Federal Court of Appeal | Cour d'appel fédérale

Date: 20180119

Docket: A-430-16

Citation: 2018 FCA 21

CORAM: **RENNIE J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

ASMA QUADIR

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Calgary, Alberta, on January 17, 2018.

Judgment delivered at Ottawa, Ontario, on January 19, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] This is an application for judicial review of the decision dated October 19, 2016 of the Social Security Tribunal – Appeal Division (2016 SSTADEI 514).

[2] The applicant had applied for employment insurance benefits under the *Employment Insurance Act*, S.C. 1996, c. 23. The Canada Employment Insurance Commission denied her application because she did not meet the requirement in subsection 10(4) of "good cause" in

order to antedate her claim, without which she had insufficient hours of insured employment to qualify. The applicant appealed to the Social Security Tribunal – General Division. The tribunal allowed her appeal and antedated her claim. On appeal by the Attorney General, the Social Security Tribunal – Appeal Division reinstated the Commission's decision.

[3] The relevant facts are set forth in detail in the decision of the General Division and need not be repeated save to note that during the qualifying period of time in question the applicant was a resident physician with Alberta Health Services. Her residency ended on October 22, 2013. She did not apply for employment insurance benefits until August 29, 2014, some ten months later. She requested that her claim be antedated to November 1, 2013.

[4] Applying the principles expressed by this Court in *Canada (Attorney General) v. Burke*, 2012 FCA 139, 434 N.R. 34 (*Burke*), the General Division allowed the applicant's appeal on the basis that she acted as a reasonable and prudent person would have in the circumstances and, consequently, showed good cause for delay (at paras. 34–38). The General Division antedated her claim to November 1, 2013 with the result that the applicant had accumulated sufficient hours within the qualifying period (at para. 40).

[5] The Appeal Division allowed the respondent's appeal, finding that the General Division erred by applying the wrong legal test. Citing the decision of this Court in *Canada (Attorney General) v. Kaler*, 2011 FCA 266 (*Kaler*). The Appeal Division stated the test as absent exceptional circumstances, an applicant must take "'reasonably prompt steps' to determine entitlement to benefits and to ensure [their] rights and obligations" and that "[t]his obligation imports a duty of care that is both demanding and strict" (at para. 11). The Appeal Division

allowed the appeal from the General Division and restored the decision of the Commission. In so doing, it erred.

[6] The jurisdiction of the Appeal Division is set forth in paragraphs 58(1)(*a*) to (*c*) of the *Department of Employment and Social Development Act* (S.C. 2005, c. 34). It reads:

Grounds of appeal	**Moyens d'appel**
58 (1) The only grounds of appeal are that	**58 (1)** Les seuls moyens d'appel sont les suivants :
(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;	**a)** la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;
(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or	**b)** elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;
(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 before it.	**c)** elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[7] None of the criteria set forth in paragraphs 58(1)(*a*) to (*c*) which would warrant the intervention of the Appeal Division were met in this case. While counsel for the Attorney General contends that the General Division made an error in law in not applying the binding jurisprudence of this Court, I am not satisfied that the reasons of the Appeal Division rest on anything more than a disagreement as to the application of settled law to the facts.

[8] The Appeal Division did not identify the nature of the legal error made by the General Division. The tests in *Burke* and *Kaler* are identical. The question is what a reasonable person

would have done "in her circumstances". Indeed, the reasons demonstrate that the Appeal Division simply disagreed with the conclusion that the General Division reached as to whether the measures taken by the applicant were "in the circumstances" reasonable.

[9] The application of settled principles to the facts is a question of mixed fact and law, and is not an error of law. In the result, the Appeal Division had no jurisdiction to interfere with the General Division decision. The standard of review applicable to consideration of decisions of the Appeal Division by this Court is reasonableness: *Kamgar v. Canada (Attorney General)*, 2013 FCA 157, 446 N.R. 337. The decision of the Appeal Division to intervene on a question of mixed fact and law was, in light of its jurisdiction, unreasonable.

[10] The appeal succeeds on a second ground as well.

[11] The Appeal Division found that the applicant's actions "were entirely reasonable given her circumstances" but nevertheless allowed the appeal on the basis that the applicant did not take "reasonably prompt steps" to determine her entitlement to benefits.

[12] The applicant's conduct cannot be both entirely reasonable under the circumstances and at the same time be unreasonable. The Appeal Division superimposed a further obligation, above and beyond the requirement of what a reasonable person would have done in similar circumstances. As noted by this Court in *Rodger v. Canada (Attorney General)*, 2013 FCA 222, 449 N.R. 295, ignorance of the law does not constitute good cause unless an individual can show that what they did was reasonable under the circumstances. Having found the applicant's conduct to be reasonable, it was not open to the Appeal Division to find it unreasonable when assessed against some further or higher obligation to take additional steps. The test is one of reasonability,

informed by the applicant's subjective appreciation of the circumstances, assessed on an objective standard.

[13] The assessment of the reasonableness of an applicant's conduct is objective, situated in the particular facts of the case. Here, those facts, as found by the General Division, included that while a resident, the applicant was technically a student, and attended academic sessions during her training period. The objective assessment also included the fact that she did not receive a record of employment after her residency, which would have prompted her to submit a benefits application.

[14] It was not open to the Appeal Division, in light of the limitation on its jurisdiction and in the absence of the existence of an error of law, breach of natural justice or capricious findings of fact, to reach a different result on the same facts as found by the General Division.

[15] I would allow the application and set aside the decision of the Appeal Division.

"Donald J. Rennie"
J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPLICATION FOR JUDICIAL REVIEW OF A DECISIONOF THE SOCIAL SECURITY TRIBUNAL – APPEAL DIVISION DATED OCTOBER 19, 2016 (2016 SSTADEI 415) DOCKET NO. AD-15-447

DOCKET:	A-430-16
STYLE OF CAUSE:	ASMA QUADIR V. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 17, 2018
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	JANUARY 19, 2018

APPEARANCES:

Asma Quadir	APPLICANT
Vanessa Luna	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT