Citation: ***Canada Employment Insurance Commission v. C. M.*****, 2015 SSTAD 703**

Date: June 5, 2015

File number: AD-13-226

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

C. M.

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On June 21, 2013, the Board of Referees (Board) determined that benefits under the *Employment Insurance Act* (EI Act) were payable. In particular, the Board held that although the Respondent was enrolled in full-time study for which he was not previously approved, his situation exhibited exceptional circumstances sufficient to rebut the presumption of unavailability. The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on July 11, 2013.

[2] The Tribunal, on January 13, 2015, requested written submissions from the parties on whether leave to appeal should be granted or refused.

[3] The Applicant did not file written submissions (over and above the Application). The Respondent filed detailed submissions on February 13, 2015.

[4] The Applicant was notified that the Respondent had filed written submissions and was provided with a copy of them and, on March 10, 2015, was notified that it had an opportunity to file reply submissions within 15 days. The Applicant did not respond or file submissions.

ISSUE

[5] The Member must decide if the appeal has a reasonable chance of success.

THE LAW

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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."

[7] 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."

[8] 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.

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

ANALYSIS

[10] 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.

Error in Findings of Fact

[11] The Application states that:

a) The Respondent has not proven his availability for work as he is taking a full time training course to which he was not referred to by the Commission;

b) He is not willing to change his course schedule to accept full time work and his intention is to finish his course rather than accept full time work. The course is a Police Academy course and he is obligated to attend class, study, maintain physical fitness and participate in police ride outs; and

c) The Board erred in law in allowing the appeal and based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it.

[12] The Respondent's submissions were:

a) the Board considered all of the evidence to get a full understanding of the Respondent's circumstances prior to making its findings of fact;

b) these findings should be granted deference and should only be overturned where they were made in a perverse or capricious manner or without regard for the material before it, none of which is the case; and

c) The Board fully considered all the evidence from the Commission and from Mr. C. M. and its findings of fact cannot be described as either perverse or capricious.

[13] The Board considered the Applicant's submissions and the evidence related to these findings of fact on pages 2 to 6, 8 to 10 and 16 and 17 of its decision.

[14] It is not my role, as a Member of the Appeal Division of the Tribunal on an application for leave to appeal, to review and evaluate the evidence that was before the Board with a view to replacing the Board's findings of fact with my own. It is my role to determine whether the appeal has a reasonable chance of success on the basis of the Applicant's specified grounds and reasons for appeal: erroneous finding(s) of fact based on the evidence that was before the Board which finding of fact, pursuant to paragraph 58(1)(c) of the DESD Act, was made in a perverse or capricious manner or without regard for the material before it (emphasis mine).

[15] I have read and carefully considered the Board's decision and the record. The Board's findings of fact were not made without regard to the material before it. The decision specifically refers to the testimonial and documentary evidence upon which the Board arrived at its findings of fact. In addition, the findings of fact identified by the Applicant as erroneous (see paragraph 11 above) were not made in a perverse or capricious manner.

Errors of Law

[16] In terms of errors of law, the Applicant points to the following:

a) The Board allowed the appeal citing a number of CUB decisions;

b) The Board erred in law when it ignored evidence without justification and failed to consider the legal test for availability to allow the claimant's appeal; and

c) The claimant failed to prove he is available for and seeking work without restrictions. Consequently he is subject to disentitlement from receiving benefits pursuant to section 18(a) of the EI Act.

[17] The Board's decision cites a number of CUB decisions. However, the Applicant does not specify how the citing of these decisions is an error of law. The Board's decision also cites Federal Court decisions.

[18] The Applicant does not state what evidence was ignored by the Board without justification. As for the legal test for availability, the Board's decision at pages 8 to 16 considers the legislation and jurisprudence it considered in allowing the claimant's appeal. The Board cannot be said to have failed to consider the legal test.

[19] As to the grounds that the claimant failed to prove he is available for and seeking work without restrictions, the Board's finding that the claimant is available for work is discussed below.

Error in jurisdiction

[20] The Applicant takes the position that the Board exceeded its jurisdiction when it allowed the claimant's availability pursuant to section 25 of the EI Act.

[21] Section 25 of the EI Act states:

> **25.** (1) For the purposes of this Part, a claimant is unemployed and capable of and available for work during a period when the claimant is
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> (a) attending a course or program of instruction or training at the claimant's own expense, or under employment benefits or similar benefits that are the subject of an agreement under section 63, to which the Commission, or an authority that the Commission designates, has referred the claimant; or
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> (b) participating in any other employment activity
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> (i) for which assistance has been provided for the claimant under prescribed employment benefits or benefits that are the subject of an agreement under section 63 and are similar to the prescribed employment benefits, and

(ii) to which the Commission, or an authority that the Commission designates, has referred the claimant.

