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

Citation: *Estate of D. L. v Canada Employment Insurance Commission*, 2019 SST 761

Tribunal File Number: AD-18-502

BETWEEN:

Estate of D. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: August 14, 2019

DECISION AND REASONS

DECISION

[1] The appeal is dismissed.

OVERVIEW

[2] The Claimant, D. L., lost his job in January 2017. A few months after he died, his estate applied for Employment Insurance (EI) benefits in July 2017. The Appellant, the Estate of D. L., applied on behalf of a deceased person in order to have access to the benefits to which the Claimant would have been entitled if he had submitted a claim for benefits.

[3] The Respondent, the Canada Employment Insurance Commission, denied EI benefits because the Appellant did not establish a valid reason for the delay in making the claim. The Appellant requested reconsideration of this decision, but the Respondent maintained its initial decision.

[4] The Appellant appealed the Respondent's reconsideration decision to the General Division of the Social Security Tribunal of Canada. The General Division concluded that the requirements of the *Employment Insurance Act* (EI Act) and the *Employment Insurance Regulations* (EI Regulations) with respect to a late application apply to situations of deceased persons. It further concluded that one of the criteria for a late application is the presence of a valid reason justifying the delay and there was nothing in the evidence to establish that the Claimant had such a reason.

[5] The Appellant appealed the General Division decision to the Appeal Division. Leave to appeal was granted because the General Division may have erred in law or based its decision on an error of mixed fact and law or a serious error in the finding of facts.

[6] The Appellant submits that the General Division erred in law by applying the same burden of proof to an application made by an estate as to one made by a claimant. It also submits that the Claimant had psychiatric problems and that is likely the reason he did not file his EI claim in time.

[7] The General Division did not make any reviewable errors. The appeal is dismissed.

PRELIMINARY MATTERS

[8] The General Division decision and the Appeal Division's leave to appeal decision were written in French, because the matter had been filed in French. After receiving a Notice of Hearing for an in-person Appeal Division hearing, the Appellant retained counsel. The Appellant's counsel requested an adjournment of the hearing and a change in the type of hearing.[1] The Appellant requested that the matter continue in English and that the hearing and decision be in English.[2]

[9] The Respondent received notice of the Appeal Division hearing but chose not to participate at the hearing.[3] It relies on the written submissions it filed with the Tribunal.

ISSUES

[10] Did the General Division err in law by misinterpreting or misapplying the applicable legislative provisions?

[11] Did the General Division base its decision on a serious error in its findings of fact by looking for one condition or reason to explain the delay?

[12] If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

ANALYSIS

[13] The Appellant submits that the General Division made errors of law and made serious errors in its fact-finding.

[14] The Respondent's position is that the General Division committed no reviewable errors.

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[1] AD5: Letter, dated March 5, 2019, from Appellant's counsel to the Tribunal.
[2] AD6: E-mail, dated March 21, 2019, from the Appellant to the Tribunal.
[3] AD4: Memorandum, dated February 1, 2019, from the Respondent to the Tribunal; and E-mail, dated March 6, 2019, from the Respondent to the Tribunal.

[15] The only grounds of appeal to the Appeal Division are that the General Division erred in law, failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction, or 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.[4]

[16] The Appeal Division does not owe any deference to the General Division on questions of natural justice, jurisdiction, and law.[5] In addition, the Appeal Division may find an error in law, whether or not it appears on the face of the record.[6] The Appeal Division should show deference to the General Division's findings of fact but has jurisdiction to intervene where the General Division bases its decision on a serious error in its findings of fact.[7] Where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, the Appeal Division may intervene under section 58(1) of the Department of Employment and Social Development Act (DESD Act).[8]

[17] The appeal before the Appeal Division rests on distinct questions of errors of law and serious errors in the findings of fact, each of which discloses an extricable legal issue.

[18] There is no dispute on the following:

a) The Claimant lost his job in January 2017, and he passed away in early July 2017.

b) The Claimant had previously applied for and received EI benefits, but he had not filed a claim for benefits in or after January 2017.

c) The Appellant filed a claim for EI benefits, on behalf of the Claimant, on August 17, 2017. The Appellant requested that the claim be treated as filed earlier (i.e. an antedate), specifically on January 27, 2017.

d) The applicable legislative provision is section 10(4) of the EI Act, which provides that a claim "shall be regarded as having been made on an earlier day if the claimant shows that

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[4] *Department of Employment and Social Development Act* at s 58(1).
[5] *Canada (Attorney General) v Paradis* and *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19 and AD12: Joint Statement of Facts and Standard of Review at paras 18 and 19.
[6] *Department of Employment and Social Development Act*, s 58(1)(b).
[7] *Department of Employment and Social Development Act*, s 58(1)(c) and AD12.
[8] *Garvey v Canada (Attorney General)*, 2018 FCA 118.

