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

Citation: *C. D. v. Canada Employment Insurance Commission*, 2018 SST 945

Tribunal File Number: AD-18-331

BETWEEN:

C. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 24, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, C. D. (Claimant), left his job at the end of August 2016 to attend school as a full-time student. He did not file an application for Employment Insurance benefits at that time. His wife was expecting a baby and she called the Respondent, the Canada Employment Insurance Commission (Commission), in October or November 2016 about parental benefits. She was directed to apply online and did so; parental benefits were approved.

[3] In March 2016, the Claimant's wife decided to return to work. She again called the Commission to discuss terminating her claim. According to the Claimant, she was then told that the unused parental benefits could be shared with her husband if he was on claim. The Claimant applied to claim the remaining parental benefits on April 23, 2017, but the Commission denied his claim on the basis that he did not have sufficient hours to qualify for benefits. The Claimant requested an antedate to August 28, 2016, but the Commission refused because it did not consider that he had good cause for delaying his application. The Commission maintained its original antedate decision when the Claimant requested a reconsideration.

[4] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division agreed with the Commission and dismissed his appeal. The Claimant is now appealing to the Appeal Division.

[5] The appeal is dismissed. The General Division did not err in fact or law by finding that the Claimant did not take reasonably prompt steps to determine his obligations under the *Employment Insurance Act* (Act), or by failing to consider or find the Claimant's circumstances to be exceptional.

ISSUES

[6] Did the General Division err in law by failing to analyze whether the Claimant's circumstances were exceptional?

[7] Did the General Division err in law by failing to consider whether the Claimant had good cause for the delay *throughout* the period of the delay?

[8] Did the General Division base 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 by ignoring Service Canada's responsibility to provide accurate information?

ANALYSIS

Standard of Review

[9] 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 in the Courts, suggesting that the same kind of standards of review analysis might also be applicable at the Appeal Division.

[10] However, 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 guide the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[11] *Canada (Attorney General) v. Jean*[2] concerned a judicial review of a decision of the Appeal Division. The Federal Court of Appeal was not required to rule on the applicability of

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

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.

[12] While certain other decisions of the Federal Court of Appeal appear to approve of the application of the standards of review,[3] I am nonetheless 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

[13] 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 that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[14] However, the Appeal Division may only intervene in a decision of the General Division if 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.

[15] 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.

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

Did the General Division err in law by failing to analyze whether the Claimant's circumstances were exceptional?

[16] Subsection 10(4) of the *Employment Insurance Act* (EI Act) permits a claimant to antedate their initial claim for benefits, "if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made".

[17] Even though the courts have said that ignorance of the law does not constitute "good cause", ignorance of the law does not necessarily rule out a finding of good cause.[4] As the Federal Court of Appeal noted in *Canada (Attorney General) v. Beaudin*, "… [bona fides and ignorance of the law] do not exclude the existence of a valid reason if the claimant shows that he acted as a reasonable person would have in the same situation in order to satisfy himself of both his rights and his obligations under the Act".[5] In *Canada (Attorney General) v. Somwaru*[6] the Federal Court of Appeal said that a claimant is expected to take "reasonably prompt steps" to understand those obligations.

[18] At the time when the Claimant left his job, his wife was expecting a baby but had not yet applied for parental benefits. The Claimant argued that his application was delayed because he had quit his job to go to school full-time and therefore, he did not believe he would qualify. He did not know his application or claim could have anything to do with his wife's later claim for parental benefits. In other words, he had no reason to apply for benefits at the end of August.

[19] The Claimant did not think to ask about benefit splitting because he did not know it was something that he could ask for. The Claimant says that he and his wife did everything the Commission asked them to do and that he acted reasonably in the circumstances. The Claimant also argued that the Commission failed in its responsibility to inform his wife about benefit splitting when she applied for parental benefits in October or November and that this is an exceptional circumstance.

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[4] *Canada (Attorney General) v. Albrecht*, A-172-85
[5] *Canada (Attorney General.) v. Beaudin*, 2005 FCA 123
[6] *Canada (Attorney General) v. Somwaru*, 2010 FCA 336

[20] In the leave to appeal decision, I found that there was an arguable case that the General Division may have erred in law by failing to properly consider whether there were "exceptional circumstances" that could explain why the Claimant did not take reasonably prompt steps.

[21] The requirement that a claimant take reasonably prompt steps to understand his or her obligations under the EI Act is relevant only where a claimant's delay in filing an application is related to ignorance of the law. However, even where a claimant is ignorant of the law, there may be exceptional circumstances such that a claimant might be found to be acting as a reasonable and prudent person, despite the claimant's failure to take any steps to remedy that ignorance. According to the Federal Court of Appeal in *Caron v. Commission, Deputy Attorney of Canada*,[7] exceptional circumstances might be found to apply even in the case of a claimant's "inaction and submissiveness".

