Citation: ***S. K. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1200**

Date: October 7, 2015

File number: AD-15-71

APPEAL DIVISION

Between:

S. K.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

Decided on the record on October 7, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance Commission (Commission) for benefits in March 2014. The Commission determined and advised the Appellant on July 14, 2014, that he had not accumulated sufficient insurable hours to establish a claim for employment insurance (EI) benefits. The Appellant requested that the Commission reconsider its decision, and, on September 8, 2014, the Commission advised him that its original decision had been upheld.

[2] The Appellant appealed to the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) on September 19, 2014.

[3] The Respondent (Commission) filed submissions, on October 8, 2014, maintaining its position that the Appellant had failed to demonstrate that he qualified to receive EI benefits pursuant to subsection 7(2) of the *Employment Insurance Act* (Act). Further, the Respondent submitted:

> Nearly all of the documentation supplied by the claimant in support of his appeal has little to no bearing on the decision by the Commission on this matter, the exceptions being the letters of decision the Commission has supplied to the claimant and the records of employment from his employers. These documents do have a bearing on the qualification for benefits. Despite the claimant's assessment of how he should have been treated as person with a disability and the policies the claimant has cited on how to equitably treat persons with mental disabilities; the Commission has no authority to ignore the existing legislation and establish a claim for benefits on the claimant's behalf outside of the existing legislation governing such matters.
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> The Commission would submit the claimant may have a legitimate Ministry of Labour and/or Human Rights complaints considering his dismissal such a short time after his return to work following a medical leave; however the establishment of a claim for Employment Insurance benefits can only be decided upon based on the facts of the case. In this situation the facts bear out the claimant did not meet the legislated conditions under which to be qualified to establish a claim for benefits.

[4] The Appellant filed written submissions, supplementing his notice of appeal to the GD, on November 23, 2014.

[5] On December 30, 2014, the Tribunal notified the Appellant that the GD Member assigned to the appeal was considering summarily dismissing the appeal as follows:

> Paragraph 7(2)(b) of the Employment Insurance Act requires a claimant to have 630 hours of insurable employment in their qualifying period to qualify for employment insurance benefits and the Claimant has accumulated only 343 hours. Section 7 of the Employment Insurance Act does not allow any discrepancy and provides no discretion.
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> If you believe this appeal should not be summarily dismissed, the Tribunal must receive your detailed written submissions explaining why your appeal as [sic] a reasonable chance of success, no later than January 30, 2015.

[6] The Appellant filed submissions, on January 19, 2015, stating:

> I am appealing the decision of General Division of the Social Security Tribunal of Canada because they are unjustified in denying my entitled Employment insurance benefits because I worked long hours at my employer Allied International Credit. Furthermore, it is my employer Allied International Credit fault that they terminated me after I joined their company on Feb 10th, 2014 from medical leave. The employer Allied International Credit is guilty of violating Paragraph 7(2)(b) of the Employment Insurance Act. According to this Employment Insurance Act Employer has to make sure that employee of the company complete 630 hours of insurable employment in their qualifying period to qualify for employment insurance benefits. Furthermore, Employer Allied International Credit hasty termination of my employment as debt collector accumulated only 343 hours. Moreover, Allied International Credit was grossly negligent in terminating an (employee with mental disability) and moreover breaching Canadian Human Rights Code (disability section), Canadian Charter of Rights and Freedom (Section 15 (1) (2) and failing their duty to accommodate me under Canadian lav1 because of my employer Allied International Credit (AIC) I cannot accumulate the hours as prescribed by Paragraph 7(2)(b) of Employment Insurance Act.

[7] On January 30, 2015, the GD dismissed the appeal summarily on the basis that the Appellant had not accumulated sufficient insurable hours to establish a claim for benefits.

[8] The Appellant filed an application to appeal (Application) to the Appeal Division (AD) of the Tribunal, on February 17, 2015, giving notice that he wished to appeal the decision of the GD. The grounds of appeal stated in the Application were identical to the reasons provided in response to the notice of intention to dismiss summarily, filed on January 19, 2015 (see paragraph [6] above).

