

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. C. O.*, 2015 SSTAD 84

Appeal No. AD-13-869

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

C. O.

Respondent

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

SOCIAL SECURITY TRIBUNAL MEMBER: Pierre Lafontaine

DATE OF DECISION: January 21, 2015

DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On October 11, 2013, a Board of Referees found that:

- Disentitling the Respondent under sections 9 and 11(1) and 11(4) of the *Employment Insurance Act* (the Act) was justified because the Respondent failed to prove that she was unemployed;
- The overpayments should be written off because of undue hardship pursuant to subparagraph 56(1)(f)(ii) of the *Employment Insurance Regulations* (the Regulations).

[3] On November 14, 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] The Applicant maintains that the Board of Referees erred in its interpretation of its jurisdiction to review the Applicant's write-off decisions. It also alleges that the Board exceeded its jurisdiction by writing off the benefit overpayments.

[13] The Applicant argues that the case law has ruled, both before and after the changes made to the former section 114 of the Act in 1996, that the Applicant's decision regarding a write-off can be reviewed only as a result of an application for judicial review filed with the Federal Court.

[14] The Applicant maintains that, in *Steel v. Canada (AG)*, 2011 FCA 153, the incidental remark by Stratus J. (concerning Parliament's intent to allow debtors to appeal the Commission's write-off decisions to the Board of Referees and the Umpire) is not part of the Federal Court of Appeal decision and does not bind the Court. Therefore, the Board of Referees erred by determining that *Steel* enabled it to make a decision regarding a write-off.

[15] Finally, the Applicant argues that it did not make any write-off decision regarding undue hardship pursuant to subparagraph 56(1)(f)(ii) of the Regulations. Consequently, it is of the opinion that the Board erred in determining that the Applicant had made such a decision and exceeded its jurisdiction by determining that the Applicant should write off the overpayments completely because the claimants had suffered undue and unreasonable hardship.

[16] 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 Board of Referees' interpretation and application of *Steel* raises a number of questions of jurisdiction, fact and law whose response might justify setting aside the decision under review.

CONCLUSION

[17] Leave to appeal is granted.

Pierre Lafontaine

Member, Appeal Division