

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. G. D. et al.*, 2015 SSTAD 96

Appeal No. AD-14-401

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

G. D. et al.

Respondents

and

Les Fruits de Mer de l'Est du Québec Inc.

Third party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Pierre Lafontaine

DATE OF DECISION: January 26, 2015

DECISION

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

INTRODUCTION

[2] On May 30, 2014, the General Division of the Tribunal found that:

- The Respondents were unemployed given that the Applicant failed to show that subsection 11(4) of the *Employment Insurance Act* (the Act) was applicable or that the Respondents worked a full week under subsection 11(1) of the Act and subsection 31(1) of the *Employment Insurance Regulations* (the Regulations).

[3] On June 30, 2014, 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 subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

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

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

(c) the General Division 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 argued that the General Division of the Tribunal erred in its interpretation of *Canada (AG) v. Buchanan*, 2003 FCA 51, and therefore made an error of law on which the Appeal Division must rule.

[13] It argued that, contrary to the General Division's interpretation, *Buchanan* does not reverse the onus of proof, and the employees making Employment Insurance benefit claims still bear the onus. The Applicant argued that the employees in this case did not submit any evidence of what constitutes a normal work week.

[14] According to the Applicant, *Buchanan* shows the importance of submitting evidence of the normal work week without suggesting, even implicitly, that the Applicant bears the onus of proof.

[15] The General Division's decision states the following regarding *Buchanan* and the question of the onus of proof:

[Translation]

[90]... however, the point to remember in this case is not the nature or even the industry in question, but the fact that, without explicitly stating it, the Court seems to indicate that the Respondent Commission bears the onus of proof regarding what would constitute a normal work schedule.

...

[97] The Tribunal reiterates that, according to its analysis of *Buchanan, supra*, there seems to have been a reversal of the onus of proof regarding the issue of the determination of a normal work week.

(Emphasis added by the undersigned)

[16] The Tribunal finds that the General Division's interpretation of *Buchanan* raises an important question of law: who has the onus of showing what constitutes a normal work week?

[17] After reviewing the appeal docket, the General Division's decision, including the aforementioned excerpt, 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. In this case, there is a question of law whose response might justify setting aside the decision under review.

CONCLUSION

[18] Leave to appeal is granted.

Pierre Lafontaine

Member, Appeal Division