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

Citation: *E. C. v. Canada Employment Insurance Commission*, 2018 SST 545

Tribunal File Number: AD-16-574

BETWEEN:

E. 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, and the matter is referred to the General Division for a decision on the merits.

OVERVIEW

[2] The Appellant, E. C. (Claimant), was receiving Employment Insurance benefits from July to December 2011. The Respondent, Canada Employment Insurance Commission (Commission), subsequently discovered that the Claimant had been self-employed as a fitness trainer within the period she was receiving benefits. The Commission assessed an overpayment of benefits, imposed a penalty for knowingly making false statements that she was not self-employed, and issued a notice of violation.

[3] Following an unsuccessful reconsideration application, the Claimant appealed to the Social Security Tribunal. The Claimant filed an appeal to the General Division in January 2016 using the form normally reserved for seeking leave to the Appeal Division; the appeal was also unaccompanied by the reconsideration decision to be appealed. The General Division notified the Claimant that the appeal was incomplete, and the Claimant properly filed a complete appeal with the General Division on February 23, 2016, after obtaining a copy of the reconsideration decision from the Commission. The General Division dismissed the appeal on the basis that the appeal was brought late and more than one year from the date of the reconsideration decision. Leave to appeal the General Division decision has since been granted, and the matter now comes before the Appeal Division.

[4] The appeal is allowed. The General Division's refusal to proceed was based on an erroneous finding that the reconsideration decision had been communicated to the Claimant on July 19, 2013.

ISSUE

[5] Did the General Division err in basing its decision on a finding that the reconsideration decision was communicated to the Claimant on July 19, 2013?

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 the standards of review, and I do not consider a standards of review analysis to be necessary.

[7] In *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 *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 in the 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 General Division decision 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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> 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.

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

Did the General Division err in basing its decision on a finding that the reconsideration decision was communicated to the Claimant on July 19, 2013?

Date of communication determined with exclusive reliance on the date on the reconsideration decision letter

[15] The General Division erred in finding that the decision was communicated to the Claimant on July 19, 2013, the date of the reconsideration decision letter.

[16] Subsection 52 of the DESD Act provides that the deadline by which an appeal must be filed is calculated from the date the decision is communicated and not from the date of the decision letter:

> (1) An appeal of a decision must be brought to the General Division in the prescribed form and manner and within,
>
> > (a) in the case of a decision made under the *Employment Insurance Act*, 30 days after the day on which it is communicated to the appellant;
>
> […]
>
> (2) The General Division may allow further time within which an appeal may be brought, but in no case may an appeal be brought more than one year after the day on which the decision is communicated to the appellant.

[17] The General Division relied on the date of the reconsideration letter as the date of communication. However, the Commission acknowledged in its February 4, 2016, letter that the reconsideration decision was mailed on July 19, 2013. The fact that the decision was mailed on July 19, 2013, does not support an inference that the Claimant would have received the letter on the same day, and there was no evidence to suggest that the decision was communicated by some other means.

[18] To the contrary, the Claimant's evidence was that the original reconsideration decision did not reach her and that she only learned of the reconsideration decision much later. She wrote in her Notice of Appeal to the General Division that "[she] applied for reconsideration on January 21, 2016, after learning of a previous decision of which [she was] not advised" and she

also indicated that she had spoken to an agent of the Commission on February 4, 2016, who told her that the Commission could not provide confirmation of delivery of the decision. The burden of proof is on the Commission to establish that it has effectively communicated the decision,[4] yet the Commission did not dispute that it could not provide confirmation of the delivery.

[19] In my view, it is extraordinarily unlikely that the reconsideration decision letter was received by the Claimant the same day that it was mailed by the Commission. At the same time, the General Division completely overlooked the Claimant's evidence as to when she did actually learn of the decision or receive a copy of the decision. Therefore, the General Division's finding that the decision was communicated to the Claimant on July 19, 2013, was made without regard for the material before it.

Rejection of extension based on finding that decision communicated on the date of the reconsideration decision letter

[20] Furthermore, the General Division's decision to deny the extension of time was based on this erroneous finding. The General Division did not need to find that the decision was communicated on a specific date in order to find that it could not consider an extension but—in order to rely on s.52(2) of the DESD Act—it would still have had to find that the decision was communicated at some point more than a year prior to the date the Claimant filed the appeal. Here, the General Division's only finding was that the decision was communicated on July 19, 2013, and the only evidence relied on for that finding was the date of the decision letter.

[21] I find 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 to the material before it, and that the Claimant has made out the ground of appeal described in s.58(1)(*c*) of the DESD Act.

