[TRANSLATION]

Citation: *D. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 578

Date: May 11, 2015

File number: AD-13-1251

APPEAL DIVISION

Between:

D. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On October 8, 2013, the General Division of the Social Security Tribunal of Canada (Tribunal) summarily dismissed the Appellant's appeal. The General Division found that the Appellant did not meet the requirements set out in subsection 10(4) of the *Employment Insurance Act* (Act) to justify his antedate request and that, in the circumstances, his appeal had no reasonable chance of success.

[2] On November 1, 2013, the Appellant appealed to the Tribunal's Appeal Division. The grounds raised are that the General Division failed to observe a principle of natural justice and that the "reasonable person" principle was misapplied in the summary dismissal.

[3] The Tribunal requested that the parties make written submissions. The Applicant did not file any further submissions. On January 4, 2014, the Commission informed the Tribunal that it would not be filing submissions.

ISSUE

[4] The Tribunal must determine whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division or confirm, rescind or vary the decision.

THE LAW AND ANALYSIS

[5] The parties made no submissions concerning the applicable standard of review.

[6] The Tribunal notes that the Federal Court of Appeal has held that the standard of judicial review applicable to a decision of a Board of Referees or an Umpire on questions of law is correctness (*Martens v. Canada (AG),* 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

[7] In employment insurance matters, the Federal Court of Appeal has determined that the standard of review for questions of law and jurisdiction is correctness. However, the standard of review for questions of fact and questions of mixed fact and law is reasonableness (*Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190).

[8] A decision of the General Division is subject to the same standards of review as a decision of the Board of Referees.

[9] Subsection 53(1) of the *Department of Employment and Social Development Act* gives the General Division the power to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[10] Under 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.

[11] The Tribunal's Appeal Division must be able to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is an error of law, fact or jurisdiction that may lead to the setting aside of the decision attacked.

[12] The Appellant raises the following grounds of appeal without citing the relevant paragraphs: failure to observe a principle of natural justice (decision by summary dismissal) and error of law or of mixed fact and law (application of the reasonable person principle).

[13] The initial determination concerns the Commission's refusal to antedate the Appellant's employment insurance application, but that is not the preliminary question for the Appeal

Division. The first question to be decided by the Appeal Division is whether the General Division correctly identified and applied the legal test for summarily dismissing an appeal.

[14] I note that the Appellant is not represented and that the Commission did not file submissions. I will therefore decide this question without the benefit of legal arguments from the parties.

[15] Although the Federal Court of Appeal has not yet considered the question of summary dismissal in the context of the Tribunal's legislative and regulatory framework, it has considered this question on several occasions in the context of its own summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, serve as representative examples of such judgments.

[16] In *Lessard-Gauvin*, the Court stated:

> 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. . . .

[17] 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.

[18] I note that the determination to summarily dismiss an appeal is a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. The question to be asked for summary dismissal is as follows: Is it plain and obvious on the record that the appeal is clearly bound to fail?

[19] For further clarity, the question to be asked is not whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, it must be determined whether the appeal is bound to fail regardless of what evidence or arguments might be submitted at a hearing. Almost by definition, a summary dismissal should not require a lengthy decision.

[20] The General Division received an appeal request that contained only basic information and a brief summary of the key dates. The reason given for the appeal to the General Division was that [translation] “this decision is unacceptable”.

[21] The General Division sent notice of its intention to proceed by summary dismissal on June 12, 2013. The Appellant did not respond to the notice. The General Division’s decision notes the following:

> [Translation]
>
> [27] Since he did not respond to the Tribunal’s letter dated June 12, 2013, informing him that the summary dismissal of his appeal was planned, the Appellant did not provide any new grounds or make any relevant additional submissions that could have enabled him to improve the possibility of his appeal being allowed.

[22] The General Division suggested that the Appellant could have made additional submissions that could have enabled him to improve the possibility of his appeal being allowed.

[23] The decision contains 11 paragraphs on the issue related to the antedate request. The Member reviewed the evidence on file and the reasonable person principle and concluded as follows:

> [Translation]
>
> [25] Without questioning the “good faith” pleaded by the Appellant, the Tribunal is of the opinion that he did not do what a reasonable and prudent person would have done in the circumstances to determine his rights and obligations.
>
> [26] In short, the Tribunal is of the opinion that the Appellant does not meet the requirements of subsection 10(4) of the Act for justifying his antedate request and that, in the circumstances, his appeal has no reasonable chance of being allowed.

[24] The General Division did not apply the proper test to find that the appeal had to be summarily dismissed. This is an error of law reviewable on the standard of correctness.

[25] I note that Parliament has adopted a legislative and regulatory framework that does not authorize the Employment Insurance Section of the General Division to make decisions on the record, even though the Income Security Section of the General Division is authorized to do so.

[26] Since Parliament does not speak in vain, I must conclude that it wanted to ensure that, as a general rule, appellants in the Employment Insurance Section of the General Division have an opportunity to be heard. Summary dismissal should not be expanded to circumvent that intention.

[27] Since the General Division did not apply the proper test, I am allowing the appeal. It is appropriate to refer the matter back to the Tribunal's General Division.

CONCLUSION

[28] The appeal is allowed and the matter is referred back to the Tribunal's General Division for reconsideration in accordance with its reasons.

Shu-Tai Cheng
Member, Appeal Division