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

Citation: *J. A. v. Canada Employment Insurance Commission*, 2018 SST 526

Tribunal File Number: AD-17-391

BETWEEN:

J. A.
(formerly J. M.)

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 11, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] In a letter dated September 30, 2015, the Appellant, J. A. (Claimant), was notified by the Respondent, the Canada Employment Insurance Commission (Commission), that she had voluntarily left her employment without just cause on November 30, 2010, and that she would be required to pay back Employment Insurance benefits she had received. The Claimant did not file a written request for reconsideration of that decision until August 17, 2016, which was refused because it was late. She appealed the Commission's refusal to accept her late request for reconsideration to the General Division of the Social Security Tribunal.

[3] The General Division found that the Commission had not exercised its discretion judicially in refusing the Claimant further time to make a request for reconsideration, and it substituted its own decision for that of the Commission. However, in doing so, the General Division found that the Claimant did not provide a reasonable explanation for the delay, and dismissed the appeal. The Claimant was granted leave to appeal to the Appeal Division.

[4] The appeal is allowed. In its analysis of the reasonableness of the Claimant's delay, the General Division failed to consider or properly appreciate the Claimant's evidence that she believed she had initiated, and was participating in, the reconsideration process well before she signed and submitted the written request form.

ISSUE

[5] Did the General Division err in ignoring or misapprehending the Claimant's evidence that she understood that she had requested a reconsideration before filing a written request for reconsideration?

ANALYSIS

Standard of review

[6] The grounds of appeal set out in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) are very similar to the usual grounds for judicial review, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division. However, there has been some relatively recent case law from the Federal Court of Appeal that has not insisted on the application of standards of review analysis, and I do not consider it to be necessary.

[7] In *Canada (Attorney General) v. Jean*[1], 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.

[8] 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.

[9] In the recent matter of *Canada (Citizenship and Immigration) v. Huruglica*[2], 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.

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

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[1] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[2] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93

[11] I recognize that the Federal Court of Appeal may not be of one mind on the applicability of such an analysis within an administrative appeal process: Certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review.[3]

[12] Nonetheless, I am persuaded by the reasoning of the Court in *Jean*, where it referred to one of the grounds of appeal set out in s. 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, and without reference to "reasonableness" or the standards of review.

General principles

[13] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[14] By way of contrast, the Appeal Division cannot intervene in a decision of the General Division unless it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the DESD Act, and set out below:

> (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.

Reasonable explanation for delay

[15] According to s. 112(1) of the Act, a claimant must make a reconsideration request within 30 days after the date the decision is communicated to him or her, or within such further time as

[3] *Hurtubise v. Canada [Attorney General]*, 2016 FCA 147; *Thibodeau v. Canada [Attorney General]*, 2015 FCA 167.

the Commission may allow. Subsection 1(1) of the Reconsideration Regulations permits the Commission to allow a longer period to make a request for reconsideration if the Commission is satisfied that there is a reasonable explanation for requesting a longer period and the claimant has demonstrated a continuing intention to request a reconsideration. In this case, the General Division accepted that the Claimant had a continuing intention to request a reconsideration, but it did not accept that she had a reasonable explanation for the delay.

[16] The Claimant argued that the appeal should be allowed on the basis that the General Division did not understand her evidence that she believed and understood that she had initiated the reconsideration process in her phone interviews with Commission agents. She argues that the General Division did not consider that her "reasonable explanation" for the delay included her actions to initiate the reconsideration and her belief that she had done so.

[17] The Commission filed written submissions but declined to participate in the appeal hearing. In its submissions, the Commission accepted that it had not provided a clear rationale to support its discretionary decision to reject the late request for reconsideration and therefore agreed with the General Decision that its discretion had not been exercised judicially. Additionally, the Commission took the position that the General Division member's analysis "leaves one to infer that the member considered the only way to formally make a request for reconsideration, was by filing an application with the Commission […]" and that this "was not supported by the evidence". It submitted that the General Division member erred in that her decision was not transparent and intelligible and it further submitted that the decision may be said to have been made in a perverse or capricious manner or without regard for the entirety of the evidence. The Commission specifically requested that the matter be referred back to the Commission to reconsider its decision of September 30, 2015.

[18] I accept that s. 78(1) of the Regulations requires a request for reconsideration to be in writing and to contain certain information. Therefore, I accept that the Claimant's request was not filed until she submitted her written request in August 2016. However, this does not mean that the General Division was precluded from accepting as reasonable the Claimant's explanation that she **believed** she had initiated an "appeal process" and was engaged in the process between

the time she received the decision and when she finally filed the request in writing—even if she had not made a reconsideration request that was compliant with s. 78(1) of the Regulations.

