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

Citation: *J. C. v. Canada Employment Insurance Commission*, 2018 SST 395

Tribunal File Number: AD-17-242

BETWEEN:

J. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shirley Netten

DATE OF DECISION: April 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed, and the antedate issue is returned to the General Division for reconsideration.

OVERVIEW

[2] The Appellant, J. C., quit his job effective July 31, 2015, and on August 15, 2015 he left Canada for Africa, where his brother was ailing. His absence was prolonged, as he became ill himself, and his brother died on March 30, 2016. The Appellant returned to Canada on or around April 17, 2016, and applied for Employment Insurance (EI) benefits on April 20, 2016. The Respondent Commission determined that the Appellant did not have sufficient hours of insurable employment in the previous 52 weeks to qualify for benefits, a matter that the Appellant does not dispute. The Commission further determined that the Appellant's claim could not be antedated (regarded as having been made on an earlier day).

[3] The General Division of the Social Security Tribunal dismissed the Appellant's appeal of the Commission's decision. Leave to appeal to the Appeal Division was granted in April 2017. I am allowing the Appellant's appeal on the basis that the General Division erred in its interpretation of s. 10(4) of the *Employment Insurance Act* (Act) and failed to consider whether the Appellant's claim could be antedated to an earlier day other than upon interruption of earnings.

PARTICIPATION IN THIS APPEAL

[4] The Commission failed to appear at the initial hearing of this appeal, and the Appellant failed to appear at the reconvened hearing of this appeal. Having satisfied myself in both cases that the parties had received notice, the hearings proceeded in the Commission's absence (December 6, 2017) and the Appellant's absence (March 19, 2018), in accordance with s. 12(1) of the *Social Security Tribunal Regulations*.

ISSUES

[5] Did the General Division base its decision on an erroneous finding of fact with respect to the number of hours required to qualify for benefits?

[6] Did the General Division err in law in making its decision, specifically with respect to the interpretation of s. 10(4) of the Act?

[7] If the General Division erred, what is the appropriate remedy?

ANALYSIS

Number of hours to qualify for benefits

[8] Leave to appeal was granted because of a possible error of fact with respect to the number of hours required for the Appellant to qualify for benefits in April 2016. One of the statutory grounds of appeal, found in s. 58(1)(*c*) of the *Department of Employment and Social Development Act* (DESDA), is that "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."

[9] The Commission presented evidence to the General Division, in the form of an "Unemployment Rate & Benefit Table for the EI Economic Region of Southern Alberta" (at GD4-2), which establishes an unemployment rate of 8.1% for the relevant period. As set out in the table found in s. 7(2)(*b*) of the Act, this unemployment rate corresponds to a requirement for 595 hours of insurable employment during the qualifying period. The General Division accepted that 595 hours of insurable employment were required. I agree with the Commission that the General Division did not base its decision on an erroneous finding of fact with respect to the insurable hours required to qualify for benefits.

Interpretation of s. 10(4) of the Act

[10] Another ground of appeal, found in s. 58(1)(*b*) of the DESDA, is that "the General Division erred in law in making its decision, whether or not the error appears on the face of the

record." Based on the unqualified wording of s. 58(1)(*b*), and consistent with the Commission's submissions, no deference is owed to the General Division on errors of law.

[11] The facts in this case are straightforward. The Appellant did not apply for EI benefits upon leaving his employment on July 31, 2015 because he was about to leave the country. He understood that he could not receive benefits while in Africa, and he intended to apply upon his return to Canada. However, the Appellant was in Africa longer than anticipated. He suffered an illness while there, his brother died on March 30, 2016, he returned home a little over two weeks later, and he applied for EI benefits three days after that, on April 20, 2016.

[12] It is important to recognize that there was no statutory obligation upon the Appellant to apply for EI benefits in August 2015, since he was not claiming benefits at that time. Indeed, it appears that the Appellant had sufficient insurable hours to qualify for EI benefits if he had applied at any point in time up to April 16, 2016[1] (with different numbers of weeks of benefits, depending on the initial claim date and the unemployment rate). However, by the time he applied on April 20, 2016, he no longer qualified for benefits, because he had less than 595 hours of insurable employment in the preceding 52 weeks.