(2) A decision of the Commission about the referral of a claimant to a course, program or other employment activity mentioned in subsection (1) is not subject to review under section 112.

[22] The Board referred to section 25 of the EI Act in its review of jurisprudence at pages 8 and10 to 13 of its decision. In relation to the claimant's Police Course, the decision noted:

> The Board finds as a fact that the claimant, reasonably, presumed approval of The Police Academy course in PEI, having followed protocol as set out by Career Works (Exhibit 11) and, already being on El Benefits. The Board points to the fact that others have been allowed, out of province, to be sponsored in this school, the only one of its kind in Atlantic Canada.
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> Furthermore, the Board finds as a fact that, while the claimant has Red Seal Certification in Auto Technician, his doctor has directed that he stop painting cars, and find a line of work that will not damage his health as he has chronic asthma. The claimant has child maintenance payments and responsibilities which fuel his drive to change careers. It seems that the Commission erroneously denied him support during his re-training; although this is beyond the jurisdiction of the Board, it is a matter of natural justice and administrative error is addressed in the jurisprudence previously cited.

[23] The Board was of the view that allowing the claimant's availability under section 25 of the EI Act was beyond its jurisdiction. At page 13 of its decision, the Board cited the Sarto Landry case (Federal Court of Appeal) for the principle that:

> While it is true that there is a presumption that a person enrolled in a course of fulltime study is generally not available for work within the meaning of the Act, at the same time it has to be admitted that this is a presumption of fact which certainly is not irrebuttable. It can be rebutted by proof of "exceptional circumstances.

The Board went on to review the evidence at the hearing and found, at page 16, that "there are exceptional circumstances in this case that prove the claimant is available" and unanimously allowed the claimant's appeal.

[24] The Respondent argues that:

a) the Board recognized that it was a principle of natural justice to fix an administrative error resulting from the Commission not having considered the application for referral;

b) this power had been exercised in past appeals;

c) the Commission had not made a decision referring or refusing to refer the claimant to the course in January 2013 (had it the request for referral been made, the Board found that the Commission would have granted it considering all the circumstances); and

d) Since no decision was made, section 25(2) of the EI Act did not bar the Board from allowing the claimant's availability.

[25] The Application does not include any details to explain how the Board exceeded its jurisdiction when it "allowed the claimant's availability pursuant to section 25 of the EI Act." The Applicant was given the opportunity to provide further information by way of written submissions and reply submissions but did not do so.

[26] The Tribunal reviewed the appeal Board record in addition to the Board's decision. The Commission did not make a decision about the referral of the Respondent to a course pursuant to section 25(1) of the EI Act. The Commission's evidence and submissions to the Board on this point were that the claimant did not obtain a referral to attend his course, not that he was refused a referral under section 25(1). As a result, he did not have the benefit of section 25(1) deeming him capable of and available for work. Rather, he was considered to be taking the course on his own initiative and must prove that he is available for work.

[27] The Board's decision found that the refusal to support the claimant during his course was made due to an administrative error (i.e. refusal to pay him benefits); that an error of this type resulting in denial of benefits was a matter of natural justice; and that Federal Court and CUB jurisprudence supported the Board's conclusion that the claimant would have been lawfully entitled to benefits except for this error. However, the Board did not allow the claimant's availability pursuant to section 25 of the EI Act. It did so by finding that the presumption - that a person enrolled in a course of full-time study is generally not available for work within the meaning of the EI Act - was rebutted in the this case by proof, by the claimant, of exceptional circumstances.

[28] The Application asserts that the Board allowed the claimant's availability pursuant to section 25 of the EI Act and that, thereby, it exceeded its jurisdiction. However, the Applicant did not explain its assertion, despite invitations to file submissions and reply submissions.

[29] The Appeal Division of the Tribunal, on an application for leave to appeal, should not need to guess how the Board is said to have exceeded its jurisdiction. After detailed review of the Board's decision and the record, with only the Applicant's assertion that the Board exceeded jurisdiction and the Respondent's detailed submissions that the Board did not exceed jurisdiction, I am unable to conclude that there is a reasonable chance of success based on this ground of appeal.

[30] 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 and show that the appeal has a reasonable chance of success based on one of these grounds.

[31] The Application is deficient in this regard, and the Applicant has not satisfied me that the appeal has a reasonable chance of success.

CONCLUSION

[32] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division