[TRANSLATION]

Citation: ***Canada Employment Insurance Commission v. M. B.,*** **2015 SSTAD 739**

Date: June 16, 2015

File number: AD 13 1141

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

M. B.

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On April 30, 2013, the Board of Referees allowed the claimant's appeal concerning the loss of his employment (because of his own misconduct within the meaning of sections 19 and 20 of the *Employment Insurance Act*) and his availability for work while taking a training course (under paragraph 18(*a*) of the Act).

[2] The Applicant (the Commission) filed an application for leave to appeal to the Appeal Division on May 21, 2013, within the time limit.

ISSUE

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

THE LAW AND ANALYSIS

[4] As stated in subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, "[a]n 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 *Department of Employment and Social Development Act* provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[6] 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.

[7] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for an applicant to meet than the one that must be met on the appeal on the merits. At the application for leave to appeal stage, applicants do not have to prove their case.

[8] The Tribunal will grant leave to appeal if the applicant shows that there is at least one of the above grounds of appeal and the Tribunal is satisfied that one of the grounds has a reasonable chance of success.

[9] To do so, the Tribunal must, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, be able to see a question of law, fact or jurisdiction the answer to which may lead to the setting aside of the decision attacked.

[10] In its application for leave to appeal, the Applicant notes the following:

(a) The Board of Referees erred in fact and in law in allowing the appeal on the two issues before it and in failing to apply the proper legal tests;

(b) The claimant requested a change to his work schedule because of a course he was taking; he had a full-time day job and asked to take Wednesdays off to devote to his studies;

(c) The employer offered him evening employment for 32 hours a week and the claimant refused, since his training was in the evening; and

(d) The claimant favoured his courses at the expense of his employment, which is certainly a sound personal choice, but the Commission submits that the claimant does not meet the legislative requirements for availability set out in section 18 of the Act.

[11] In its application for leave to appeal, the Applicant submits that the Board of Referees misinterpreted the case law of the Federal Court of Appeal finding that an employee who

advises his or her employer that he or she is less available than previously is for all intents and purposes asking the employer to terminate the employment contract if the employer cannot accommodate the employee's reduced availability (A-562-04).

[12] The Applicant further argues that the Board erred in fact and in law in making its decision, since the evidence on file confirms that the claimant left his employment to avoid jeopardizing his studies. Availability is determined on the basis of the three factors enunciated in *Faucher* (Federal Court of Appeal: A-56-96), and the Applicant submits that the claimant could not meet those requirements.

[13] After reviewing the appeal file, the Board of Referees' decision and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised several questions of fact and law relating to the Board of Referees' interpretation and application of sections 18, 29 and 30 of the Act, the answer to which may lead to the setting aside of the decision attacked.

CONCLUSION

[14] Leave to appeal is granted.

[15] This decision on leave to appeal does not assume the outcome of the appeal on the merits.

[16] I invite the parties to make submissions on the following questions: whether a hearing is appropriate and, if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division