[13] Antedating is a mechanism by which the initial claim date may be backdated. Antedate is governed by s. 10(4) of the Act:

> An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made **on an earlier day** if the claimant shows that the claimant qualified to receive benefits **on the earlier day** and that there was good cause for the delay **throughout the period beginning on the earlier day and ending on the day when the initial claim was made**. [Emphasis added]

[14] The Commission upheld its initial decision not to pay EI benefits after considering the possibility of antedating the claim, without elaboration: the reconsideration decision of July 11, 2016 states only "Issue: Antedate; We regret to inform you that we have not changed our decision…." Because this decision does not reference any specific date(s) for the antedate, I

[1] The Record of Employment indicates that the Appellant had approximately 617 insurable hours in the 52 weeks preceding Sunday, April 10, 2016 (the Sunday of the week including April 16, 2016), and the Commission provided evidence that the relevant unemployment rate was 8.1%. The Appellant would have been eligible for 18 weeks of benefits. See ss. 7(2), 8(1)(*a*), 10(1)(*b*), and Schedule 1 of the Act.

interpret it as denying the Appellant any antedate of the initial claim made on April 20, 2016. This was the issue before the General Division.

[15] The General Division determined that the Appellant ought reasonably to have enquired about his EI entitlements either before leaving Canada or while in Africa, and that he did not have good cause throughout the eight-month period of delay from August 2015 to April 2016. I agree with the Commission that there is no reviewable error of fact or law in this aspect of the General Division's decision, in terms of an antedate back to August 1, 2015. However, the issue of antedate, broadly speaking, was under appeal, yet the General Division considered only whether the Appellant's initial claim for benefits could have been antedated back to August 2015, and not any other "earlier day." In introducing the antedate issue during the hearing, the member informed the Appellant that the Act required him to file "as soon as you're first qualified to receive benefits" and that he had to show good cause for the whole delay. Given that the Appellant was self-represented, this effectively precluded any discussion of a later antedate at the hearing. The Commission's submissions to the Appeal Division similarly addressed only the question of an antedate to August 1, 2015. When asked for submissions on consideration of an alternative antedate by the General Division, the Commission's representative took the position that there was no error, because s. 10(4) of the Act contemplates antedate only back to the interruption of earnings, and good cause was required for the entire period back to August 2015.

[16] The language of s. 10(4) of the Act is unequivocal. It permits antedate to "an earlier day," and not only to the interruption of earnings or to the day when the claimant first qualified for benefits. In this case, the Appellant was clearly not seeking benefits from August 2015: although he was not familiar with the qualifying period and hours, he understood, correctly, that he was not entitled to receive EI benefits while out of Canada (s. 37 of the Act). He did not request a specific antedate, and the Commission denied "antedate" generally, in its decision. In my view, the General Division's failure to consider antedating to an earlier day when the Appellant qualified to receive benefits, along with the member's explanation of antedate to the Appellant, indicate that the member interpreted s. 10(4) as permitting an antedate back only to the interruption of earnings. This reflects an inaccurate interpretation of s. 10(4), and constitutes an error of law.

[17] As a result of this error, the appeal of the antedate decision was dismissed without consideration of alternative dates. While it is not incumbent upon the General Division to consider each and every possible “earlier day” for an antedate on its own initiative, the General Division should have clarified the scope of the antedate issue before it by canvassing the question of alternative antedates directly with the Appellant, in light of the circumstances of this appeal: antedate was broadly denied by the Commission; the Appellant did not request an antedate back to the interruption of earnings; he had planned to apply on a date later than the interruption of earnings; an antedate back to the interruption of earnings was potentially disadvantageous since the benefit period would end sooner; and there were obvious alternative antedates that could have been considered.

Remedy

[18] The Appellant did not attend the reconvened hearing, and the Commission’s representative declined to provide a submission on whether an antedate to a specific date other than August 1, 2015 should be granted under s. 10(4) of the Act. Accordingly, I find it appropriate to return this matter to the General Division for reconsideration, pursuant to s. 59 of the DESDA. The General Division is directed to determine the Appellant’s position on an antedate to an earlier day or days (other than back to August 1, 2015), and to decide whether the initial claim of April 20, 2016 shall be regarded as having been made on an earlier day (i.e, antedated) under s. 10(4) of the Act.

CONCLUSION

[19] The appeal is allowed on the antedate issue. This issue is returned to the General Division for reconsideration, in accordance with the direction outlined above.

Shirley Netten
Member, Appeal Division

HEARD ON:	December 6, 2017, and March 19, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. C., Appellant (December 6, 2017) S. Prud'homme, Representative for the Respondent (March 19, 2018)