[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. M. P.*, 2015 SSTAD 53

Appeal No. AD-13-1098

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

M. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Application for Leave to Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Pierre Lafontaine

DATE OF DECISION: January 14, 2015

DECISION

[1] The Tribunal allows the application for leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On June 12, 2013, a Board of Referees found that:

> - There was no basis for allocating the Respondent's earnings in accordance with sections 35 and 36 of the *Employment Insurance Regulations* (Regulations) because section 46.01 of the *Employment Insurance Act* (Act) provides for a time limit of thirty-six (36) months.

[3] On June 28, 2013, the Applicant filed an application for leave to appeal with the Appeal Division.

ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal."

[6] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ANALYSIS

[7] In accordance with section 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(*a*) the Board of Referees failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(*b*) the Board of Referees erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) the Board of Referees based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[9] The Tribunal will grant leave to appeal if the Applicant shows that one of the above-mentioned grounds of appeal has a reasonable chance of success.

[10] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction whose response might justify setting aside the decision under review.

[11] Given the foregoing, does the Applicant's appeal have a reasonable chance of success?

[12] In its application for leave to appeal, the Applicant argues that section 46.01 of the Act has been in play only since January 6, 2013, and only for earnings received by a claimant for which the Applicant on that date had not yet determined whether there had been payment of excess benefits "that would not have been paid if the earnings had been paid or payable at the time the benefits were paid."

[13] In this case, the Applicant argues that the determination was done in December 2012 and that, on that date, section 45 of the Act was not subject to any time limit for reconsideration.

[14] It also argues that, if the Tribunal were to conclude that section 46.01 of the Act applied to this case, the Board of Referees would have exceeded its jurisdiction because it did not consider each of the requirements provided for in that section. The Applicant argues that, although the 36-month limitation period referred to in section 46.01 of the Act had elapsed, the Board of Referees should have returned the file to the Applicant so that it could rule on the second requirement, namely the one dealing with administrative costs.

[15] After reviewing the appeal docket, the Board of Referees' decision and the arguments made in support of the application for leave to appeal, the Tribunal concludes that the appeal has a reasonable chance of success. The Applicant raised a number of questions of fact and law regarding the Board of Referees' interpretation and application of sections 45 and 46.01 of the Act, whose responses might justify setting aside the decision under review.

CONCLUSION

[14] The Tribunal allows the application for leave to appeal to the Appeal Division of the Social Security Tribunal.

Pierre Lafontaine
Member, Appeal Division