Citation: ***A. M. v. Canada Employment Insurance Commission*****, 2015 SSTAD 483**

Date: April 14, 2015

File number: AD-14-548

APPEAL DIVISION

Between:

A. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

Decision by: Mark Borer, Member, Appeal Division

Decided on the record on April 14, 2015

DECISION

[1] The appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

INTRODUCTION

[2] On August 25, 2014, a member of the General Division notified the Appellant that he was considering summarily dismissing his appeal. In accordance with s. 22 of the *Social Security Tribunal Regulations*, the Appellant was given time to make additional submissions as to why this should not be done.

[3] In response, the Appellant made additional submissions. After considering the matter, the General Division member proceeded to summarily dismiss the appeal of the Appellant on September 24, 2014.

[4] In due course, the Appellant filed an appeal of this decision with the Appeal Division.

[5] This appeal was decided on the record.

THE LAW

[6] 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.

[7] 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

[8] Although the initial determination of the Commission under appeal relates to whether or not the Appellant had just cause to voluntarily leave his employment, 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 not.

[9] 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".

[10] The Appellant asks that his appeal be allowed and that he be granted benefits.

[11] The Commission submits that the decision of the General Division was entirely reasonable, and that the Appellant was not entitled to benefits. The Commission asks that the appeal be dismissed.

[12] 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 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".

[13] 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.

[14] 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…

[15] 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.

[16] 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?

[17] 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.

[18] In the case at hand, the General Division member was faced with an initial appeal that contained an explanation as to why the Appellant voluntarily left his employment. These submissions also set out his view that the Commission did not take into consideration the factors that explained his voluntary leaving.

[19] Although I make no finding on the matter, I note that if these submissions were accepted the appeal could have been successful on the merits.

[20] In their decision, the General Division member stated that:

> The issue before the Tribunal is whether or not this appeal has a reasonable chance of success. To make that decision the Tribunal has to examine the Employment

> Insurance Act and the applicable jurisprudence related to voluntary leaving one's employment… In the instant cause [sic] it is clear the Claimant voluntarily left his employment. He submits he had just cause.

[21] The member then examined the jurisprudence and evidence, and determined that the Appellant had not shown just cause as required. No further mention was made as to whether or not the appeal had no reasonable chance of success until the very end of the decision, where this was simply stated without any explanation or reason being given.

[22] I find that the General Division member did not determine the correct test to establish whether or not a summary dismissal was required as he should have, but instead decided the case on its merits and on the record. This constitutes an error of law, reviewable on the correctness standard.

[23] 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.

[24] As Parliament does not speak in vain, I must conclude from this that it was Parliament's intention to ensure that appellants in employment insurance cases before the General Division be given an opportunity to be heard. The summary dismissal provisions should not be stretched in order to bypass this intention.

[25] As the General Division did not determine or apply the correct test, this appeal must be allowed. The appropriate remedy is for this matter to be returned to the General Division for reconsideration.

CONCLUSION

[26] Therefore, the appeal is allowed. The matter is returned to the General Division for reconsideration in accordance with these reasons.

Mark Borer
Member, Appeal Division