice nor erred in law, and I do not find that its conclusion was based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

Did the General Division fail to exercise its jurisdiction in failing to consider that the Claimant may be entitled to benefits still available under the earlier established benefit period?

[26] The General Division failed to exercise its jurisdiction by not considering that the Claimant may be entitled to benefits still available under the earlier established benefit period.

[27] The Claimant argued that the General Division had failed to consider that he had not exhausted the benefits to which he was entitled under his initial claim, whose benefit period was established effective February 1, 2015. The earlier claim was based on insurable hours that were accumulated before he found employment on February 5, 2015.

[28] As I understand the Claimant, he argues that he should still have been entitled to the benefits that had not been paid in connection with the earlier benefit period, regardless of whether he was disqualified for voluntarily leaving his employment on June 27, 2015. He submits that the General Division failed to take this into consideration.

[29] According to the Commission, "the disqualification (determined in the October 23, 2015, decision) prevented any further payment of EI benefits on the claim that was reactivated effective September 27, 2015" (AD2-4). As noted by the Commission, "[i]t is this indefinite disqualification which prevented any further payment of EI benefits on the claim that was reopened effective September 27, 2015" (AD2-3, paragraph 7). However, the Commission also argues that the Claimant is raising the issue of benefits owed on his "last claim" (meaning the initial claim) for the first time and that it was not before the General Division. These two arguments are contradictory: If the disqualification must extend to include benefits from the initial claim, then it was before the General Division, regardless of how the Claimant framed his arguments.

[30] I am satisfied that the Claimant's entitlement to benefits in respect of the prior benefit period was before the General Division by virtue of the reference, in the Commission's October 23, 2017, decision, to the Claimant's application to "reactivate" his claim. The General Division faithfully recorded this in the first paragraph of the decision under "Information from the Docket." The claim that was "reopened" was the claim for which the benefit period was established effective February 1, 2015, which was also the "open claim."

[31] In support of its argument that the General Division actually considered that the disqualification extended to include any benefits that might otherwise have been payable in respect of the benefit period established in February 2015, the Commission pointed to the General Division's citation, at paragraphs 5 and 6 of its decision, of subsection 30(1) and subsection 30(5) of the Act, which it submits is the law relevant to a disqualification decision.

[32] I do not find this persuasive. There is nothing in the analysis that applies either section 30 (or *Trochimchuk* [1] as cited by the General Division at paragaraph 38) to that initial claim. Nor does the recital of that law necessarily imply that the Member turned her mind to the

[1] *Canada (Attorney General) v. Trochimchuk*, 2011 FCA 268

Claimant's remaining entitlement to benefits under the prior benefit period. The General Division might justifiably have cited section 30 and *Trochimchuk*, even if no benefit period had been established in connection with other employment, previous to the job that he voluntarily left on June 27, 2015.

[33] The General Division does not otherwise acknowledge that there had ever been any prior benefit period, or that there might still have been benefits available as a result of a prior claim. The reasons are also silent as to the Claimant's disqualification from such benefits.

[34] I accept that the General Division considered all the evidence, and that it applied the correct legal test in determining that the Claimant had left his employment without just cause. However, I find that the General Division did not consider whether the Claimant might still be entitled to benefits under the prior benefit period and that it thereby failed to exercise its jurisdiction, an error under paragraph 58(1)(*a*) of the DESDA, and that it further failed to cite or apply subsections 30(2) and 30(3) of the Act, which would be relevant to the determination of a disqualification that occurs during an established benefit period.

Effect of Error

[35] While I have found that the General Division made a jurisdictional error, this error has no impact on the disqualification. Had the General Division expressly considered the Claimant's entitlement to benefits in relation to the previously established benefit period, it would still have been required to find that the Claimant was disqualified from any benefits. The disqualification does not just apply to the benefits that would have been payable in relation to insurable hours accumulated in the employment that the Claimant "voluntarily left without just cause." Section 30 of the Act states that a claimant is disqualified from receiving *any* benefits if the claimant lost *any* employment because the claimant voluntarily left an employment without just cause. Subsection 30(2) states that disqualification is for each week of the benefit period following the waiting period, and subsection 30(3) states that a disqualifying event that occurs during a benefit period (in this case, during the benefit period established in February 2015), would *not* include any week in the benefit period *before the week of the disqualifying event*. However, the disqualification would still apply to the week of June 27, 2015, and the remaining weeks of the benefit period established in February 2015.

[36] The necessary result of that determination is that the Claimant is disqualified in accordance with subsection 30(1). The disqualification stipulated in section 30 is a disqualification from all benefits that would otherwise have been payable under the benefit period established in February 2015, commencing with benefits payable in the week of June 27, 2015, through to the end of the benefit period.

CONCLUSION

[37] I confirm that the Claimant voluntarily left his employment on June 27, 2015, without just cause. The appeal is dismissed in relation to this issue.

[38] The appeal is allowed in that the General Division failed to exercise its jurisdiction by failing to consider whether the disqualification extended to benefits associated with a benefit period that was established prior to the disqualifying event.

[39] I am authorized by subsection 59(1) of the DESDA to give the decision that the General Division should have given. Accordingly, I find that the Claimant is disqualified from receiving any additional benefits in connection with the initial claim and the benefit period established February 1, 2015, from the week of June 27, 2015, to the end of the benefit period.

Stephen Bergen
Member, Appeal Division