

Citation: *Canada Employment Insurance Commission v. L. B.*, 2015 SSTAD 738

Date: June 16, 2015

File number: AD-13-1140

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

L. B.

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 26, 2013. The Board allowed the claimant's appeal although the Commission had imposed a disentitlement pursuant to subsection 18(a) of the *Employment Insurance Act* (Act). The Commission had determined that the claimant had not proven that she was available for work because she was not legally allowed to work in Canada and, therefore, not available for work with employers other than her previous employer.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on May 9, 2013.

ISSUE

[3] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[4] 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".

[5] 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".

[6] 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.

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

SUBMISSIONS

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

- a) the Board erred in law, and in fact and law, in making its decision when it failed to apply the correct legal test to the issue of availability;
- b) in particular, the claimant is a temporary foreign worker who had a permanent teaching contract;
- c) she was unable to work because her work permit expired on July 15, 2012;
- d) she was on unpaid leave of absence with her employer and returned to work on November 26, 2012 after receiving her new work permit;
- e) she cannot prove her availability for work from August 27, 2012 as required by section 18(a) of the EI Act;
- f) the applicable standard for review of questions of law is correctness and for questions of fact and law is reasonableness; and
- g) based on the evidence before the Board, its decision is unreasonable.

ANALYSIS

[9] 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.

[10] The Applicant's submissions suggest an error of law and erroneous finding of facts.

[11] In *Faucher v. Attorney General of Canada* (A-56-96), the Federal Court of Appeal stated that an EI claimant must satisfy three criteria to be found available for work:

- a) A wish to return to the labour market as soon as suitable employment is offered;
- b) An indication of this wish by efforts to find suitable employment; and
- c) An absence of personal conditions that unduly limit their chances of returning to the labour market.

[12] While the Board's decision cites *Faucher*, under the heading "Finding of Fact, Application of the Law", the only finding on the criteria is the conclusion: "The Board finds the appellant did meet these factors." The Board then cites a CUB decision for the proposition that section 18 of the Act "is not intended to apply where unavailability is imposed upon a claimant in circumstances beyond his control when the claimant is ready, available and willing to accept employment."

[13] The Applicant's grounds of appeal are that the Board erred in law, and in fact and law, in making its decision when it failed to apply the correct legal test to the issue of availability. The Board made its decision based on application of the legal tests noted in paragraphs [11] and [12] above.

[14] 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. Here, the Applicant refers to the legal test(s) on the issue of availability and provides an explanation on how the Board is said to have failed to apply the correct test.

[15] The Application has set out reasons which fall into the enumerated grounds of appeal, and I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[16] The Application is granted.

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

[18] 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