

**Citation: *A. A. v. Canada Employment Insurance Commission*, 2015 SSTAD 494**

**Date: April 17, 2015**

**File number: AD-13-640**

**APPEAL DIVISION**

**Between:**

**A. A.**

**Applicant**

**and**

**Canada Employment Insurance Commission**

**Respondent**

**Decision by: Shu-Tai Cheng, Member, Appeal Division**

## **REASONS AND DECISION**

### **INTRODUCTION**

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the Board of Referees (Board) issued on April 17, 2013. The Board denied his appeal on whether his vacation pay, pay in lieu of notice and severance pay constituted earnings that should be allocated pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations) with a modification that the Commission recalculate the overpayment amount after correcting its error in the period of allocation of vacation and severance pay.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on June 5, 2013, having received the Board decision on April 23, 2013. The Application was filed 43 days after the Applicant received the Board's decision.

[3] The Application was not treated administratively by the Tribunal as a late application for leave to appeal.

### **ISSUE**

[4] In order to succeed on this application for leave, the Applicant must show that the appeal has a reasonable chance of success.

### **SUBMISSIONS**

[5] The Applicant submitted in support of the Application that:

- a) He verbally accepted to join a project in July 2012 with the same employer that had given him a temporary lay-off notice in February 2012, and verbal acceptance is the normal practice in that company;
- b) He was introduced to the project team on July 25, 2012 and he attended meetings, spent time on research, document preparation and gave advice on the project;

- c) The project manager “had his fingers crossed” that the procedural issues to transfer him to the project team could be resolved through the company’s human resources manager (but ultimately he was not officially hired back);
- d) Because of the foregoing, the lieu of notice amount should be allocated as of September 19, 2012, the last day he worked on the project; and
- e) The Board made an erroneous decision because it did not familiarize itself with the business practices of the company and misinterpreted the materials he submitted in evidence.

[6] The Applicant also made the arguments in paragraph [5] a) to d), above, before the Board.

## **LAW AND ANALYSIS**

[7] The Applicant relied on the 60-day limit which existed at the time he filed an appeal with the Board. The Application was filed with the Tribunal outside of the current 30-day time limit, but it was filed within the old 60-day time limit. The Applicant gave these reasons for being late with filing the Application.

[8] In the interests of justice, I grant an extension of time for the filing of the Application, if one is needed.

[9] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development (DESD) 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”.

[10] Subsection 58(2) of the DESD Act provides that “leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success”.

[11] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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.

[12] For our purposes, the decision of the Board is considered to be a decision of the General Division.

[13] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[14] I will discuss each of the Applicant's submissions in paragraph [5] above. Although the Applicant does not cite the subsection relied upon, it appears to me that each of these submissions is based the ground of appeal referred to in paragraph 58(1)(c) of the DESD Act: that the Board 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.

[15] The Board considered the Applicant's submissions as set out in subparagraphs [5] a) to d) and referred to submissions made by the Applicant on pages 3 to 6 of its decision. The Applicant's testimony related to subparagraphs [5] a) to d) is set out on pages 3 and 4 of the decision.

[16] In subparagraph [5] e), the Applicant argues that the Board's decision is erroneous because it did not familiarize itself with the company's hiring practices. There was evidence before the Board on the circumstances of the Applicant's possible hire back in July 2012

[17] The Applicant gave similar evidence and made the same arguments before the Board. The Appeal Division of the Tribunal, on an application for leave to appeal, cannot review and evaluate the evidence that was presented before the Board outside of the grounds of appeal

enumerated in subsection 58(1) of the DESD Act. An application for leave to appeal is not a new hearing of the Applicant's case.

[18] I have read and carefully considered the Board's decision and the record and the Application. There is no suggestion by the Applicant that the Board failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law nor identified any erroneous findings of fact which the Board may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

### **CONCLUSION**

[19] The Application is refused.

Shu-Tai Cheng  
Member, Appeal Division