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

Citation: *I. J. v. Canada Employment Insurance Commission*, 2018 SST 267

Tribunal File Number: AD-17-23

BETWEEN:

I. J.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: March 26, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed in part.

OVERVIEW

[2] The Appellant (Claimant) applied for regular Employment Insurance benefits on November 13, 2014, and was paid regular and sick benefits for the period between December 14, 2014, and October 31, 2015. On learning that the Claimant was outside Canada from December 4, 2014, until April 30, 2015, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was ineligible for benefits during her absence. The Commission also determined that the Claimant could not prove her availability for work and that she knowingly made a series of misrepresentations. As a result, the Commission assessed a penalty of $5,000.00 and issued a “very serious” notice of violation. In response to the Claimant’s application for a reconsideration, the Commission reduced the penalty to $2000.00 and reversed its notice of violation. The Commission maintained its decision that the Claimant was outside Canada and unavailable for work.

[3] The Claimant then appealed to the General Division of the Social Security Tribunal. In a decision dated December 1, 2016, the General Division agreed with the Commission that the Claimant should be disentitled from benefits during the period that she was absent from Canada. The General Division further found that the Claimant should be disentitled for the same period because she had failed to prove her availability for work. The General Division confirmed that the Claimant knowingly made false statements when she repeatedly reported that she was not outside Canada during the period in which she was outside Canada. It also found that the Commission had exercised its discretion judiciously when determining the penalty.

[4] Leave to appeal to the Appeal Division was granted on September 21, 2017, and the appeal was heard on February 6, 2018. The appeal is denied in relation to the disentitlement during the time the Claimant was outside Canada. The appeal is allowed on the issues of availability for work, misrepresentation and the appropriate penalty.

ISSUES

[5] Did the General Division err in law or base its decision on an erroneous finding of fact when it found that the Claimant was outside Canada from December 4, 2014, until April 30, 2015, and therefore disentitled to benefits under s. 37 of the *Employment Insurance Act* (Act)?

[6] Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant had failed to prove her availability for work during the period in which she was outside Canada, under s. 18(1) of the Act?

[7] Did the General Division err in law in determining that the Claimant knowingly made false statements?

[8] Did the General Division err in fact or law in concluding that the Commission exercised its discretion judiciously when determining the appropriate penalty for misrepresentation?

ANALYSIS

Standard of review

[9] The Commission's written submissions suggest 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 *Department of Employment and Social Development Act* (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 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.

[12] 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.

[13] In the relatively 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.

[14] 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.

[15] 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.

[16] 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 therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only, without reference to “reasonableness” or the standard of review.

General principles

[17] 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 apply the law. The law would include the statutory provisions of the Act and the *Employment Insurance Regulations* (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 reach conclusions on the issues that it must decide, by applying the law to the facts.

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

[19] Subsection 58(1) of the DESD Act sets out 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.

Issue 1: Did the General Division err in law or base its decision on an erroneous finding of fact when it found that the Claimant was outside Canada from December 4, 2014, until April 30, 2015?

[20] The General Division did not err in law or base its decision on an erroneous finding of fact when it determined that the Claimant was outside of Canada from December 4, 2014, until April 30, 2015, and therefore disentitled to benefits.

[21] The language of s. 37(*b*) of the Act is clear: "Except as may otherwise be prescribed, a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada." Specific exceptions are prescribed in s. 55 of the Regulations, but the Claimant has not argued that any of the exceptions are applicable, and there was no evidence before the General Division that would support a finding that her circumstances fall within any of those exceptions.

[22] The Commission supports the General Division in its decision that the Claimant was disentitled to benefits from December 4, 2014, until April 30, 2015, arguing that the Tribunal did not misunderstand or misinterpret the evidence and that it correctly applied the law. The Claimant has not disputed that she was outside Canada from December 4, 2014, until April 30,

2015, and she did not argue that the General Division erred in so finding or that it misapplied s. 37 of the Act.

[23] Therefore, the General Division did not err in finding the Claimant was outside Canada and therefore disentitled to benefits. The General Division decision on the disentitlement for being outside Canada is upheld.

Issue 2: Did the General Division base its decision on an erroneous finding of fact when it found that the Claimant had failed to prove her availability for work during the period in which she was outside Canada?

[24] I find that the General Division based its decision that the Claimant had not proven her availability for work on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[25] Paragraph 18(1)(*a*) of the Act states that a claimant is not entitled to be paid benefits for a working day in a benefit period for which the claimant fails to prove that on that day the Claimant was capable of and available for work and unable to obtain suitable employment. The General Division based its decision on availability, namely; on its subordinate conclusion that the Claimant had not demonstrated a desire to return to the job market during the period in question. This conclusion, in turn, relied on the General Division's finding (at paragraph 23[a] of the decision) that the Applicant did not attend scheduled interviews in Canada with the Ministry of Environment on February 22, 2016, and with the City of X on January 22, 2016, because she remained in Bangladesh, and on its finding that "there is no evidence that she attempted to attend [the February 22, 2016,] interview (paragraph 23[b]). These findings were made without regard to the material before the General Division. The General Division ignored the Claimant's submissions, email correspondence, and testimony that she had returned to Canada and did attend both interviews.

[26] Not only did the General Division ignore evidence when finding that the Claimant had not attended the interviews in early 2016, but the Claimant's non-attendance (or attendance) was not relevant to the determination of whether she was eligible for benefits during what the General Division describes in paragraph 23(b) as the "period in question". As noted in the Commission's representations (AD2-4), the period in question is the period from December 4, 2014, to April 30, 2015. The interviews were not scheduled until early 2016. Therefore, the General Division's conclusion could be said to be perverse in that it relied in part on irrelevant considerations.