[9] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity to the issue(s) under appeal; and

b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[10] The AD of the Tribunal must decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

SUBMISSIONS

[11] The Appellant argues that the GD decision was wrong for the following reasons:

a) The GD was unjustified in denying him employment insurance benefits because he worked long hours at his employer;

b) It is the employer's fault that he was terminated after he had returned to work from a medical leave;

c) It was the employer's responsibility to make sure that an employee has enough insurable hours in their qualifying period to qualify for benefits;

d) The employer was negligent for terminating him and breached the *Canadian Human Rights Code* (CHRC) and the *Canadian Charter of Rights and Freedoms* (CCRF); the employer also failed to accommodate him (as he has a mental disability); and

e) He could not accumulate the hours prescribed by paragraph 7(2) of the Act because of his employer's conduct in terminating his employment.

[12] The Respondent submits that:

a) Failure is pre-ordained no matter what evidence or arguments the claimant may have presented at a hearing before the Tribunal (*Lessard-Gauvin* v. *AG*, 2013 FCA 147);

b) The Tribunal committed no error when it summarily dismissed the appeal under section 53(1) of the *Department of Employment and Social Development Act* (DESD Act) with the finding that it has no reasonable chance of success;

c) There is no reason for the AD to disturb the GD decision; and

d) The claimant has not proven that the GD committed a reviewable error in summarily dismissing the appeal under section 53(1) of the DESD Act.

LAW AND ANALYSIS

[13] The Appellant appeals a decision, dated January 30, 2015, of the GD, whereby it summarily dismissed his appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[14] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the DESD Act, as there is an appeal as of right when dealing with a summary dismissal from the GD. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

Standard of Review

[15] In assessing whether, as submitted by the Appellant, the GD was wrong, the AD must first determine the appropriate standard of review to be applied to the GD decision.

[16] The Appellant made no submissions in this regard. The Respondent submitted that "reasonableness" is the appropriate standard by which the Tribunal should review the GD decision, as the issue involves questions of fact and mixed fact and law. Therefore, the Respondent submitted that the Tribunal owes deference to the GD's decision.

[17] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada determined that there are only two standards of review at common law in Canada: reasonableness and correctness. Questions of law, jurisdiction or natural justice, generally, are determined on the correctness standard, while questions of fact and of mixed fact and law are determined on a reasonableness standard. When applying the correctness standard, a reviewing body will not

show deference to the decision-maker's reasoning process and instead, will conduct its own analysis, which could involve substituting its own view as to the correct outcome.

[18] The Tribunal notes that the Federal Court of Appeal ruled that the standard of review applicable to a decision of a Board of Referees (Board) or an Umpire with respect to questions of law is the standard of correctness (*Martens v. Canada* (AG), 2008 FCA 240) and that the standard of review applicable to questions of mixed fact and law is reasonableness (*Canada (AG) v. Hallée*, 2008 FCA 159).

[19] A decision of the GD is considered a reviewable decision by the same standards as that of a decision of the Board.

[20] The applicable standard of review will depend upon the nature of the alleged errors involved.

[21] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

(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.

[22] The Appellant alleges that the GD was not justified in denying his appeal. Without referring to the paragraphs of subsection of 58(1) of the DESD Act upon which he relies, the Appellant appears to be arguing a failure to observe a principle of natural justice, errors of law and errors of mixed fact and law. As such, I find that a correctness standard applies where the GD is alleged to have erred in law or in jurisdiction and that a reasonableness standard applies where the GD is alleged to have erred in its findings of facts or on issues of mixed fact and law.

Legal Test for Summary Dismissal

[23] I will address the appropriateness of the summary dismissal procedure for this appeal, before I assess the decision of the GD.

[24] Subsection 53(1) of the DESD Act allows the GD to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[25] If the GD failed to identify the test for summary dismissal or misstated the test altogether, this would qualify as an error of law which, under the correctness standard, would allow the AD to make its own analysis and substitute its own opinion: *Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33 (CanLII) at para. 8.

[26] The powers of the AD include but are not limited to substituting its own opinion for that of the GD. Pursuant to section 59(1) of the DESD Act, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

[27] Here, the GD correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraph 4 of its decision.

