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

[TRANSLATION]

Citation: *J. M. v Canada Employment Insurance Commission*, 2019 SST 992

Tribunal File Number: AD-18-488

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision by: Shu-Tai Cheng

Date of Decision: October 8, 2019

DECISION AND REASONS

DECISION

[1] The appeal of the decision of the General Division of the Social Security Tribunal of Canada dated June 29, 2018, is allowed in part.

OVERVIEW

[2] The Appellant, J. M., applied for Employment Insurance (EI) benefits in May 2016 in relation to the suspension of his employment in February 2016. He also submitted an application for renewal of his benefits in October 2017 in relation to his dismissal in September 2016. The Respondent, the Canada Employment Insurance Commission, refused the applications because the Appellant had not established good cause for the delay in submitting his applications.

[3] The Appellant submits that he had several reasons for the delay: he was disputing the suspension and had filed a complaint against the employer; the suspension had a significant psychological effect on him; the Commission did not follow up on his initial application, which he submitted at the time of his suspension; he had received EI sickness benefits and believed he was not entitled to EI regular benefits; he was disputing the dismissal and had filed a complaint against the employer; and he had a reasonable expectation of compensation from the employer.

[4] The Appellant appealed the Commission's decision. The General Division found that the Appellant did not have good cause for the delay.

[5] The Appellant submits that the General Division erred in law in making its decision and based its decision on an important error concerning the facts in the appeal file.

[6] The appeal is allowed in part because the General Division erred with respect to the May 2016 application.

ISSUES

[7] Did the General Division err in finding that the Appellant did not have good cause for the delay?

[8] If the General Division erred, should the Appeal Division give the decision that the General Division should have given or refer the matter back to the General Division?

ANALYSIS

[9] The only grounds of appeal are that the General Division erred in law, failed to observe a principle of natural justice, 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. Given that the General Division may have erred in law in making its decision, the Appeal Division granted leave to appeal.[1]

[10] The Appeal Division does not owe any deference to the General Division on issues of natural justice, jurisdiction, or law.[2] In addition, the Appeal Division may find an error of law whether or not it appears on the face of the record.[3]

[11] The appeal before the General Division turned on the question of whether the Appellant had good cause for the delay in filing his applications, which is a question of mixed fact and law.

[12] Where an error of mixed fact and law made by the General Division concerns a question of law or a serious error in the findings of fact, the Appeal Division may intervene under section 58(1) of the *Department of Employment and Social Development Act*.[4]

[13] The appeal before the Appeal Division is based on errors of law and serious errors in the findings of fact.

[14] Following the Appellant's applications and submissions, an in-person hearing before the Appeal Division was granted. The Appellant attended with his lawyer. The Respondent gave notice before the hearing that it would not attend and that its position was explained in the written arguments.

---

[1] *Department of Employment and Social Development Act* (DESD Act), s 58(1).
[2] *Canada (Attorney General) v Paradis* and *Canada (Attorney General) v Jean*, 2015 FCA 242 at para 19.
[3] DESD Act, s 58(1)(b).
[4] *Garvey v Canada (Attorney General)*, 2018 FCA 118.

Issue 1: Did the General Division err in finding that the Appellant did not have good cause for the delay?

[15] Yes, the General Division erred in basing its decision on an erroneous finding of fact that it made without regard for the material before it.

[16] According to the Appellant, the General Division erred in its application of the legislation by imposing a burden of proof that exceeds the one required by the applicable case law.

[17] He also argues that, although the General Division acknowledged that the applicable test is objective and subjective, it arbitrarily refused and failed to consider the determinative evidence before it. In other words, the General Division misapplied the legal test.

[18] According to the Appellant, the General Division refused and failed to consider the following determining factors:

a) The Appellant had filed an application in May 2016 concerning the suspension of his employment (in February and March 2016), and it was rejected. Based on that experience, he thought he was not entitled. Furthermore, he had received EI benefits in the 1990s and he had received cards in the mail. The absence of cards in 2016 contributed to his belief that he was not entitled.

b) It was the Appellant's children who helped him find a psychologist and a lawyer. He was emotionally overwhelmed and could not act on his own or otherwise.

c) The Appellant filed a complaint against the employer in April 2016. Among other things, he wanted to be reinstated to his employment and to be compensated.

d) The Appellant was dismissed in September 2016. There was already a complaint filed against the employer regarding the suspension. The dismissal was added to his case against the employer.

e) He was advised by his lawyer that he was going to win in court and that there would be a settlement, in other words, that he would eventually receive compensation from his employer. The Appellant had been informed by his lawyer that he would have to

reimburse the EI benefits, if he received them, when he received compensation from his employer.

f) It was reasonable for the Appellant to wait to see the eventual compensation from the employer before filing another EI application.

g) According to case law, other workers saw their antedate requests granted when they were waiting for compensation.

h) The documents regarding the settlement with the employer were finalized on October 31, 2017. The Appellant filed a renewal application on October 27, 2017, concerning his dismissal, when the settlement was reached.

[19] The General Division considered past Umpire decisions: [translation] "demonstrate a certain flexibility regarding claimants who were waiting for a decision or payment related to compensation and who were late in filing their application for benefits for that reason."[5] However, it referred to Federal Court of Appeal case law that applies to the situation and applied that case law here. The General Division made no error in law in this regard.

[20] The General Division decision refers to the Appellant's emotional state and to the fact that he was disputing his suspension and his dismissal. Regarding the Appellant's belief that he was not eligible for benefits, the General Division noted that he had considered the advice of a friend.

[21] The General Division believed the Appellant's sincerity and the fact that the suspension had greatly affected him. However, it found that filing an application is relatively simple and takes little time, and that the Appellant had been able to consult a lawyer and file a complaint. Therefore, the General Division could not understand why the Appellant had not taken the time to file an application within the applicable time limits.