[27] The General Division's finding that the Claimant did not desire to return to the labour market as soon as a suitable job was offered was based on a misapprehension of the evidence and the consideration of irrelevant evidence. Therefore, I find that the General Division erred under s. 58(1)(*c*) of the DESD Act.

Issue 3: Did the General Division err in law in determining that the Claimant knowingly made false statements?

[28] The General Division erred in law in determining that the Claimant knowingly made false statements. The Commission concedes that the General Division erred in law because the General Division failed to justify its conclusion that the appeal has no merit.

[29] I find that the General Division erred in law on a different basis. The General Division misapplied the legal test in determining that the Claimant knowingly made false statements. The Commission has the initial onus of establishing that her false statements were not made knowingly before the burden shifts to the Claimant to provide an explanation.[1] In this case, the General Division placed the onus on the Claimant to provide evidence of "mitigating factors" that would allow it to find that she did not knowingly make a false statement.

[30] The jurisprudence makes reference to "mitigating factors" but only in relation to whether the penalty has been properly determined under s. 38(2) of the Act and after the Claimant has been found to have knowingly made a false statement under s. 38(1)(*d*) of the Act. According to *Mootoo*,[2] the determination of whether a claimant knowingly made a false and misleading statement under s. 38(1) relates to the subjective state of mind, although it may "take into account common sense and objective factors"[3.] "Mitigating factors" and "common sense and objective factors" are not necessarily the same thing. There is no authority for the proposition that the Claimant must establish mitigating factors in order to show that she did not have subjective knowledge that her statements were false.

[31] Furthermore, from the General Division's comments at paragraph 31, it appears that the General Division understood the "knowledge" component of s. 38(1) of the Act to incorporate knowledge that her actions were fraudulent. Fraud suggests a willful deception for some personal gain or advantage. This is not a requisite element of knowingly making a false statement under

[1] *Purcell*, A-694-94.
[2] *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206.
[3] *Ibid.*

s. 38(1).[4] According to *Purcell*,[5] the Applicant must make the false or misleading statement with the knowledge that it is false or misleading. That is all.

[32] For these reasons, I find that the General Division erred in law under s. 58(1)(*b*) of the DESD Act in its interpretation of what constitutes "knowingly" making a false statement.

Issue 4: Did the General Division err in fact or law in concluding that the Commission exercised its discretion judiciously in determining the appropriate penalty for misrepresentation?

[33] The General Division erred in determining that the Commission exercised its discretion judiciously in determining the appropriate penalty for misrepresentation. The General Division found that the Commission rendered its decision in a judicial manner in accordance with section 7 of the Act. As noted by the Commission, the General Division's reliance on s. 7 is an error of law.

[34] Section 7 is a provision which relates to qualification for benefits, and it has nothing to say in regard to whether the Commission has exercised its discretion judiciously in determining the penalty for any false statement made by the Claimant**.** The General Division erred in law when determining whether the Commission exercised its discretion judiciously with regard to s. 7 of the Act.

[35] The General Division's reasons do not disclose any other justification for finding the Commission's exercise of discretion to have been judicious. The General Division referred to the "mitigating and aggravating circumstances" at paragraph 29, but it did not refer to the circumstances the Commission took into account (found at GD3-44) or specify whether the circumstances that the Commission had considered were individually appropriate or comprehensive of the relevant circumstances in this case. The General Division's earlier finding that the Claimant knew her claim was fraudulent was not based on facts in evidence, yet the Claimant's intention to defraud, if it existed, would seem to be relevant to the exercise of discretion concerning the appropriate penalty. There is no indication in the file that the Commission accepted that the Claimant meant to commit fraud. The General Division may have misdirected itself in relation to the Claimant's intention, and this may have been a factor in upholding the Commission's exercise of discretion, but this cannot be

[4] *Canada (Procureur général) c. Bellil* 2017 CAF 104.
[5] *Canada (Attorney General) v. Purcell*, [1996] 1 FCR 644 (FCA).

determined from the reasons. As in *Carle*,[6] the reasons are so terse as to be inadequate. As a result, the Claimant could well be prejudiced in her ability to appeal this aspect of the decision.

[36] I find that the General Division erred in law in basing its decision on the application of s. 7 of the Act and in failing to justify its decision that the General Division exercised its discretion judiciously.

CONCLUSION

[37] The appeal is allowed in part. In accordance with my authority under s. 59 of the DESD Act, I refer the matter back to the General Division to reconsider the Claimant's availability for work under s. 18(1)(*a*) of the Act.

[38] I note that the Claimant's availability for work concerns the exact period in which she was outside Canada, and therefore this finding does not affect the period in which she was disentitled to benefits. I also note that the Commission does not appear to have held her availability for work against her in imposing sanctions (GD3-15). However, a determination on the Claimant's availability for work may still be relevant to the question of whether the Commission exercised its discretion judiciously.

[39] I also refer the matter back to the General Division to reconsider whether the Claimant knowingly made false statements under s. 38(1)(*a*) of the Act and whether the Commission exercised its discretion judiciously and, if not, to determine the appropriate level of penalty under s. 38 of the Act.

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[6] *Canada (Attorney General) v. Carle*, 2003 FCA 489.

[40] The Appeal is dismissed in relation to the disentitlement based on the Claimant's absence from Canada under s. 37(*b*) of the Act.

Stephen Bergen
Member, Appeal Division

HEARD ON:	February 6, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	I. J., Appellant Susan Prud'homme, Representative for the Respondent