[TRANSLATION]

Citation: *D. D. v. Canada Employment Insurance Commission*, 2015 SSTAD 930

Date: July 28, 2015

File number: AD-14-142

APPEAL DIVISION

Between:

D. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

Decision rendered on the basis of the record on July 28, 2015

REASONS AND DECISION

INTRODUCTION

[1] On January 22, 2014, The General Division of the Social Security Tribunal of Canada (the Tribunal) summarily dismissed the Appellant's appeal. The General Division concluded that:

(a) The claimant failed to show that the sum in question was paid to him for a reason other than the loss of his wages, that is, a loss which is totally unrelated to advantages arising from employment;

(b) The claimant is responsible for proving that all or a portion of the moneys received following dismissal constitute something other than earnings under the Regulations;

(c) Subject to subsection 35(7) of the Regulations, money received from an employer constitute earnings;

(d) The earnings received from an employer upon separation or as vacation pay shall be allocated under the provisions of subsection 36(9) of the Regulations;

(e) Where there is sufficient connection between the claimant's employment and the moneys paid by the employer, these moneys are considered to be earnings under section 35 of the Regulations and shall be allocated in accordance with subsection 36(9) of the Regulations if they were paid due to a severance of the employment relationship; and

(f) On the basis of these facts, the Tribunal must summarily dismiss the claimant's appeal, as it has no reasonable chance of success.

[2] On January 22, 2014, the General Division rendered a summary dismissal decision. This decision was communicated to the Appellant's representative on January 27, 2014, and to the Appellant by his representative on February 6, 2014.

[3] On January 27, 2014, the Appellant's representative sent the Tribunal an email stating his intention to file an appeal. On February 20, 2014, the Appellant, through his representative, officially filed an appeal with the Tribunal's Appeal Division. The following grounds were raised:

(a) There was a breach of the *audi alteram partem* rule;

(b) The General Division did not consider any of the Applicant's grounds of appeal, at least from what can be gleaned from the written decision; and

(c) The General Division's decision is based on an error of law and an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[4] This appeal was decided on the record for the following reasons: the need to proceed as informally and quickly as possible according to the Tribunal's Regulations on circumstances, fairness and natural justice.

ISSUE

[5] The Tribunal must decide whether to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division, or confirm, rescind or vary the decision.

THE LAW AND ANALYSIS

Standard of review

[6] The Respondent submitted that:

(a) The applicable standard of review for questions of fact and questions of mixed fact and law and is reasonableness; and

(b) Given that the primary issue involves the application of law to the facts (and is therefore a question of mixed fact and law), the applicable standard of review in this case is reasonableness.

[7] The Tribunal notes that the Federal Court of Appeal has held that the standard of review of the Tribunal's decision applicable to questions or law or jurisdiction is correctness – *Dunsmuir v. Nouveau-Brunswick*, 2008 SCC 9, cited by *Atkinson v. Canada (PG)*, 2013 FCA 187. The standard of review applicable to questions of mixed fact and law is reasonableness – *Atkinson v. Canada (AG)*, 2013 FCA 187.

Legislative provisions

[8] Subsection 53(1) of the *Department of Employment and Social Development Act* provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[9] In accordance with 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.

[10] The Tribunal's Appeal Division must be in a position to determine, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction whose response might justify setting aside the decision under review.

Legal test for summary dismissal

[11] The Appellant raised the following grounds of appeal: failure to observe a principle of natural justice (the decision was summarily dismissed without consideration of his arguments and without notice to his representative that a summary dismissal was being considered) and

errors of law or of mixed fact and law (the earnings paid to the claimant are earnings that must be allocated and do not constitute one of the exceptions set out in the legislation).

[12] While the initial decision concerned the allocation of earnings received by the claimant, this is not the first issue before the Appeal Division. The first issue before the Appeal Division is whether the General Division correctly identified and applied the legal test for summarily dismissing the appeal.

[13] The Respondent noted in its submissions that section 53 of the *Department of Employment and Social Development Act* sets out the criteria for a summary dismissal and that the General Division clearly stated the applicable test (namely, whether the appeal had a reasonable chance of success).

[14] Although the Federal Court of Appeal has yet to examine the issue of summary dismissal within the context of the Tribunal's legislative and regulatory framework, it has examined the issue within the context of it its own summary dismissal process several times. The decisions in *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147 and *Breslaw v. Canada (AG)*, 2004 FCA 264 are representative examples of those rulings.

[15] In *Lessard-Gauvin*, the Court stated:

> The standard for a preliminary dismissal of an appeal is high. This Court will only summarily dismiss an appeal if it is obvious that the basis of the appeal is such that the appeal has no reasonable chance of success and is clearly bound to fail.

[16] The Court expressed a similar opinion in *Breslaw*, noting that:

> ... the threshold for the summary dismissal of an appeal is very high, and while I have serious doubt about the validity of the appellant's position, the written representations which he has filed do raise an arguable case. The appeal will therefore be allowed to continue.

