Citation: *P. G. v. Canada Employment Insurance Commission*, 2015 SSTAD 406

Appeal No. AD-14-478

BETWEEN:

P. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER : Mark Borer

DATE OF DECISION: March 24, 2015

DECISION: Appeal dismissed

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On May 27, 2014, a member of the General Division summarily dismissed the Appellant's appeal. In due course, the Appellant appealed to the Appeal Division.

[3] On February 3, 2015, a teleconference hearing was held. The Appellant and the Commission attended and made submissions.

THE LAW

[4] According to 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, whether or not the error appears on the face of the record; or
>
> (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.

[5] As previously determined by the Federal Court of Appeal in *Canada (Attorney General) v. Jewett* 2013 FCA 243, *Chaulk v. Canada (Attorney General)* 2012 FCA 190 and many other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for questions of fact and mixed fact and law in employment insurance appeals is reasonableness.

ANALYSIS

[6] Although the initial determination of the Commission under appeal relates to whether or not the Appellant had accumulated enough insurable hours to qualify for benefits, the true issue in this case is whether or not the General Division member correctly determined and applied the legal test to be used when summarily dismissing an appeal. For the following reasons, I find that they did.

[7] Subsection 53(1) of the *Act* states that "the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success".

[8] To my knowledge, this will be among the first decisions issued by the Appeal Division providing guidance as to how to determine whether or not a summary dismissal is warranted.

[9] The Appellant asks that I grant him "moral justice". He submits that he has paid into the system for many years and is entitled to benefits, but admits that he is short on insurable hours.

[10] The Commission submits that the decision of the General Division member was correct, and that the Appellant's appeal had no reasonable chance of success. They ask that the appeal be dismissed.

[11] Although the *Act* does not elaborate as to what constitutes a reasonable chance of success in the context of a summary dismissal, I take judicial notice of Issue 19 of the Senate of Canada publication "Proceedings of the Standing Senate Committee on National Finance". At the morning hearing on May 15, 2012, testimony was given indicating that the intent of the legislation was to limit summary dismissals to cases "where there is 100 per cent [sic] inability to move forward".

[12] In support of the above testimony, I note that Parliament has enacted a legislative and regulatory framework that does not allow the Employment Insurance Section of the General Division to make determinations on the record, even though the Income Security Section of the General Division is permitted to do so.

[13] As Parliament does not speak in vain, I must conclude from this that it was Parliament's intention to ensure that appellants in the vast majority of employment insurance cases before the General Division be given an opportunity to be heard. It may be inferred from this that summary dismissals are not meant to be used routinely.

[14] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the Social Security Tribunal legislative and regulatory framework, they have considered the issue many times in the context of their own summary dismissal procedure. *Lessard-Gauvin v. Canada (Attorney General)* 2013 FCA 147 and *Breslaw v. Canada (Attorney General)* 2004 FCA 264 serve as representative examples of this group of cases.

[15] In *Lessard-Gauvin*, the court stated that:

> "The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail…"

[16] The court expressed similar sentiments in *Breslaw*, finding that:

> "…the threshold for the summary dismissal of an appeal is very high, and while I have serious doubt about the validity of the appellant's position, the written representations which he has filed do raise an arguable case. The appeal will therefore be allowed to continue."

[17] I note that the determination of whether or not to summarily dismiss is a threshold test. It is not appropriate to examine the case on the merits in the absence of the parties, and then to dismiss the case on the basis that it cannot succeed. Instead, considering the cases cited above, I conclude that the correct test to be applied in cases of summary dismissal is:

> Is it plain and obvious on the face of the record that the appeal is bound to fail?

[18] To be clear, the question is not whether or not the appeal must fail after a full airing of the facts, jurisprudence, and submissions. Rather, the true question is whether or not that failure is pre-ordained no matter what evidence or arguments might be presented at a hearing. Almost by definition, a summary dismissal should not require a lengthy decision.

[19] In the case at hand, the General Division member was faced with an appeal that did not set out any factual basis for the contention that the Appellant was entitled to benefits. Given that there was no evidence filed to show that the Appellant had sufficient hours to qualify, the General Division member had no choice but to send notice of her intention to proceed by way of summary dismissal in accordance with s. 22 of the *Social Security Tribunal Regulations*.

[20] In response to this notice, the Appellant provided additional submissions detailing his views on a variety of issues relating to justice and the employment insurance system as well as his personal circumstances and work history. No additional evidence was adduced suggesting that the Appellant had sufficient insurable hours to qualify for benefits as required by the *Employment Insurance Act*.

[21] In their decision, the General Division member found that:

> "Although the [General Division member] sympathizes with [the Appellant's] particular situation and is not without compassion for the circumstances described, the criteria for eligibility cannot be modified to reflect [the Appellant's] personal situation. The [General Division member] is supported in its finding by the Federal Court of Appeal which has held that the *Act* does not allow any discrepancy and provides no discretion with regards to the number of hours of work required in order to fulfill the conditions for eligibility (*Levesque* 2001 FCA 304).
>
> For the aforementioned reasons, the [General Division member] finds that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed."

[22] Although the General Division member did not explicitly state the correct test to be applied, it is clear to me that they had an appreciation of the purpose of summary

dismissals, bore in mind the high threshold required to summarily dismiss an appeal, and properly considered whether the case before them met that high threshold.

[23] Having considered the docket and the submissions of the parties, I find that it was plain and obvious on the face of the record that the appeal to the General Division was bound to fail. As such, the General Division member's determination that this appeal should be summarily dismissed was correct.

CONCLUSION

[24] For the reasons above, the appeal is dismissed.

Mark Borer
Member, Appeal Division