Citation: ***Canada Employment Insurance Commission v. E. S.*****, 2015 SSTAD 1229**

Date: October 19, 2015

File number: AD-15-69

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

E. S.

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Appeal Division of the Social Security Tribunal of Canada (Tribunal) for leave to appeal the decision of the General Division (GD) issued on February 4, 2015. The GD allowed the Respondent's appeal where the Commission had determined that she (the Respondent) did not have sufficient insurable hours during her qualifying period and was ineligible for maternity benefits pursuant to subsections 6(1) and 22(1) of the *Employment Insurance Act* (EI Act) and section 93 of the *Employment Insurance Regulations* (EI Regulations).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 30, 2015. The Application was filed within the 30 day time limit.

[3] The grounds of appeal stated in the Application are:

a) The GD acted beyond its jurisdiction and erred in fact and law when it found that the Respondent had met the criteria of subsection 8(2) of the EI Act to extend the qualifying period;

b) The GD based its decision on an erroneous finding of fact, as the evidence does not support a finding that the Respondent was incapable of work because of a prescribed illness during her qualifying period; and

c) The GD erred in fact and in law when it concluded that the Respondent had accumulated sufficient hours to establish a claim for maternity benefits.

[4] The Applicant relies, in particular, on the following:

a) The Respondent accumulated 489 hours of insurable employment in her qualifying period whereas she required 600; and

b) The medical evidence did not prove that the Respondent was incapable of work because of prescribed illness during her qualifying period.

ISSUE

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

LAW AND ANALYSIS

[6] 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".

[7] 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".

[8] 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.

[9] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

Error of Jurisdiction

[10] The Applicant submits that the GD acted beyond its jurisdiction when it found that the Respondent had met the criteria of subsection 8(2) of the EI Act to extend the qualifying period.

[11] The GD has jurisdiction to extend a qualifying period pursuant to subsection 8(2) of the EI Act. Therefore, I am not satisfied that there is a reasonable chance of success on this ground of appeal.

Error of Fact and Law

[12] The Applicant asserts errors of fact and law as follows:

a) Evidence shows that the Respondent's period of illness fell outside the qualifying period, therefore, the medical evidence did not prove that the Respondent was incapable of working because of a prescribed illness during her qualifying period; and

b) It was unreasonable for the GD to conclude that the Respondent had accumulated sufficient insurable hours to establish a claim for maternity benefits.

[13] The Tribunal notes that the Respondent was present and testified at the hearing before the GD, but the Applicant chose not to attend.

[14] The GD found, at pages 6 and 7 of its decision, that:

a) A medical note indicating that the Respondent was unable to work after June 28, 2014 due to her pregnancy, was submitted: paragraph [16];

b) The Respondent meets the criteria of subsection 8(2) of the EI Act to extend the qualifying period: paragraph [23]; and

c) The Respondent submitted three ROEs which when taken together, indicate that she did accumulate sufficient insurable hours to establish a claim for maternity benefits: paragraph [24].

[15] On the basis of these findings, the GD allowed the Respondent's appeal.

[16] While the GD stated the legislative provisions relevant to the issues on appeal, the GD does not appear to make a finding that the Respondent was incapable of working because of a prescribed illness during her qualifying period. It concluded that she met the criteria of subsection 8(2) of the EI Act to extend the qualifying period, but it is arguable whether the findings of fact necessary for this conclusion were made. The Applicant argues that the GD's findings under subsection 8(2) of the EI Act were not supported by the evidence.

[17] The GD's decision to extend the qualifying period, under subsection 8(2) of the EI Act, led to the determination that two additional records of employment were included in the calculation of the total number of insurable hours.

[18] 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 has identified two grounds and set out reasons for appeal which fall into the enumerated grounds of appeal.

[19] On the ground that there may be errors of mixed fact and law, made in a perverse or capricious manner or without regard for the material before it, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[20] The Application is granted as specified in paragraphs [12] to [17] above.

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

[22] 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