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

Citation: *P. M. v. Canada Employment Insurance Commission*, 2018 SST 185

Tribunal File Number: AD-15-1638

BETWEEN:

P. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

HEARD ON: October 12, 2017

DATE OF DECISION: February 27, 2018

Canada

DECISION AND REASONS

PERSONS IN ATTENDANCE

J. M., Representative for the Appellant
S. Prud'homme, Representative for the Respondent, the Canada Employment Insurance Commission

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant was dismissed by his employer on March 19, 2014, for not reporting to work and not informing the employer that he would not be in. When he applied for Employment Insurance benefits, the Canada Employment Insurance Commission (Commission) denied his claim. The Commission determined that he had lost his job due to his own misconduct and that he was therefore disqualified from receiving benefits. He asked the Commission to reconsider but the Commission upheld its initial decision on November 27, 2014.

[3] The Appellant appealed to the General Division of the Social Security Tribunal of Canada and a hearing was held on July 7, 2015. In the course of that hearing, the Appellant requested additional time to obtain and submit medical evidence relating to his alcoholism. Alcoholism was said to be the reason he missed work and was dismissed. The General Division agreed to this request, and the Appellant submitted a letter from his doctor dated August 20, 2015. This letter confirmed the diagnosis of alcoholism and its severity, briefly discussed the Appellant's treatment history, and opined that his condition had contributed to his absences and lateness and that he was unable to work as a result of his condition.

[4] The General Division found that the medical evidence, including the August 20, 2015, letter did not "speak to the 'involuntariness' of the Claimant's conduct." It found that the Appellant's consumption of alcohol was voluntary, that he understood the possible consequences of drinking including its effect on his ability to perform his job duties, and that he knew or ought to have known that dismissal was a real possibility. Like the Commission, the General Division concluded that the Appellant had lost his employment as a result of his

misconduct and that he was therefore disqualified from receiving regular Employment Insurance benefits pursuant to sections 29 and 30 of the *Employment Insurance Act* (Act).

[5] After the General Division dismissed the appeal, the Appellant filed a leave to appeal application with the Appeal Division on December 21, 2015. In that leave application, the Appellant claimed that the General Division made its decision without the complete medical evidence. More than a year after filing the application for leave to appeal, an additional medical report dated March 2, 2017, was submitted to the Appeal Division. In granting leave to appeal on April 26, 2017, the Appeal Division Member stated that he would refer the matter back to the General Division if it were determined on appeal that new medical evidence should be accepted.

[6] The issue now before the Appeal Division is whether the General Division erred in accordance with the grounds of appeal described in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act). The medical evidence submitted to the Appeal Division may have been relevant to the General Division's decision on the issue of misconduct, but it is not relevant to whether the General Division made an error *on the basis of the evidence that was before it.* Therefore, I cannot accept this evidence for the purpose of determining whether the General Division erred. I also find that the General Division provided a reasonable amount of time for the Appellant to submit his additional evidence and that it was entitled to rely on the August 20, 2015, letter as the Appellant's final submission. There was no breach of natural justice and no other error apparent.

ISSUE

[7] Did the General Division fail to observe a principle of natural justice when it rendered its decision following the filing of the August 20, 2015, letter?

THE LAW

[8] The General Division is required to consider and weigh the evidence that was before it and to make findings of fact. It is also required to consider the law. The law would include the statutory provisions of the Act and the *Employment Insurance Regulations* that are relevant to the issues under consideration, and could also include court decisions that have interpreted the

statutory provisions. Finally, the General Division must apply the law to the facts to reach its conclusions on the issues that it must decide.

[9] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a General Division decision only if the General Division has made certain types of errors, which are called "grounds of appeal."

[10] Subsection 58(1) of the DESD Act states that 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; and
>
> 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.

[11] Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division would otherwise disagree with the General Division's conclusion and the result.

SUBMISSIONS

[12] As in the General Division hearing, the Appellant did not appear for the Appeal Division hearings. The Appellant was represented by his father (Representative) who made all of the submissions on behalf of the Appellant.

[13] The Representative suggests that the result would have been different if the General Division had had the March 2, 2017, medical opinion of the Appellant's doctor (Dr. Y), which he believes is critical to the issue of involuntariness. He did not suggest that the General Division's findings of fact were perverse or capricious or that they were made without regard to the material before the General Division. Nor did he identify any error of law.

