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

Citation: *J. L. v. Canada Employment Insurance Commission*, 2018 SST 1090

Tribunal File Number: AD-18-516

BETWEEN:

J. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: October 23, 2018

Canada

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Appellant, J. L. (Claimant), sought to return to his employer in September 2017 after an unpaid leave of about 14 months, but he found that his position had been filled. He applied for Employment Insurance benefits on January 17, 2018, requesting an antedate to September 11, 2017, at the same time. The Respondent, the Canada Employment Insurance Commission (Commission), was unable to establish a benefit period because the Claimant had zero hours of insurable employment in his qualifying period, which it determined to be from January 15, 2017, to January 13, 2018. The Commission also determined that he would not have qualified for benefits as at the earlier date of September 10, 2017, and that he did not have good cause for the delay in filing his application. The Claimant requested the Commission to reconsider, but the Commission maintained its decision that he was not entitled to an antedate and that he had not established a benefit period.

[3] The Claimant next appealed to the General Division of the Social Security Tribunal, where his appeal was summarily dismissed. The Claimant now appeals to the Appeal Division.

[4] The Claimant's appeal is denied. The General Division did not err by concluding that the appeal had no reasonable chance of success.

ISSUES

[5] Did the General Division fail to observe a principle of natural justice by summarily dismissing the Claimant's appeal or otherwise act beyond or fail to exercise its discretion?

[6] Did the General Division err in fact or law by summarily dismissing the Claimant's appeal?

ANALYSIS

Standard of Review

[7] 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.

[8] 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 guided the role of courts on judicial review of administrative decisions have no application in a multilevel administrative framework.

[9] *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 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.

[10] 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.

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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; *Thibodeau v. Canada (Attorney General*), 2015 FCA 167

General Principles

[11] 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.

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

[13] 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.

Issue 1: Did the General Division fail to observe a principle of natural justice by summarily dismissing the Claimant's appeal or otherwise act beyond or fail to exercise its discretion?

[14] The Claimant's contention that the General Division decision is in error appears to relate to the fact that he had been a federal government employee. He asserts that Employment Insurance benefits are a federal benefit and that it was the federal government that took away his employment. Therefore, he believes he should be entitled to benefits as compensation for his loss of employment. He stated that he realized the Commission was operating according to its policies, but he argued that the federal government was in a conflict of interest.

[15] Unfortunately for the Claimant, neither the General Division nor the Appeal Division has the jurisdiction to determine whether the laws and regulations enacted by Parliament put the Commission in a conflict of interest with federal government employees or former employees. In making its decision, the General Division was required to apply the *Employment Insurance Act*

(EI Act) and the DESD Act to the facts, regardless of whether the legislation could be said to be unfair in its operation.

[16] The Claimant has not identified how the General Division decision was procedurally unfair. As to its jurisdiction, the General Division did not refuse to exercise its discretion in finding that there was no reasonable chance of success without considering the "conflict of interest" argument raised by the Claimant. In fact, the General Division would have erred by exceeding its jurisdiction if this had been the basis on which it permitted the appeal to proceed.

[17] The General Division did not err under s. 58(1)(*a*) of the DESD Act.

Issue 2: Did the General Division err in fact or law by summarily dismissing the Claimant's appeal?

[18] The Claimant did not have sufficient hours of insurable employment at the time of his application and sought an antedate to September 11, 2017, the date when he expected to return to work after his leave. Subsection 10(4) of the EI Act requires that the Claimant show that he would have qualified to receive benefits on the earlier day (the date for which he sought an antedate) and that there was good cause for the delay throughout the period of the delay.

[19] According to s. 8(1)(*a*) of the EI Act, the length of the Claimant's qualifying period could not exceed the "52-week period immediately before the beginning of a benefit period under subsection 10(1)," which, in the Claimant's case, would be the Sunday of the week in which the initial claim for benefits would be paid if his claim were not antedated. If his claim were antedated, as he requested, then the 52-week period would be that period immediately prior to September 10, 2017, the Sunday of the week preceding the antedate of his claim.

[20] The Claimant did not dispute that he had not accumulated any hours of insurable employment since July 3, 2016, when he went off work on an unpaid leave, and he also confirmed that none of the circumstances under which s. 8 of the EI Act permits a qualifying period to be extended were applicable to him. Therefore, the length of the qualifying period for his antedate would not have been extended beyond the 52 weeks prior to September 10, 2017. He had no hours of insurable employment in that period, which means that he could not possibly

have qualified for benefits as at September 10, 2017. The Claimant does not meet the first criteria for antedate described in s. 10(1) of the EI Act.

[21] The General Division reviewed the facts and applied the law to correctly find that the Claimant had, on his own admission, zero hours of insurable employment within the qualifying period from January 15, 2017, to January 13, 2018, and therefore he did not qualify when he applied for benefits on January 18, 2018. Likewise, the General Division found that the Claimant would not have qualified on his requested antedate of September 11, 2017. Once again, the Claimant admitted to zero hours of insurable employment in what would have been the qualifying period for the antedate: the period from September 11, 2016, to September 9, 2017.

[22] With reference to the Claimant's residence and his regional rate of employment, the General Division determined that he would have needed 700 hours of insurable employment in his qualifying period, regardless of whether this period preceded his application date or preceded the antedate he requested.

[23] The General Division set out the requirement under s. 53(1) of the DESD Act that it must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.[4] It went on to explain that an appeal with "no reasonable chance of success," in the context of summary dismissal appeals, is one in which 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 the hearing. It cited the Federal Court of Appeals case *Lessard-Gauvin v. Canada (Attorney General*)[5] in support of this point.

[24] The General Division found that it was plain and obvious that the appeal was bound to fail because the Claimant had accumulated zero hours of insurable employment, regardless of whichever qualifying period was selected.

[25] The General Division correctly stated the test for summary dismissal, correctly applied that test, and correctly concluded that the appeal had no reasonable chance of success on the evidence before it. I can find no error of law under s. 58(1)(*b*) or of fact under s. 58(1)(*c*) of the

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

DESD Act in the General Division's determination that it is plain and obvious that the appeal must fail.

CONCLUSION

[26] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division

METHOD OF PROCEEDING:	On the record
SUBMISSIONS:	J. L., Appellant S. Prud'homme, Representative for the Respondent