[22] In this case, the Claimant told the General Division that he did not originally apply for benefits because he had quit to attend school and he knew that he would be ineligible. Unfortunately, the Claimant did not grasp all the intricacies of the law: The Claimant was unaware that if he had applied, the disqualification (that would likely have been imposed because he quit his job to attend an unsponsored program of studies) could later be suspended under s. 30(4) of the EI Act to allow him to access parental benefits and that, in the event that his wife did not exhaust any parental benefits allowed under s. 23(1), those benefits could then be split with him under s. 23(4), assuming that he had established a claim with a minimum of 600 hours of insurable employment in his qualifying period.

[23] At the General Division, the Claimant argued that he did not know that he should be taking steps to understand his obligations under the EI Act, given that he did not expect any present benefit and had no reason to expect any future benefit. In essence, the Claimant argued that he would have had to know more about Employment Insurance than can reasonably be expected of a person in his circumstances even to understand that he had any rights or obligations that he should have been investigating.

[24] The Claimant had also raised a number of other circumstances to explain his delay: He argued that he was only 18 years old at the time, that he had never before claimed Employment

[7] *Caron v. Commission, Deputy Attorney of Canada* A-1063-87

Insurance benefits, that he had recently moved from home, that his wife was expecting a baby, and that he had quit work to return to school full-time. The General Division did not analyze the effect of each of these circumstances individually, stating instead that the Claimant was preoccupied with other matters—particularly a new child and school—and just did not think to submit an application. The General Division did not accept that these circumstances were sufficient to justify the Claimant's failure to take reasonably prompt steps.

[25] The General Division notes the Claimant's assertion that his wife had not been given information about splitting parental benefits when she applied for benefits in October or November 2016. At the same time, the General Division found no evidence that the Claimant's wife had asked about splitting benefits and stated that the Commission cannot be expected to outline "all possible scenarios".

[26] After noting that ignorance of the law is not "good cause", the General Division explains that this includes "ignorance of the right to claim for benefits (i.e. that benefits exist)" (paragraph 25). I have reviewed the audio tape of the General Division hearing and it is clear to me that the General Division appreciated the Claimant's argument that he did not take steps to understand his obligations because he did not know that he could access any benefit that might have given rise to any obligation and that he would not have even known what to ask.

[27] The reasoning in paragraph 23 could have been clearer or more thorough, but I accept that the General Division considered and rejected the Claimant's argument that the Commission had a responsibility to inform his wife about benefit splitting and that it found instead that the Claimant, as a reasonable person, should have made his own enquiries about benefit splitting.

[28] I am satisfied that, in finding that a reasonable person would have done more to satisfy himself or herself as to his or her rights and obligations, the General Division took into account all of the circumstances that the Claimant raised. This included the complexity of benefit splitting, the level of sophistication required of someone in the Claimant's circumstances to anticipate that benefit, and that the Commission may not have explained to the Claimant's wife the circumstances under which she might split parental benefits with the Claimant.

[29] The General Division could not simultaneously find that a reasonable person (in the Claimant's circumstances) would have done more and also find the circumstances were so exceptional that they justified **not** doing more. When the General Division found that the Claimant's circumstances were not exceptional, I must take it to have considered each of the circumstances that it analyzed in determining whether he acted reasonably.

[30] Thus, I do not find that the General Division erred under s. 58(1)(*b*) of the DESD Act because I do not find that it failed to consider whether the Claimant's circumstances were exceptional. In the absence of exceptional circumstances, the General Division was correct to require the Claimant to have taken reasonably prompt steps to understand his obligations.

[31] I appreciate that the General Division's finding that the Claimant's explanation and circumstances did not amount to "good cause" is the Claimant's principal concern with the General Division decision, but I do not have jurisdiction to review whether the General Division erred in this regard.

[32] Whether the Claimant had good cause for the delay in the circumstances (which, in this case, means whether the Claimant took reasonably prompt steps to determine his obligations under the EI Act) is a mixed question of fact and law.[8] The Federal Court of Appeal has confirmed that the Appeal Division does not have jurisdiction over mixed questions of fact and law.[9]

Did the General Division err in law in failing to consider whether the Claimant had good cause for the delay *throughout* the period of the delay?

[33] The Claimant also argued that the Commission directed him to request that his claim be antedated to September 2016 when he started school. He suggested that he would still have had sufficient insurable hours in his qualifying period to qualify for the parental benefit even if the Commission had antedated his claim to February 2017 instead of September 2016.