[19] As I noted in the leave decision, the Claimant's understanding of the process is of some significance in determining whether she had a reasonable explanation for the delay. The General Division understood the Claimant to be trying to deal with the issue over the phone without filing a formal request (paragraph 34), but the Claimant's evidence was that **she thought she had** initiated the reconsideration request over the phone.

[20] The Claimant testified at the General Division as follows:

> I kept just trying to appeal through them, saying you know, here's my side of the story and then they would take notes and they would take into account my side of the story and then they kept kind of saying, there is a process where you can appeal it. And I thought that being on the phone, speaking to representatives was the process.[4]
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> …
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> The day I got the letter—when I made the call—I truly believed that this was me starting my appeal process. Speaking with this representative for almost an hour in detail and stating my case. Her taking notes, I thought, okay, this is her helping me with my appeal.[5]
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> …
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> I also thought I was starting my appeal by, like I said, phone representative because they're taking everything you say […] and I feel like what's the difference if they're typing it out and I'm saying it in person, or if I'm writing it out and bringing it down. […] That's what I kept believing would start this process.[6]

[21] Based on the record, it is not clear when the Claimant finally learned that her reconsideration would not proceed until the written request was received. She emphasized to the General Division that she was not told about a "form" when she first called to start her appeal. She also said that she had kept trying to appeal over the phone until she was "finally" told about

[4] Found at 23 minutes and10 seconds into the audio recording, denoted: "23:10"
[5] Audio recording: 29:18
[6] Audio recording: 29:40

the request form, and then she, "went that route".[7] Her husband had been away, but she testified that, when he returned home, they went together to drop off and to sign the form in person, in the manner that she thought was required[8] or prudent.[9]

[22] The General Division recorded the Claimant's evidence that the Claimant thought she had started the reconsideration process over the phone, but its decision was based on its finding that she took "over nine months [to file] a request for reconsideration", which it then suggested would involve filling portions of a two-page form and mailing or dropping it off (paragraph 33).

[23] The General Division's analysis is wholly concerned with the Claimant's logistical difficulties in completing and delivering the written request form. There is no analysis of the Claimant's testimony that she was not aware of a reconsideration request "form" for a significant portion of the delay and, in addition, the decision does not address the reasonableness of her belief that she was already involved in the reconsideration process. Nor does the decision explain whether the Claimant's belief or understanding was considered a relevant consideration in determining the reasonableness of her delay.

[24] I therefore find that the General Division misapprehended the Claimant's evidence as it related to her belief that she initiated her reconsideration request with an agent over the phone, and as it related to the reasonableness of that belief. As such, 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, an error under s. 58(1)(*c*) of the DESD Act.

[25] In light of the Commission's position, and in accordance with my authority under s. 59(1) of the DESD Act, I will give the decision the General Division should have given on the issue of the extension of time and the application of s. 1(1) of the Reconsideration Regulations. I find that the Claimant's mistakenly believed that she had initiated a reconsideration request in her early interview with a Commission agent, and that she believed that she remained engaged in that reconsideration process throughout her subsequent discussions with Commission agents. Given her testimony that she had a lengthy initial interview in which her information was taken down, that she continued to learn more about her case in successive discussions with the Commission,

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[7] Audio recording: 19:32
[8] Audio recording: 21:25
[9] Audio recording: 22:05

and that the Commission was receptive to her additional oral representations[10] , I further find that her mistaken belief is objectively reasonable and that her reasonable belief is relevant to the question of whether her delay in filing a written reconsideration request is reasonable. The date when the Claimant eventually understood that the Commission would require a written reconsideration request form remains uncertain, but I am satisfied on the evidence that the Claimant maintained her belief that the reconsideration process had been engaged from the outset. Even at the time that she finally competed and filed the request form, I find that it is more likely than not that she understood that she was only perfecting an existing reconsideration request, as opposed to filing a time-constrained initiating application.

[26] Therefore, I find that the Claimant had a reasonable explanation for her delay in filing the reconsideration request. I further find, as did the General Division, that the Claimant demonstrated a continuing intention to seek a reconsideration. In accordance with s. 1(1) of the Reconsideration Regulations, I find that the Claimant had a reasonable explanation for the delay in completing and submitting a reconsideration request that is compliant with s. 78(1) of the Regulations.

CONCLUSION

[27] The appeal is allowed. The Claimant's explanation is reasonable, and she should be permitted an extension of time in which to request a reconsideration.

Stephen Bergen
Member, Appeal Division

HEARD ON:	April 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. A. (formerly J. M.) S. Prud'Homme, by written representations

[10] Audio recording: 23:04