[22] The General Division did not note that the Appellant had needed the help of his children to consult a lawyer and a psychologist. Nor did it consider that the Appellant's belief (that he

[5] General Division decision, para 18.

was not entitled) was based on more than the advice of a friend. On this question, the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

[23] The General Division made an error that the Appeal Division can review.

Issue 2: If the General Division erred, should the Appeal Division give the decision that the General Division should have given or refer the matter back to the General Division?

[24] The Appeal Division may give the decision that the General Division should have given or refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate.[6]

[25] The Appellant submits that the evidence in the file is complete and that the Appeal Division can give the decision that the General Division should have given. The Respondent provided no submissions on this question.

[26] The evidence in the file is complete, and there is no question of the Appellant's credibility or testimony before the General Division. The Appeal Division will give the decision the General Division should have given.

[27] Unless there are exceptional circumstances, an applicant is required to take reasonably prompt steps to determine their eligibility for benefits and to guarantee their rights and obligations under the law.[7] Ignorance of the law, even if coupled with good faith, is not sufficient to establish good cause.[8]

[28] The Appellant must establish good cause for the delay based on the evidence in the file. That does not means that he needs only one reason to justify the delay; the circumstances as a whole must be considered to establish whether there is good cause. The burden of proof is on a balance of probabilities.

---

[6] DESD Act, s 59(1).
[7] *Canada (Attorney General) v Persiiantsev*, 2010 FCA 101; *Canada (Attorney General) v Kokavec*, 2008 FCA 307; *Canada (Attorney General) v Paquette*, 2006 FCA 309.
[8] *Canada (Attorney General) v Kaler*, 2011 FCA 266.

Application concerning the suspension

[29] Regarding the application filed on May 3, 2016, concerning the suspension of the Appellant's employment on February 13, 2016, the Appellant submits that he was greatly affected by his suspension and that he had been able to ask for help (lawyer and psychologist) only through his children. The Appellant's son accompanied him to meetings with the lawyer. The Appellant also notes that he is unfamiliar with computers and that his daughter helped him with his online applications. Furthermore, he believed that he was not entitled to EI benefits.

[30] Did the Appellant establish good cause for the delay (between the deadline for filing his application concerning his February 13, 2016, suspension and May 3, 2016)? Were the Appellant's circumstances in March and April 2016 exceptional circumstances of the kind required by case law?

[31] The evidence shows that the Appellant was emotionally affected by his suspension and that he had been able to seek help through his children. The evidence also shows that the Appellant returned to work on March 14, 2016, in a negative work environment and in a state of constant stress. He filed a complaint with the labour standards commission regarding his suspension in April 2016, and an application for benefits in May 2016.

[32] The Appeal Division found that the Appellant demonstrated that, between February 13, 2016, and May 3, 2016, he did what a reasonable and prudent person would have done in similar circumstances. He returned to work despite the constant stress and difficult environment. He accepted help to consult a lawyer and a psychologist. His belief that he was not entitled to benefits was only one factor. The Appellant's psychological condition, the measures taken against him by his employer, and the negative environment on his return to work after his suspension constitute exceptional circumstances exempting him from the requirement that a claimant take reasonably prompt steps to determine their eligibility for EI benefits.

[33] The Respondent established the benefit period starting on May 1, 2016. The May 3, 2016, application is antedated.

Application concerning the dismissal

[34] The Appellant was dismissed on September 6, 2016. At the time, he was still covered by the benefit period established on May 1, 2016, following his initial application. However, his renewal application was filed only on October 27, 2017, that is, more than 13 months after his employment ended.

[35] In addition to the factors already discussed, the Appellant submits that his belief that he was not entitled to EI benefits had been bolstered by the refusal of his application in May 2016 and an absence of cards in the mail. Furthermore, the Appellant had filed a complaint against the employer, to which he added the dismissal, and he had a reasonable expectation of eventual compensation from the employer. He also submits that his lawyer had advised him that he would have to pay back EI benefits if he received any, but his lawyer did not handle EI applications.

[36] Did the Appellant establish good cause for the delay (between the deadline for filing an application regarding his September 6, 2016, dismissal and October 27, 2017)? Were the Appellant's circumstances during this period exceptional circumstances of the kind required by case law?

[37] The Appeal Division finds that the Appellant's circumstances are not exceptional circumstances of the kind required by case law.

[38] The Appellant believed he was not entitled to EI benefits. He was also waiting for compensation from the employer and had been advised that he would have to pay back the EI benefits after the employer's compensation was finalized. Ignorance of the law, even if coupled with good faith—here a combination of personal beliefs and the advice of a lawyer on another subject—is not sufficient to establish good cause. Furthermore, the Appellant's psychological condition no longer prevented him from obtaining information from reliable sources. He had hired a lawyer in April 2016, and this lawyer continued his work on the file concerning the complaint against the employer. The Appellant's children helped him consult a psychologist in 2016. In September 2016, the Appellant could have and should have verified whether he was eligible for EI benefits relating to his dismissal and what his obligations were under the law.

[39] It is possible that the Appellant's lawyer relied on the historical line of Umpire decisions showing a certain flexibility with respect to claimants who were awaiting a decision or payment relating to compensation and who were late in filing an application for benefits for that reason, but those decisions do not constitute binding case law for the General Division or Appeal Division. By contrast, the Tribunal is bound by case law of the Federal Court and Federal Court of Appeal.

[40] The Appeal Division finds that the Appellant has not established good cause for the delay in filing his renewal application.

CONCLUSION

[41] The appeal is allowed in part.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVES:	Alain Béliveau, Lawyer for the Appellant J. M. Manon Richardson, Representative for the Respondent