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."

[19] The appeal before the General Division turned on the following questions:

a) Do the provisions in the EI Act and EI Regulations related to late applications and requests for antedate apply the same way to a claim filed by an estate as to a claim filed by a claimant?

b) Did the Appellant show that there was a good cause for the delay throughout the relevant period?

Issue 1: Did the General Division err in law by misinterpreting or misapplying the applicable legislative provisions?

[20] The parties agree on the applicable legislative provision. They disagree on its interpretation and its application to the current situation.

[21] The General Division's statement of the legal test was that a claimant must prove the existence of a good cause throughout the entire period of the delay by showing that they acted as a reasonable and prudent person in the same circumstances would have acted.[9]

[22] The Respondent submits that section 10(4) of the EI Act requires a claimant to "show there was good cause for the delay throughout the period" and that the jurisprudence establishes that to show this, the claimant must demonstrate they acted as a reasonable and prudent person in the same circumstances would have acted.[10] Specifically, the claimant must establish that they have fulfilled their obligation to take "reasonably prompt steps" to determine entitlement to benefits and to ensure their rights and obligations under the law.[11] Further, ignorance of the law, even if coupled with good faith, is not sufficient to establish good cause.[12]

[9] General Division decision, at paras 19-21, and 25.
[10] *Canada (AG) v Albrecht*, [1985] 1 FC 710 (CA).
[11] *Canada (AG) v Kaler*, 2011 FCA 266; *Canada (AG) v Scott*, 2008 FCA 145.
[12] *Canada (AG) v Somwaru*, 2010 FCA 336.

[23] The Appellant submits that section 10(4) of the EI Act must be interpreted in a manner that is fair and reasonable in the circumstances. It relies on Supreme Court of Canada jurisprudence and leading scholars on statutory interpretation.[13] The Appellant argues that taking a large and liberal interpretation means taking into account that a living claimant can provide insight into their circumstances but a deceased person cannot. Therefore, where an estate makes the claim, one must depart from the usual legal test of good cause and the reasonable person. Instead, the legal test requiring good cause for delay should be interpreted as: Was it probable that there were things that kept the claimant from being able to apply for benefits?

[24] The Appellant has stated that its submission rests on three pillars:

a) To incur a benefit for a vulnerable party, the opportunity/benefit should not be denied because of an over-restrictive test.

b) One cannot rely on the wording of the legislation alone.

c) Interpretation of the benefits conferring provision should not be mechanical.

[25] The Appellant argues that the General Division erred in law by doing all three in its interpretation and application of section 10(4) of the EI Act. In particular, the Appellant submits that the General Division interpreted the applicable provision mechanically and in an over-restrictive manner by applying the “reasonable person” test.

[26] The *Godbout*[14] case cited by the Appellant is not of much assistance. The appellants in *Godbou*t were individuals injured in a motor vehicle accident, and they alleged that their injuries had been aggravated by conduct of third parties (healthcare providers and police officers). They sought to bring a civil action against third parties in a province that had a no-fault automobile insurance scheme in place. The primary question on appeal was whether a person injured in an automobile accident, who is eligible to receive compensation under the Quebec *Automobile Insurance Act* (QAI Act) but whose condition is aggravated as a result of a fault committed by a third party, can bring a civil action against the third party to seek compensation for bodily injury

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[13] *Godbout v Pagé*, [2017] 1 SCR 273; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 7; and Elmer Driedger in *Construction of Statutes* (2nd ed. 1983), at p 87.
[14] *Supra*, note 3.

resulting from that subsequent fault.[15] In this context, it was necessary to interpret the wording "an injury 'suffered . . . in an accident' within the meaning of the [QAI] Act".[16]

[27] The Appellant here argues that *Godbout* stands for the principle that the opportunity to incur a benefit should not be denied to a vulnerable party because of an over-restrictive legal test. However, a majority of the Supreme Court of Canada held that the appellants' injuries were "suffered … in an accident" and, therefore, they were entitled to the compensation provided for in the QAI Act. As a result, they were not entitled to bring further civil liability proceedings against third parties. In effect, the Supreme Court of Canada denied the appellants' the chance to sue the third parties. A minority of the Court reasoned that because the applicable provision created an exception to the general law of civil liability, it must be narrowly construed. Neither the majority nor the minority decision, in my view, stands for the principle advanced by the Appellant. In addition, the legislative context and statutory interpretation in *Godbout* are not relevant to the present matter.

[28] At best, the *Godbout* decision is an example of statutory interpretation that furthers the objects of the statute and that is plausible, fair, and reasonable. The *Rizzo*[17] case and the Driedger text[18] are also cited by the Appellant in support of these principles of interpretation.