[14] The Representative advised the General Division that it was difficult to obtain medical evidence initially because the Appellant was in a rehabilitation program prior to and at the time of the General Division hearing, and therefore not available to consent to the release of personal medical information. At the General Division hearing, the Member had agreed to allow additional time for the Representative to submit new medical evidence. She had also indicated that she would not make her decision until she received the new evidence.

[15] In his oral submissions to the Appeal Division, the Representative said that the Tribunal had called twice to get the evidence and that he "even asked for additional time." He continued on to say, "they were calling all the time." According to the Representative, he "probably stated" over the phone that he did not have enough time but that he would send in something. In his written submissions (AD1B-1), the Representative also stated that he had received numerous telephone calls from the Appeal Division (not the General Division). The Representative continued, stating that "numerous calls were placed" to the doctor (in his oral submission, he clarifies that it was him that was calling the doctor) and that the doctor may have felt pressure to complete the letter for the General Division. Concerning the production of the new evidence, the Representative testified that he "felt under the gun," that he was "at the mercy of the medical system" and that he had "no time to supply full information."

[16] The Representative also told the Appeal Division that the Appellant's doctor had needed more time to provide an opinion that would address the involuntariness of the Appellant's conduct. He stated that he had understood that the opinion would need to address "involuntariness" and that he had communicated this to Dr. Y. However, Dr. Y had indicated to the Representative that he did not want to establish a precedent and that he needed to first obtain legal advice. The Representative expressed his belief that the doctor was rushed in preparing the August 20, 2015, letter, echoing his concerns from his leave to appeal application.

[17] The Commission initially argued that the appropriate test for admission of additional evidence to the Appeal Division is whether the claimant acting diligently could have produced this evidence before the General Division hearing and it submitted that the answer is "yes." The Respondent argued that the new evidence (AD2-2) could have been obtained at the time the other medical notes were obtained in the period from October 2014 to August 2015.

[18] The Commission further argued that there is a difference between new facts and new evidence supporting facts already known, and that a different or more detailed version of the facts already known to the claimant, or the sudden realization of the consequences of certain facts are not new facts per *Canada (Attorney General) v. Chan*, [1994] F.C.J. No 1916.

[19] According to the Commission, the Appellant's additional evidence was obtained after the General Division's decision and after he realized that the previously submitted evidence was insufficient, and that it would be unfair to give the Respondent a "second kick at the can."

[20] In response to the questions I posed to the parties on November 27, 2017, the Commission emphasized that the Appeal Division is limited to the grounds in subsection 58(1) of the DESD Act and that new medical evidence cannot support a finding that the General Division made an error as it was not before the General Division Member.

ANALYSIS

Standard of review

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

[22] 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.

[23] 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.

[24] 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 guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework, and that the standards of review should be applied only if the enabling statute provides for it.

[25] 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.

[26] 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.

[27] 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 to the grounds of appeal set out in the DESD Act only, and without reference to "reasonableness" or the standard of review.

Preliminary Issue: Can I consider the March 2, 2017, doctor's letter?

[28] I am unable to consider the March 2, 2017, letter. I accept that the March 2, 2017, letter is new evidence in that it is a medical opinion that had not existed previously. It is also the first medical opinion to address the aspect of the involuntariness of the Appellant's conduct so it is clearly significant. It may have made a difference to the General Division decision if it had been before the General Division.

[29] However, this new evidence does not assist the Appellant to establish that the General Division made an error on the basis of the evidence that the General Division had before it. Section 58 sets out the only grounds of appeal and I am unable to allow the appeal on the basis of this new evidence, as it is not relevant to whether the General Division made an error.

[30] I appreciate that the Appeal Division's leave to appeal decision appears to suggest that medical evidence such as the Appellant obtained could support a successful appeal, but I disagree. The Federal Court considered the circumstances in which new evidence could be admitted at the Appeal Division[1] and stated that new evidence should not be permitted at the Appeal Division because it would be like holding a new trial—which is not the function of the Appeal Division. The Court allowed for exceptions such as allegations of a breach of procedural fairness or of a reasonable apprehension of bias, but the new medical evidence is not relevant to these exceptions.

Merits of the appeal

Issue 1: Did the General Division fail to observe a principle of natural justice when it rendered its decision following the filing of the August 20, 2015, letter?

[31] The General Division did not fail to observe a principle of natural justice in rendering its decision after the August 20, 2015, letter had been filed. The Representative appears to be arguing that the General Division restricted his natural justice right to be heard: He claims that the Appellant was denied the opportunity to submit a relevant medical opinion by virtue of the fact that the Representative, or Dr. Y, had felt pressured by the Tribunal to produce the earlier opinion of August 20, 2015, which is said to be incomplete.

