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

Citation: *Z. N. v. Canada Employment Insurance Commission, 2018* SST 795

Tribunal File Number: AD-18-390

BETWEEN:

Z. N.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: August 10, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, Z. N. (Claimant), applied for Employment Insurance benefits but was denied on the basis that he had not accumulated sufficient hours of Insurable employment (insurable hours) during his qualifying period. The Claimant requested that the Respondent, the Canada Employment Insurance Commission (Commission), reconsider, but the Commission maintained its original decision. The Claimant's appeal to the General Division of the Social Security Tribunal was summarily dismissed, and the Claimant now appeals to the Appeal Division by right.

[3] The General Division did not err by concluding that the appeal had no reasonable chance of success. The General Division did not have the jurisdiction to interfere with the Canada Revenue Agency's (CRA) determination of the Claimant's insurable hours. The Claimant's insurable hours, as determined by CRA, were less than the insurable hours required to qualify for Employment Insurance benefits.

ISSUE

[4] Did the General Division refuse to exercise its jurisdiction by summarily dismissing the Claimant's appeal without investigating or reviewing whether the insurable hours were properly determined by the Canada Revenue Agency?

ANALYSIS

Standard of review

[5] 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 standards of review analysis might also be applicable at the Appeal Division.

[6] I do not consider the application of standards of review to be necessary or helpful. Administrative appeals of Employment Insurance decisions are governed by the DESD Act. The DESD Act does not provide that a review should be conducted in accordance with the standards of review. The Federal Court of Appeal in *Canada (Citizenship and Immigration) v. Huruglica*[1] was of the view that standards of review should be applied only if the enabling statute provides for their application. It stated that the principles that guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[7] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of an Appeal Division decision. The Federal Court of Appeal was not required to rule on the applicability of standards of review, but it acknowledged in its reasons that administrative appeal tribunals do not have the review and superintending powers that are exercised by the Federal Court and the Federal Court of Appeal where the standards of review are applied. The Court also observed that the Appeal Division has as much expertise as the General Division and is therefore not required to show deference.

[8] Certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] but I am still persuaded by the reasoning of the Court in *Huruglica* and *Jean*. I will therefore consider this appeal by referring to the grounds of appeal set out in the DESD Act only.

General principles

[9] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence before it and to make findings of fact. The General Division must apply the law to these facts to reach conclusions on the substantive issues raised by the appeal.

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[1] *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93
[2] *Canada (Attorney General) v. Jean*, 2015 FCA 242
[3] See for example *Hurtubise v. Canada (Attorney General)*, 2016 FCA 147, and *Thibodeau v. Canada (Attorney General)*, 2015 FCA 167

[10] For the Appeal Division to intervene in a decision of the General Division, the Appeal Division must 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.

[11] The only grounds of appeal are described 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.

Did the General Division refuse to exercise its jurisdiction by not investigating or reviewing the Canada Revenue Agency ruling on the number or insurable hours?

[12] Subsection 53(1) of the DESD Act requires the General Division to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success. The General Division rightly noted that the legal test for whether there is a reasonable chance of success is whether it is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing.[4]

[13] The Claimant did not dispute that his qualifying period was the period from November 13, 2016, to November 11, 2017, or that the applicable regional rate of unemployment relative to the week beginning November 12, 2017, was 5.8% according to the chart in s. 7(2) of the *Employment Insurance Act* (EI Act). Therefore the General Division could not have found the Claimant to be entitled to benefits if he had less than 700 insurable hours. The Claimant's argument at the General Division focused on the fact that he had worked as a superintendent in a live-in position and that he had accumulated 1,110 hours within his qualifying period according to his calculations, despite the fact that his Record of Employment recorded only 400 hours.

[4] *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147

[14] Subsection 7(2) of the EI Act specifies the number of hours required to qualify for benefits. The EI Act "does not allow any discrepancy and provides no discretion" as to the insurable hours required to qualify.[5]

[15] At the request of the Commission under s. 90(1)(*d*) of the EI Act, the CRA ruled on the Claimant's insurable hours in accordance with s. 90.1. The CRA determined the Claimant's insurable hours in accordance with s. 10(1) of the *Employment Insurance Regulations* and confirmed that the Claimant had accumulated only 400 hours of insurable employment.[6] The Claimant suggests that the CRA ruling was in error and that the General Division should have assumed jurisdiction to overturn the CRA ruling, or the Commission decision that relied on the CRA ruling, based on what appears to be fairness or equitable grounds.

[16] However, the Social Security Tribunal has no equitable jurisdiction,[7] meaning that it must apply the EI Act and Regulations. It cannot use the principle of fairness to grant benefits that are not authorized by the EI Act. As the General Division noted at paragraph 32 of the decision, "the question as to the hours of insurable employment is within the exclusive jurisdiction of the CRA".[8] The General Division does not have jurisdiction to determine this question[9] or the authority to overrule the CRA ruling, so it cannot be an error for it to have failed to do so.

[17] The CRA ruling that the Claimant had only 400 insurable hours meant that the Claimant did not have the required number of insurable hours to qualify for benefits. Given that the General Division was bound by the CRA ruling, I cannot find that the General Division erred by finding that there was no reasonable chance that the Claimant could succeed in an appeal to the General Division that was based on his disagreement with the number of hours of insurable employment.

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[5] *Canada (Attorney General) v. Lévesque*, 2001 FCA 304
[6] GD3-38
[7] *Stevens Estate v. Canada (Attorney General)*, 2011 FC 103
[8] See also *Canada (Attorney General) v. Romano*, 2008 FCA 117
[9] *Canada (Attorney General) v. Didiodato*, 2002 FCA 345

CONCLUSION

[18] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	Z. N., Appellant G. Reid, Representative for the Respondent