[29] Even while adopting the modern principle of statutory interpretation - which recognizes that statutory interpretation cannot be founded on the wording of the legislation alone and that the words of the statute have to be read in their entire context, having regard not just to their ordinary and grammatical meaning but also to the scheme and object of the EI Act and to the legislature's intention - this principle does not empower tribunals to expand legislative provisions.

[30] Section 10(4) of the EI Act requires a claimant to "show there was good cause for the delay." The Appellant invites me to depart from legal test established by the jurisprudence - that a claimant must demonstrate they acted as a reasonable and prudent person in the same circumstances would have acted – in favour of the question "Was it probable that there were

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[15] *Godbout*, *supra*, note 13, at para 5.
[16] *Ibid.* at para 6.
[17] *Supra,* note 13.
[18] *Ibid.*

things that kept the claimant from being able to apply for benefits?" The Appellant suggested a two-part test as follows: (1) Is there an operating disability present? (2) If there is, was the claimant seriously ill?

[31] However, I can find no basis in the language of the provision or the jurisprudence to adopt an entirely different legal test in situations of a deceased claimant who may have had an operating disability.

[32] The General Division did not err in law by applying the legal test that a claimant must prove the existence of a good cause throughout the entire period of the delay by showing that they acted as a reasonable and prudent person in the same circumstances would have acted.

Issue 2: Did the General Division base its decision on a serious error in its findings of fact by looking for one condition or reason to explain the delay?

[33] No. The General Division did not base its decision on a serious error in its findings of fact.

[34] The Appellant submits that the General Division based its decision on erroneous findings of fact by looking for one condition or reason to explain the Claimant's delay in filing a claim. Instead, the Appellant argues, the General Division should have assessed whether any reason (or a combination of possible reasons) was "probably" what kept him from filing a claim.

[35] The Appellant points to the Claimant's history of alcohol dependence and depression, in addition to his previous periods of receiving EI benefits. The argument advanced is that the Claimant had qualified for benefits in the past and would have qualified again, had he applied. Logically, we should conclude that something kept him from applying for EI benefits this time and it is probable that the "something" was his illness(es).

[36] There are a number of gaps in the Appellant's arguments, not the least of which is a lack of evidence. There is no medical evidence about the Claimant's history of illness (depression or alcohol dependence) in the appeal record. The Claimant's sisters testified at the General Division hearing as follows:

a) They had little contact with the Claimant. In the months before his passing, the Claimant did not communicate with members of his family.

b) They did not know why he had not applied for EI benefits this time, when he had in previous years.

c) Posthumous medical examinations did not establish that the Claimant had suffered from any particular illness(es), physical or mental, prior to his death. The cause of death is unknown.

[37] In *Canada (AG) v Scott*,[19] the Federal Court of Appeal allowed a judicial review of an Umpire's decision on an EI antedating matter under section 10(4) of the EI Act. The Umpire had accepted as good cause for delay that the claimant had testified before the Board of Referees (Board) that she feared she would be accused of attempting to abuse the system. The Board had considered this factor when it found that the claimant failed to act diligently. However, the claimant argued at the Federal Court of Appeal that the Board had failed to consider this argument. The Federal Court of Appeal, in overturning the Umpire's decision stated as follows:

> … [T]he respondent made the same argument before the Umpire that she had made before the Board. The Umpire's duty was then to consider and assess the argument. This he did not do. It was not sufficient for him to say "that these comments could have provided an explanation in regard to a good cause for her delay in applying for benefits earlier." (emphasis added). Either the respondent's fear did provide a good explanation or it did not. To state what a possible effect of an argument is and to leave it at that is not to adjudicate on the merit of that argument. It leaves the answer in the realm of speculation.

[38] The Appellant invites the Appeal Division to conclude that the Claimant's medical condition could have provided an explanation concerning a good cause for his delay in applying for benefits. The Federal Court of Appeal has described this kind of analysis as "is in the realm of speculation." There is no evidence about the Claimant's medical condition and there is no evidence about his delay in applying for EI benefits. Although the Appellant's argument could have provided an explanation that is not enough to "show there was good cause for the delay throughout the period."

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[19] *Supra* note 11 at para 11.

[39] The General Division did not commit a reviewable error in looking for evidence of a reason to explain the delay. The Federal Court of Appeal has held that it is the duty of the tribunal authorized to review EI matters to consider and assess the parties' arguments. The General Division did that and did not base its decision on a serious error in its findings of fact in so doing.

Issue 3: If the General Division committed a reviewable error, should the Appeal Division refer the matter back to the General Division for reconsideration, or can the Appeal Division render the decision that the General Division should have rendered?

[40] Since I have found that the General Division did not commit a reviewable error, the issue of appropriate remedy need not be considered.

CONCLUSION

[41] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division

HEARD ON:	April 24, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	Y. L. and H. L., co-executors of the Estate of D. L. (Appellant) Kelly Lamrock, Representative for the Appellant