

Citation: *Canada Employment Insurance Commission v. R. H.*, 2015 SSTAD 750

Date: June 18, 2015

File number: AD-13-1166

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

R. H.

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 3, 2013. The Board allowed the claimant's appeal where the Commission had imposed a disentitlement pursuant to subsections 29 and 30 of the *Employment Insurance Act* (Act) and section 30 of the *Employment Insurance Regulations* (Regulations). The Commission had determined that the claimant had not proven that he was unemployed or that he was employed to a "minor extent" in the operation of a business.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on April 19, 2013.

ISSUE

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

LEGISLATIVE PROVISIONS

[4] 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".

[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.

[8] Section 59(1) of the DESD Act sets out the powers of the Appeal Division. It states:

The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[9] Section 30 of the Regulations applies to self-employed claimants or those engaged in the operation of a business. It states:

30. (1) Subject to subsections (2) and (4), where during any week a claimant is self-employed or engaged in the operation of a business on the claimant's own account or in a partnership or co-adventure, or is employed in any other employment in which the claimant controls their working hours, the claimant is considered to have worked a full working week during that week.

(2) Where a claimant is employed or engaged in the operation of a business as described in subsection (1) to such a minor extent that a person would not normally rely on that employment or engagement as a principal means of livelihood, the claimant is, in respect of that employment or engagement, not regarded as working a full working week.

[10] Subsection 30(3) of the Regulations sets out the circumstances to be considered in determining whether the claimant's employment or engagement in the operation of a business is of minor extent as described in subsection 30(2) of the Regulations.

SUBMISSIONS

[11] In support of the Application, the Applicant referred to each subparagraph of subsection 58(1) of the DESD Act and argued that each ground of appeal was made out. In particular, the Application asserts that:

- a) The Board failed to exercise its jurisdiction on the relevant issue before it, that of a disentitlement under sections 9, and 11 of the Act and section 30 of the Regulations;
- b) The Board erred in law by:
 - i. failing to apply the correct legislative provisions under the Act and the Regulations, by not applying the objective test under subsection 30(2) of the Regulations; and
 - ii. failing to justify its decision with relevant findings of fact; and
- c) The Board based its decision on erroneous findings of fact, as the evidence was undisputed that the claimant was working full-time while operating a business.

ANALYSIS

[12] The Applicant needs to satisfy me that the reasons for appeal fall within any of the grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[13] The Board's decision, under the heading "Finding of Fact, Application of the Law", cites the *2011 Annotated Employment Insurance Act* in relation to employment that is unsuitable and a CUB decision for the proposition that a credible claimant who did not know she was providing the answers she was expected to give did not knowingly make false statements. The only findings of fact are in the conclusion: "The Board believes that the claimant did what any reasonable person would have done under a similar set of circumstances. We, therefore, find the appellant entitled to the Benefit of the Doubt."

[14] The Board did not refer to the legislative provisions under which the Commission had imposed the disentitlement, namely, sections 9, 11, 29 and 30 of the Act and section 30 of the Regulations. The Board did not consider whether the claimant's engagement in business met the exception under subsection 30(2) of the Regulations or refer to the six factors in subsection

30(3). The Board did not make findings of fact in relation whether the claimant was unemployed or employed to a “minor extent” in the operation of a business.

[15] Considering the arguments raised by the Applicant, and my review of the Board decision and docket, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[16] The application for leave to appeal 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 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