[28] However, it is insufficient to simply recite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act, without properly applying it. After identifying the legislative basis, the GD must correctly identify the legal test and apply the law to the facts.

Error of the GD

[29] While the GD did not state the legal test applied, it did explain the basis upon which it summarily dismissed the appeal:

> [22] The Tribunal must summarily dismiss an appeal where it is satisfied that the appeal has no reasonable chance of success.
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> [23] In this case the facts are clear. The Claimant resides in the economic region of X where the unemployment rate was 8% and therefore he required 630 insured hours to qualify for regular benefits. Section 17(1) of the Regulations states that subject to

> subsection (2), the regional rate of unemployment that applies to a claimant is the average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics Canada that precedes the week referred to in subsection 10(1) of the EI Act.
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> [24] The facts of the case are not in dispute. The Claimant applied for regular benefits and in accordance with Section 93(1)(b) of the Regulations he is required to have accumulated 630 hours of insurable employment in his qualifying period and the facts clearly show that he had accumulated 343 hours of insurable employment. The Claimant's evidence is clear that he agrees with his accumulation of insurable hours as shown on his record of employment. (Ex. GD 3-26)
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> [25] Case law has held that there is no discretion for the Tribunal or Commission to vary the hours required to qualify for benefits (Lésveque A-196-01) [sic] and therefore the appeal has no reasonable chance of success.
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> [26] The Tribunal finds no evidence that the Claimant was denied natural justice or treated unfairly by the Commission or that his "Human Rights" were violated. The Tribunal is satisfied that the Claimant received the Notice of Intent to Summarily Dismiss dated December 30, 2014.
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> [27] The Tribunal finds that the Claimant failed to prove that he is qualified to receive benefits under the EI Act and that the appeal has no reasonable chance of success.

[30] I find that the GD member did not determine the correct test to establish whether or not a summary dismissal was required but, instead, decided the case on its merits, on the record. As stated above, in paragraph [28] of this decision, the GD did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts. This constitutes an error of law, reviewable on the correctness standard.

[31] Therefore, the AD is required, under the correctness standard, to make its own analysis and decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD, confirm, reverse or modify the decision.

Application of Legal Test for Summary Dismissal

[32] Despite having erred in not identifying and applying the applicable legal test, paragraphs [23] to [25] of the GD decision are correct, and I agree with the findings stated in them.

[33] As for paragraph [26], I agree that there was no evidence that the Appellant was treated unfairly or denied natural justice by the Respondent. In terms of his allegations that the

employer wrongfully terminated him and thereby breached the CHRC or the CCRF, although the Tribunal does have the jurisdiction to determine if a particular provision of the Act infringes the Appellant's right to equality, the Tribunal does not have the jurisdiction to make the determination the Appellant was seeking (i.e. that his former employer wrongfully terminated him and, in so doing, breached the CHRC or the CCRF).

[34] Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of section 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and has been the subject of previous decisions of the AD.

[35] There appear to be three lines of cases in previous decisions of the AD on appeals of summary dismissals by the GD:

a) Examples AD-13-825 (2015 SSTAD 715), AD-14-131 (2015 SSTAD 594), AD-14-310 (2015 SSTAD 237), AD-15-74 (2015 SSTAD 596): the legal test applied was: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 1, and *Breslaw v. Canada (AG)*, 2004 FCA 264.

b) Examples AD-15-236 (2015 SSTAD 974), AD-15-297 (2015 SSTAD 973), AD-15-401: the AD has applied a differently articulated legal test: Whether there is a "triable issue" and whether there is any merit to the claim using the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it; and

c) Examples AD-15-216 (2015 SSTAD 929) and AD-15-260 (2015 SSTAD 987): the AD did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[36] I find that the application of the two tests cited in paragraph [35] of this decision leads to the same result in the present case – the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a "weak case" but an "utterly hopeless" one, as it does not involve assessing the merits of the case or examining the evidence.

[37] After reviewing the appeal of the Appellant, the GD record and decision, the previous decisions of the AD relating to summary dismissals, and by applying the legal test applicable to a summary dismissal to the facts in this matter, I dismiss the appeal.

CONCLUSION

[38] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division