[TRANSLATION]

Citation: *K. B. v. Canada Employment Insurance Commission*, 2015 SSTAD 625

Date: May 22, 2015

File number: AD-13-654

APPEAL DIVISION

Between:

K. B.

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 of Canada (Tribunal) for leave to appeal the decision of the Board of Referees (Board) issued on February 18, 2013. The Board dismissed the claimant's appeal on an allocation of earnings pursuant to the *Employment Insurance Regulations* (Regulations). The claimant had received an amount from a health and welfare fund which the Commission had determined was a retiring allowance and constituted earnings, while the claimant asserted that this amount did not constitute earnings.

[2] The Applicant received the Board decision on February 18, 2013 and filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on May 13, 2013.

[3] The Application was filed with the Tribunal 84 days after receipt of the decision, 54 days outside of the current 30-day time limit.

ISSUES

[4] The Tribunal must first decide if an extension of time to appeal for leave to appeal should be granted.

[5] If an extension of time is granted, the Tribunal must decide if the appeal has a reasonable chance of success.

THE LAW

[6] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the Appeal Division, in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant, and the Appeal Division may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

[7] According to subsections 56(1) and 58(3) of the 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".

[8] 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".

[9] 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.

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

SUBMISSIONS

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

a) the Board decision asked the Commission to review and explain the overpayment calculation by March 29, 3013 and this was not done;

b) her representative at the Board hearing called a meeting on April 25, 2013;

c) she filled out the application for leave to appeal on May 1, 2013 and sent it to the Tribunal;

d) the Board made a mistake in finding that the wage indemnity amount (from the health and welfare fund) she received should be allocated as earnings;

e) the wage indemnity amount was a payment under a wage-loss indemnity plan that was not a group plan, as described in subsections 35(7) and (8) of the Regulations; and

f) the Board did not consider in its decision that the wage indemnity plan was entirely funded by the employees and not by the employer or the union, and that the money paid into it had already been taxed and other deductions taken.

[12] The Respondent's written submissions state that it does not object to leave to appeal being granted in this matter.

ANALYSIS

Extension of Time

[13] As to the late filing of the Application, the Applicant has explained the delay and demonstrated a continued intention to pursue the application. She relied on the advice of her representative at the Board hearing. When she was advised that the representative could do nothing more, 66 days after the date of the decision, she prepared the Application on her own and filed it at the 84 day mark.

[14] There is no prejudice to the Respondent in allowing the extension. The Respondent does not object to the leave to appeal being granted.

[15] I will address the issue of whether the matter discloses an arguable case in the context of the leave application, immediately below.

[16] As I am satisfied with the Applicant's explanation for the delay, her continued intention to pursue the appeal and that there is no prejudice to the Respondent. These are factors that are relevant to a request for an extension of time. As such, I grant an extension of time for the filing of the Application.

Application for Leave to Appeal

[17] 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.

[18] The Applicant's submissions suggest an error of law and erroneous finding of facts. In particular, the argument in paragraph 11e), above, is that the Board misinterpreted subsections 35(7) and (8) of the Regulations, which is an error of law. The arguments in paragraph 11d) and f), above, suggest erroneous findings of fact (that the Board made in a perverse or capricious manner or without regard for the material before it) or errors of mixed fact and law when the Board concluded that the wage indemnity amount received by the Applicant should be allocated as earnings without considering whether the wage indemnity plan was funded by the employees or the employer.

[19] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal.

[20] The Application has set out reasons which fall into the enumerated grounds of appeal and it has satisfied me that the appeal has a reasonable chance of success.

CONCLUSION

[21] The Application is granted.

[22] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[23] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division