Remedy

[22] I must now decide whether I should return the matter to the General Division or whether I may give the decision that the General Division should have given.

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[4] *Bartlett v. Canada (Attorney General)*, 2012 FCA 230

[23] The only direct evidence bearing on the date that the decision was communicated comes from the Claimant. The Claimant had written to the Commission seeking reconsideration on January 18, 2016 (apparently date-stamped by Service Canada on January 21, 2016); this letter was attached to her initial incomplete appeal application. Attached to the Notice of Appeal that she resubmitted to the General Division was a February 12, 2016, letter from the Commission. This was the Commission's response to her new request for reconsideration, in which the Commission informs the Claimant that her decision had already been reconsidered in the decision of July 19, 2013. A copy of the original reconsideration decision is said to be attached. In her Notice of Appeal the Claimant wrote: "We applied for reconsideration on 2016-01-21 after learning of a previous decision of which we were not advised. We were advised to apply for reconsideration by Service Canada … which we did on 2016-01-21." It does not appear there was any evidence to contradict the Claimant.

[24] The lapse of time from the date of the original application for reconsideration and decision is long, and one might ordinarily expect the Claimant to have made further enquiries. At the same time, I do not see that there was no obvious process underway at the Commission. There is only one documented communication between the Commission and the Claimant (other than the Claimant's original reconsideration request and the July 19 reconsideration decision). This was a call from a Commission agent to the Claimant's husband informing him that the Commission had not received permission to discuss the claim with the husband and that it would need to speak to the Claimant.

[25] The Claimant confirmed that there was no contact with the Claimant herself prior to the issuance of the reconsideration decision (GD2A-3), and the reconsideration file contains no other record of any interview, correspondence, or call or attempted call to either the Claimant or her husband. In other words, there was no documented communication with the Claimant that would suggest that a decision was pending or completed and no development in the file by which the Claimant could have known that an investigation was in progress or completed, a decision was pending or completed, or that the Commission had mailed a decision to her. At best, the claim file is ambiguous as to whether an investigation had even been initiated such that a decision could be expected.

[26] I also note that the Claimant was simultaneously engaged in a protracted process to obtain a Canada Revenue Agency (CRA) ruling in respect of whether her employment was insurable, and it is apparent that the Claimant considered the outcome of the CRA process to be relevant to the Commission's decision (see GD2-4, 5). In my view, it would be reasonable for the Claimant to have rationalized the Commission's apparent dormancy on her reconsideration request on the basis that a parallel CRA investigation and determination process was underway.

[27] Addressing the issue of when a decision is "communicated", the Federal Court in *Atlantic Coast*[5] stated that "positive action is required on the part of the decision maker in order to communicate his decisions to the parties directly affected". In *Cousins,*[6] the Federal Court explained the earlier *Atlantic* decision, saying that it was decided as it was because the information received by the affected persons in *Atlantic* was ambiguous.

[28] In this case, the Commission has not established that the decision letter was communicated (prior to the copy directed to the Claimant in February 2016) and other communications evident on the face of the file are vague and of uncertain significance. The circumstances of the investigation and reconsideration process are so ill-defined that the Claimant cannot be presumed to have known that a reconsideration decision existed or even that it should exist.

[29] I find that the reconsideration decision was finally communicated on February 18, 2016, the date the Claimant received a copy of the written reconsideration decision (GD2A-3). I appreciate that the Claimant has admitted to having knowledge even prior to January 21, 2016, that a decision had been made. She also stated that she was contacted by an agent of the Commission on February 4, 2016, after resubmitting her reconsideration application. However, there are no additional details of how she initially learned of the decision or from whom, and no record of what the agent discussed with her in February. I cannot presume that the substance of the reconsideration letter, including the decisions taken on the various issues, was fully communicated to the Claimant at any point prior to her receipt of a copy of the reconsideration letter.

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[5] *Atlantic Coast Scallop Fishermen's Association et al. v. Canada (Minister of Fisheries and Oceans),* (1995) 189 N.R 220

[6] *Cousins v. Canada (Attorney General*), 2007 FC 469

[30] I conclude that the best evidence supports a communication date of February 18, 2016, which is only seven days prior to the General Division's acceptance of the complete Notice of Appeal. I therefore find that I may properly make the decision that the General Division ought to have made on my authority under s.59 of the DESD Act. The appeal was brought within 30 days of the date the decision was communicated, as prescribed in s.52(1) of the DESD Act. The appeal is not late and may therefore proceed.

CONCLUSION

[31] The appeal is allowed.

[32] The matter is referred back to the General Division for a decision on the merits.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	E. C., Appellant S. C., Representative for the Appellant Both by written representations