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

Citation: *J. C. v. Canada Employment Insurance Commission*, 2018 SST 548

Tribunal File Number: AD-17-432

BETWEEN:

J. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: May 17, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, J. C. (Claimant), worked as a contract and substitute teacher. Her last day of work was May 19, 2016, and she gave birth in June 2016. She applied for parental benefits on August 16, 2016, but the Respondent, the Canada Employment Insurance Commission (Commission), refused her claim for Employment Insurance benefits. The Respondent stated that she did not have sufficient hours for special benefits. The Claimant requested a reconsideration and also asked that her claim be antedated so that the Commission could include more of her insurable hours. The Commission considered her antedate request but determined that she would still be five hours short of qualifying. This calculation was based on an antedate to May 22, 2016, the Sunday after her last working shift, and it took into account a three-week extension to her qualifying period for the time the Claimant was off work for pregnancy-related complications. Having determined that the Claimant could not qualify in any event, the Commission denied the antedate request. The reconsideration decision of September 12, 2016, maintained the original decision.

[3] The Claimant appealed to the General Division, but her appeal was dismissed. The Appeal Division granted her application for leave to appeal, and a hearing was held on April 17, 2018.

[4] The Claimant's appeal is allowed. While the General Division considered the Claimant's evidence that there were specific days that she had to cancel work because of complications, it found that they did not comprise whole weeks. In so doing, it failed to consider four other nil-earning workweeks identified in her 2016 record of employment (ROE), together with her testimony that she was required by her employer to book off other days when she anticipated she would not be able to come in to work because of illness.

ISSUE

[5] Did the General Division base its decision on an erroneous finding of fact by failing to consider the Claimant's evidence of additional weeks within her qualification period in which she was unable to work as a result of her medical problems?

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 similar to the usual grounds for judicial review, suggesting that the same kind of standard 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 standard 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

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

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.

[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 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, which are 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;

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

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.

Extension of qualifying period

[15] The General Division concluded that there was *no evidence* on which the Claimant's qualifying period could be extended beyond the three weeks already identified by the Commission. If the Claimant's qualifying period could not be extended, the Claimant could not show that she would have had sufficient hours to qualify, and her claim could not be antedated under s. 10(4) of the *Employment Insurance Act*. It was on this basis that the General Division dismissed her appeal.

[16] In her leave to appeal application, the Claimant submitted that the General Division failed to consider that she had zero earnings in pay periods 2, 8, 9 and 14 in her ROE (GD3-19), and that these weeks should also be considered in extending the qualifying period (in addition to the 3-week extension that the Commission had already considered). The Claimant was also concerned that the legislation was ambiguous and took issue with the effect of the legislation in practice. She suggested that it was an error of law that the General Division did not provide direction as to how she could prove that she was not employed due to illness or pregnancy.

[17] The Commission submitted that it reviewed the Tribunal member's analysis and accepts that the Tribunal member failed to consider whether the Claimant was scheduled to work in pay periods 2, 8, 9 and 14 of the ROE (GD3-19) and whether she was unable to work due to illness.

[18] I agree. I find that the General Division failed to appreciate that the week of February 15–19, which is nil pay period 2 in the 2016 ROE, was a four-day workweek because of a provincial holiday. I also find that the General Division failed to consider the additional nil-earning weeks within her period of employment that were supported by her ROE evidence, or her testimony that there were other days that she had been obliged to book off in advance because of a resurgence in symptoms. These were not included in the scheduled workdays that she cancelled. I note that two of the cancelled workdays which were acknowledged by the General Division, fell within weeks in which she did not otherwise work: nil pay periods 9 and 14.

[19] Therefore, the finding that there was no evidence that the Claimant's qualifying period could be further extended was made without regard for the material before the General Division, and the General Division erred under s. 58(1)(*c*) of the DESD Act.

[20] Given this finding, it is unnecessary for me to consider the Claimant's concerns about the clarity of the legislation or the Commission's failure to advise her as to what manner of evidence would be required to establish her claim.

[21] In light of the Commission's submissions, I have considered whether to exercise my authority under s. 59 of the DESD Act to give the decision that the General Division should have given. However, I do not consider the record to be complete for this purpose. I understand that the Commission has conducted additional investigations and that it has satisfied itself that it may allow additional extensions to the qualifying period such that an antedate of the Claimant's application could result in her qualifying for benefits. However, the evidence that the Commission obtained through its recent investigation was not before the General Division. The Federal Court has confirmed that the Appeal Division does not allow new evidence,[4] and I cannot take it into account.

CONCLUSION

[22] The appeal is allowed. I refer the matter back to the General Division for reconsideration.

[4] *Canada (Attorney General) v. O'keefe*, 2016 FC 503

[23] The General Division shall have regard to the Commission's evidence and submissions concerning the investigation it conducted after the leave to appeal decision was issued.

Stephen Bergen
Member, Appeal Division

HEARD ON:	April 17, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	J. C., Appellant D. C., Representative for the Appellant S. Prud'Homme, Representative for the Respondent by written submission only