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

Citation: *T. H. v. Canada Employment Insurance Commission*, 2018 SST 724

Tribunal File Number: AD-18-408

BETWEEN:

T. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: July 11, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, T. H. (Claimant), lost his job on June 10, 2016. He exhausted his severance and depleted his own savings while he looked for another job, but he did not apply for Employment Insurance benefits until August 23, 2017. At that time, the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim on the basis that he required 595 insurable hours within his qualifying period, but he had none. The Claimant requested a reconsideration, citing his efforts to obtain alternate employment, his many years of contributions to Employment Insurance, and that he had not made any claims on the fund for many years. The Commission maintained its original decision, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his claim, and the Claimant now seeks leave to appeal to the Appeal Division on the basis that his application should have been antedated.

[3] There is no reasonable chance of success on appeal. The issue of antedating was not before the General Division, and the General Division had no jurisdiction to consider it. There is no arguable case that the General Division erred in failing to consider the Claimant's eligibility for antedating.

ISSUE

[4] Is there an arguable case that the General Division erred by refusing to exercise its jurisdiction to consider the Claimant's entitlement to having his claim antedated?

ANALYSIS

General principles

[5] 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.

[6] 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 *Department of Employment and Social Development 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 before it.

Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion.

[7] At this stage, I must find that there is a reasonable chance of success on one or more grounds of appeal in order to grant leave and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1]

Is there an arguable case that the General Division erred by refusing to exercise its jurisdiction to consider the Claimant's entitlement to having his claim antedated?

[8] In the Commission's reconsideration decision, it maintained its earlier decision that the Claimant did not have sufficient hours to qualify at the time he applied for benefits. According to s. 10(1) of the *Employment Insurance Act* (Act), a Claimant's benefit period must begin on the Sunday of the week in which he first experienced an interruption of earnings or the Sunday of the week that he made his initial application for benefits—whichever is later. The Claimant experienced an interruption of earnings on June 10, 2016, and he applied for benefits on August 23, 2017. Therefore, the Claimant's benefit period begins on August 20, 2017.

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[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259

[9] Unless it is extended within limited circumstances,[2] the qualifying period is that period within the 52-week period immediately preceding the benefit period. In the Claimant's case, this would have been the 52-week period preceding August 20, 2017.

[10] From the Claimant's testimony to the General Division, it was apparent that the Claimant understood that he was denied benefits because of the particular qualifying period selected by the Commission and because he missed the one-year deadline for applying. However, the Claimant did not "miss a deadline" in the sense that he would only have had to submit his application within a year in order to qualify. The Commission would have been required by s. 10(1) of the Act to use the 52 weeks prior to his application as the period in which it calculated the insurable hours for qualification purposes. More than a year had passed between the interruption of earnings and the Claimant's application, and the Claimant had no earnings in that time, therefore it was impossible for any of his insurable hours to fall within the qualifying period.

[11] The Claimant is not disputing the General Division's finding that he had zero insurable hours in the qualifying period preceding his application. Rather, he submits that his application should be antedated to February 5, 2017, at which point he believes he would have had sufficient hours in his qualifying period. He argues that the General Division failed to apply s. 10(4) of the Act, which would allow him to have his claim antedated to the earlier date.

[12] Unfortunately for the Claimant, I cannot assist him. Neither the Commission's original decision nor its reconsideration decision addressed the issue of antedating. At the time of the General Division hearing, the Commission had not made a decision as to whether to allow the Claimant to antedate his claim. This is not surprising: The Commission's notes of conversations with the Claimant do not record that the Claimant ever asked the Commission about antedating, nor is there any other indication in the General Division file that this was requested or discussed with the Commission.

[13] I appreciate that the Claimant testified at his General Division hearing that he was informed by an agent at the Canada Revenue Agency (CRA) that the Commission would generally go back two years to look at his earnings. I consider it likely that this was a reference to the ability of the Commission to extend the qualifying period by as much as a year in limited

[2] See ss. 8(1)(*b*), 8(2), and 8(3) of the Act.

circumstances, as opposed to a reference to the possibility of antedating. In any event, this was a conversation with the CRA, and not with the Commission.[3]

[14] Because the Commission had not considered antedating or made a decision on antedating, the General Division had no jurisdiction to consider whether the Claimant's application should be antedated. The General Division is required to consider the Commission's actual decision, not the decision that the Commission should have made. It would have been an error of law for the General Division to consider whether the claim should be antedated.[4]

[15] Therefore, there is no arguable case that the General Division made a jurisdictional error—or any other error of law—by not considering whether the Claimant's application should have been antedated.

[16] The Claimant does not dispute any of the essential facts necessary to the General Division decision. Nonetheless, I reviewed the record to determine whether any evidence was ignored or overlooked that might have supported an arguable case that the General Division erred. I did not find any basis for an arguable case.

[17] There is no reasonable chance of success on appeal.

CONCLUSION

[18] The application for leave to appeal is refused.

[3] Audio recording of hearing at 00:07:38, 00:13:41, and 00:14:15
[4] *Lapointe v. Canada (Attorney General)*, 2011 FCA 66; *Attorney General of Canada v. Read*, A-371-93;

[19] For the Claimant's information, it may still be open to the Claimant to specifically request that the Commission antedate his application (unless the Commission has made a decision on antedating since the General Division hearing).

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	T. H., self-represented