[34] The General Division decision records that the Claimant raised this issue at the hearing, but the analysis section of the decision does not address the date to which the claim should be antedated. Furthermore, the General Division does not differentiate between whether the

[8] *Canada (Attorney General) v. Burke*, 2012 FCA 139
[9] *Quadir v. Canada (Attorney General)* 2018 FCA 21

Claimant had good cause in different periods in which the circumstances may have changed. For example, the circumstances could be said to be different between when the Claimant left his job and October/November and when his wife first applied for parental benefits; between when his wife applied and when his wife first learned that she could share her parental benefits with her spouse; and between when the Claimant was aware of the benefit and April, when he made his initial application for benefits.

[35] Regardless, I do not find that the General Division erred by failing to separately analyze whether the Claimant would have had good cause in the period since February 2017 (had his claim been antedated to February only), or in any other discrete period between August 28 and April 23. As the General Division noted, a claimant must have good cause for the delay throughout the period of the delay. While the length of the delay is relevant, the more important consideration is the reason for the delay.[10]

[36] The primary reason that the Claimant has given for the delay is ignorance of the law. The Claimant's explanation for his failure to take steps to understand his obligations under the EI Act is at its *most* persuasive at the time when he quit his job to return to school, when he may not have anticipated that his wife would return to work early and before his wife made any enquiries about, or application for, parental benefits. It only becomes less persuasive as time passes and the Claimant learns more or is given greater cause to enquire; i.e. as his wife applies for parental benefits, and then decides to return to work instead of using all the available parental benefits, and then contacts the Commission and learns she could share benefits with the Claimant.

[37] In other words, if the General Division did not consider the Claimant's failure to inform himself to be reasonable at the outset, it could not have considered the Claimant's continued failure to be reasonable in the period following these events, absent the introduction of some exceptional circumstance. As noted above, the General Division concluded that the circumstances in this case were not exceptional.

[38] I do not find that the General Division erred in law under s. 58(1)(*b*) of the DESD Act by considering the Claimant's reasons for delay only in respect of the entire period of delay.

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[10] *Caron supra* at note 7.

Did the General Division base 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 by ignoring Service Canada's responsibility to provide accurate information?

[39] The General Division stated that the Commission cannot be expected to outline all possible scenarios to claimants. The Claimant argued that the General Division did not take into account the description of Service Canada responsibilities taken from the Claimant's online application for parental benefits (GD3-7). The Claimant pointed out to the General Division that, according to the application, Service Canada must give a claimant "accurate information about [the claimant's] claim, including how [the claimant] may share parental benefits with [their] EI-eligible partner". This is found under the heading "Service Canada responsibilities."

[40] The Claimant suggested that this evidence supports an expectation that the Commission is obligated to outline the manner in which parental benefits may be shared, in all cases where a claimant is completing an application for parental benefits. Because the Claimant's spouse was not told about benefit splitting when she applied for benefits, the Claimant argues that the Commission breached its duty to her as well as to him because, if she had known, she would have had him establish a claim to maintain his eligibility to share her parental benefits.

[41] The standard statement that Service Canada has an "aim" to provide claimants with accurate information does not impose a duty on the Commission to proactively enquire as to all the circumstances that might potentially impact future benefits. In *Rodger v. Canada (Attorney General)*,[11] the Federal Court of Appeal considered a similar situation. In that case, a claimant did not apply for benefits because he was returning to school and did not expect he would qualify. The Service Canada agent failed to inform him that he should file an application anyway to be in a position to access benefits at a later date. The Court held that "there was no basis to find that the [Employment Insurance] agent had a duty to address all possible hypotheses".

[42] Therefore, I do not see how the Service Canada statement is of significance to the General Division's determination that the Claimant did not take reasonably prompt steps. If anything, the inclusion of such a statement in her own application for parental benefits might have assisted the Claimant's wife by putting her on notice (in October or November when she applied), that she or the Claimant should enquire about parental benefit sharing. In any event, I

[11] *Rodger v. Canada (Attorney General)* 2013 FCA 222

cannot find that the General Division ignored or misunderstood this evidence, just because it does not refer to it. As stated in *Simpson v. Canada (Attorney General)*,[12] “a tribunal need not refer in its reasons to each and every piece of evidence before it”.

[43] The General Division did not base its decision on an erroneous finding of fact that it made in a perverse of capricious manner or without regard for this Service Canada statement. The General Division did not err under s. 58(1)(*c*) of the DESD Act.

CONCLUSION

[44] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

HEARD ON:	September 11, 2018
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	C. D., Appellant

[12] *Simpson v. Canada (Attorney General)* 2012 FCA 82