[17] I note that the decision to summarily dismiss an appeal is a threshold test. It is not proper to consider the case on its merits in the absence of the parties and then conclude that the appeal cannot succeed. The issue in the case of summary dismissal is whether, on the basis of the record, it is plain and obvious that the appeal is bound to fail.

[18] Specifically, the issue is not whether the appeal should be dismissed after analyzing the facts, the case law and the arguments of the parties. The issue is whether the appeal is bound to fail, regardless of the evidence or arguments that may be presented at a hearing.

Decision of the General Division

[19] On October 1, 2013, the General Division received a request to appeal and authorization to disclose information to the claimant's representative. Several reasons and grounds of appeal were raised.

[20] On December 23, 2013, the General Division sent a notice of its intention to summarily dismiss the appeal. The notice was sent to the Appellant but not to his representative. The notice stated the following:

> If you find that this appeal should not be summarily dismissed, you must provide the Tribunal no later than January 17, 2014, with detailed written submissions explaining why your appeal has a reasonable chance of success.

[21] In a letter dated December 29, 2013, which the Tribunal received on January 7, 2014, the Appellant objected to the notice, referring to eight pages of written submissions. His representative, not having received the notice, did not have the opportunity to respond.

[22] On January 8, 2014, the Tribunal sent a letter to the Appellant's representative along with additional documents that were received by one of the parties to the 'attached' appeal. On January 20, 2014, the latter received the letter without any documents. On January 20, 2014, he responded to inform the Tribunal that the additional documents of the appeal file were not included with the letter and to request that evidence.

[23] On January 22, 2014, the General Division summarily dismissed the appeal. The Appellant's representative received a copy of the General Division's decision but did not receive a response to his letter of January 20, 2014.

[24] The General Division's decision does not outline the details of the December 23, 2013, notice or the Appellant's submissions of December 29, 2013.

[25] The member of the General Division reviewed the applicable sections and subsections of law, the evidence on file and the request to appeal (but not the Appellant's submissions regarding the notice of summary dismissal) and concluded that:

> [Translation]
>
> [22] The claimant's submissions fail to show that the sum was paid to him for a reason other than the loss of his wages, that is, a loss which is totally unrelated to advantages arising from employment.
>
> [23] The claimant is responsible for proving that all or a portion of the moneys received following dismissal constitute something other than earnings under the Regulations (*Radigan* A-567-99).
>
> [24] Therefore, the Act is clear and the case law abundant on the issue of earnings under sections 35 and 36 of the Regulations. Subject to subsection 35(7) of the Regulations, moneys received from an employer constitute earnings.
>
> [25] The earnings received from an employer upon separation or as vacation pay must be allocated under the provisions of subsection 36(9) of the Regulations.
>
> [26] The courts have held in similar cases that, where there is sufficient connection between the claimant's employment and the moneys paid by an employer, these moneys are considered earnings within the meaning of section 35 of the Regulations and must be allocated in accordance with subsection 36(9) of the Regulations if they were paid because of the severance of an employment relationship (*Dancause*, 2010 FCA 270; *Deschamps*, A-489-96).
>
> [27] On the basis of these facts, the Tribunal must summarily dismiss the claimant's appeal because it has no reasonable chance of success.

Errors of the General Division

[26] The General Division examined the matter on its merits in the absence of the parties and concluded that the appeal could not succeed.

[27] The General Division did not apply the correct test to conclude that the appeal should be summarily dismissed. This is an error of law, which is reviewable on the standard of correctness.

[28] After examining the facts, the case law and the arguments of the parties, the General Division concluded that the appeal must be dismissed. It did not determine whether the appeal was bound to fail, regardless of the evidence or arguments that might be presented at a hearing.

[29] The General Division did not apply the correct test to conclude that the appeal should be summarily dismissed. This is an error of law, which is reviewable on the standard of correctness.

[30] I note that Parliament adopted a legislative and regulatory framework that does not allow the General Division's Employment Insurance Section to render decisions on the record, even if the General Division's Income Security Section is authorized to do so.

[31] As Parliament does not speak in vain, I must conclude that Parliament wanted to ensure that, as a general rule, appellants before the Employment Insurance Section of the General Division have the opportunity to be heard. Summary dismissal should not be stretched to circumvent this intention.

[32] Since the General Division failed to apply the correct test, I will allow the appeal. It is appropriate to refer the case back to the Tribunal's General Division.

[33] In addition, the General Division failed to observe a principle of natural justice, as the notice of summary dismissal was not sent to the Appellant's representative. The representative was not notified of the General Division's intention to proceed by way of summary dismissal. The representative learned that the General Division had summarily dismissed the appeal by reading the decision.

[34] It is appropriate to allow the appeal and refer the matter back to the Tribunal's General Division because the General Division applied the wrong test for summary dismissal and there has been a breach of the right to be heard (*audi alteram partem*).

CONCLUSION

[35] The appeal is allowed and the case is referred back to the Tribunal's General Division for reconsideration on the basis of these reasons.

Shu-Tai Cheng
Member, Appeal Division