

[TRANSLATION]

Citation: *F. C. v. Canada Employment Insurance Commission*, 2015 SSTAD 355

Appeal No. AD-13-611

BETWEEN:

F. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

SOCIAL SECURITY TRIBUNAL MEMBER: Shu-Tai Cheng

DATE OF DECISION: March 17, 2015

DECISION

[1] Leave to appeal to the Appeal Division of the Social Security Tribunal (Tribunal) is granted.

INTRODUCTION

[2] The Applicant received severance pay from his employment with Air Canada/Aveos, and the Respondent determined that the amount constituted earnings within the meaning of subsection 35(2) of the *Employment Insurance Regulations (Regulations)*. On June 21, 2013, a Board of Referees determined that the Applicant's earnings had been allocated in accordance with sections 35 and 36 of the Regulations, and dismissed the Applicant's appeal.

[3] The Applicant filed an application for leave to appeal (the Leave Application) with the Appeal Division of the Tribunal on July 18, 2013.

[4] The Tribunal asked the parties for written submissions concerning the Leave Application. The Applicant's representative filed submissions on his behalf. The Respondent filed a letter stating that its only submission regarding the Leave Application was that the Applicant had not met his burden of proof.

ISSUE

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

THE LAW AND ANALYSIS

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

[7] 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".

[8] According to subsection 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.

[9] A decision of the Board of Referees is considered a decision of the General Division.

[10] A Leave Application is a preliminary step to a hearing on the merits. It is a first and lower hurdle for the applicant to meet than that which must be met on the hearing of an appeal on the merits. The applicant at the Leave Application stage does not have to prove his or her arguments.

[11] The Tribunal must grant the Leave Application if the applicant shows that one of the above-mentioned grounds of appeal has a reasonable chance of success.

[12] To this end, the Tribunal must be able to determine, in accordance with section 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision attacked.

[13] In his Leave Application and written submissions, the Applicant points out that

- a) a notice of representation by Mouvement action chômage de Montréal (MAC Montréal) was filed with the Commission on May 22, 2013;
- b) an appeal file was created for the Board of Referees without notifying the Applicant or his representative;
- c) the file should have been included with those of the same employer's former workers, as established by the Commission;
- d) neither the Applicant nor his representative were notified of the Board of Referees' hearing;
- e) the hearing was held in their absence; and
- f) a decision was made without having given the Applicant the opportunity to be heard.

The substance of these arguments is that the Board of Referees failed to observe a principle of natural justice, namely, *audi alteram partem*, the principle that the other side (or sides) should be heard.

[14] The decision of the Board of Referees indicates that the Applicant did not attend his hearing, and that the decision was made on the basis of the appeal file. I have reviewed the Board's decision and the appeal file in detail. There is no notice of hearing in the file. The notice of representation by MAC Montréal is not in the appeal file either, but the Applicant provided a copy of the notice with his Leave Application. The notice is dated May 22, 2013, and was faxed that same day, one month before the hearing.

[15] Having reviewed the appeal file, the decision of the Board of Referees, and the arguments in support of the Leave Application, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question of natural justice, the answer to which may lead to the setting aside of the contested decision.

CONCLUSION

[16] The Tribunal grants leave to appeal to the Appeal Division of the Tribunal.

[17] This decision on the application for leave to appeal does not presume the result of the appeal on the merits.

[18] I invite the parties to file submissions about the form of hearing—if a hearing is appropriate—and about the merits of the appeal.

Shu-Tai Cheng

Member, Appeal Division