[32] I have reviewed the audio recording of the July 7, 2015, videoconference hearing. The General Division Member indicated that "[she] didn't want to delay getting him a decision" and it is clear from this and other comments that her interest in expediency was for the benefit of the Appellant. With regard to the Member's willingness to accept late evidence, she did not initially impose a specific deadline for additional evidence. Although, the Representative had asked for a month to provide the evidence and also suggested that he could obtain it by the first

[1] *Paradis v. Canada (Attorney General*), 2016 FC 1282.

week of August, the Member stated that her commitments were such that she would want to complete the decision by mid-August. At the same time, the Member did allow that the Representative could take the time he needed, and that she would not make a decision on the appeal until she received the evidence.

[33] However, the General Division decision states that the Member asked the Appellant to submit his evidence by July 30, 2015, and that the Representative informed the Tribunal that he was still waiting for the doctor to respond. The decision indicates that the deadline was extended to the end of September 2015.

[34] I reviewed the General Division file in order to determine what occurred between the hearing and the decision. The following information touches on the Tribunal's efforts to ready the matter for decision:

> A telephone log of August 5, 2015, in which the Representative related that the medical evidence was not yet prepared and indicated that he would follow up with an email explaining further. It is not clear whether this call was initiated by the General Division or by the Representative.
>
> An email of August 5, 2015, in which the Representative requested additional time to produce information and thanked the Tribunal in advance for its patience.
>
> A telephone log of August 6, 2015, in which it is said that there was a conversation that referenced a "new deadline for submission" and indicated that the decision will be rendered at the end of September. Again, it is not clear whether this call was initiated by the General Division or by the Representative.
>
> A call from the Representative on August 10, 2015, asking when he could expect the decision.

[35] Other than the calls noted above, the General Division has no other record of calls made to the Appellant to remind him to provide his evidence (although there were other communications in respect of the Appellant's attempts to get the new evidence before the Appeal Division.) However, I accept that the reference to an otherwise unspecified "new

deadline" prior to the end of September in the August 6, 2015, call, relates to the September extension recorded in the General Division decision. The decision records that the Representative indicated his difficulty obtaining the evidence on August 5, 2015, and then continues on to record that the Member granted an extension to the end of September (at paragraph 6 of the decision). This is consistent with the telephone log records.

[36] Although the telephone log documentation is perfunctory in nature, I am satisfied that the Tribunal and the Appellant were in contact in relation to the additional evidence that he wished to submit and that the Representative communicated his need for additional time in order to obtain fulsome medical support. I also accept that on or before September 6, 2015, Tribunal staff confirmed to the Representative a new deadline for receipt of the additional evidence that was at or around the end of September 2015, and that the Representative understood that he was required to submit such evidence by that deadline. It appears from the General Division decision that this new deadline was imposed at the direction of the General Division Member.

[37] I am not satisfied that the Representative clearly communicated his difficulty obtaining the medical evidence or informed the General Division of how much more time he expected he would need. I note that at least some of the Representative's submissions that relate to the Tribunal's exhortations that he submit his additional evidence are actually concerned with later efforts by the Appeal Division to have him file his evidence to the Appeal Division. This would not be relevant to the fairness of the process at the General Division. Furthermore, while the Representative believes he "probably" told the Tribunal that he did not have enough time when he was asked or reminded to send in his new evidence, the Representative did not actually recall saying this.

[38] When he submitted the doctor's letter of August 20, 2015, it was without qualification as to its adequacy or protest as to the time constraints imposed. The Representative now argues that the medical report was inadequate because the doctor may have felt rushed, but he did not raise this concern until after the unfavourable General Division decision had been issued.

[39] I cannot fault the General Division for permitting the Appellant an additional 12 weeks (approximately) to provide additional evidence. There is no evidence of a specific request for a

longer extension and no reason for the General Division to believe that the evidence submitted by the Appellant was not the evidence for which the extension was sought.

[40] I find no breach of natural justice in the General Division's proceeding on the basis of the evidence before it including the August 20, 2015, doctor's letter. I am also unable to find any other error of natural justice, error of law, or finding of fact that was made perversely or capriciously or without regard to the material before the General Division.

[41] There is no error in the General Division decision on the basis of the grounds described in subsection 58(1) of the DESD Act.

CONCLUSION

[42] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division