Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *S. R. v. Canada Employment Insurance Commission,* 2016 SSTADEI 25

Appeal No. AD-15-154

BETWEEN:

S. R.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Appeal

SOCIAL SECURITY TRIBUNAL MEMBER: Mark BORER

DATE OF DECISION: January 19, 2016

DECISION: Appeal dismissed

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On February 17, 2015, the General Division summarily dismissed the Appellant's appeal. In due course, the Appellant appealed to the Appeal Division.

[3] On December 3, 2015, a teleconference hearing was held. The Appellant and the Commission attended and made submissions.

THE LAW

[4] According to 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.

ANALYSIS

[5] Although the initial determination of the Commission under appeal relates to whether or not the Appellant had accumulated enough insurable hours to qualify for benefits, the true issue in this case is whether or not the General Division correctly determined and applied the legal test to be used when summarily dismissing an appeal. For the following reasons, I find that it did.

[6] Subsection 53(1) of the *Act* states that "the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success".

[7] The Appellant, in oral argument before me, admitted that she has insufficient insurable hours of employment to qualify for benefits. Instead, she challenged a separate decision from 2011 which she admitted she did not appeal at the time.

[8] The Commission submits that the decision of the General Division member was correct, and that the Appellant's appeal had no reasonable chance of success. They ask that the appeal be dismissed.

[9] As this is a very similar situation to that with which I dealt in *P. G. v. Canada Employment Insurance Commission*, 2015 SSTAD 406, I see no reason not to deal with this case in a similar way.

[10] Although the *Act* does not elaborate as to what constitutes a reasonable chance of success in the context of a summary dismissal, I take judicial notice of Issue 19 of the Senate of Canada publication "Proceedings of the Standing Senate Committee on National Finance". At the morning hearing on May 15, 2012, testimony was given indicating that the intent of the legislation was to limit summary dismissals to cases "where there is 100 per cent [sic] inability to move forward".

[11] In support of the above testimony, I note that Parliament has enacted a legislative and regulatory framework that does not allow the Employment Insurance Section of the General Division to make determinations on the record, even though the Income Security Section of the General Division is permitted to do so.

[12] As Parliament does not speak in vain, I must conclude from this that it was Parliament's intention to ensure that appellants in the vast majority of employment insurance cases before the General Division be given an opportunity to be heard. It may be inferred from this that summary dismissals are not meant to be used routinely.

[13] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the Social Security Tribunal legislative and regulatory framework, they have considered the issue many times in the context of their own summary dismissal procedure. *Lessard-Gauvin v. Canada (Attorney General)* 2013 FCA 147 and *Breslaw v. Canada (Attorney General)* 2004 FCA 264 serve as representative examples of this group of cases.

[14] In *Lessard-Gauvin*, the court stated that:

> "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…"

[15] The court expressed similar sentiments in *Breslaw*, finding 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."

[16] I note that the determination of whether or not to summarily dismiss is a threshold test. It is not appropriate to examine the case on the merits in the absence of the parties, and then to dismiss the case on the basis that it cannot succeed. Instead, considering the cases cited above, I conclude that the correct test to be applied in cases of summary dismissal is:

> Is it plain and obvious on the face of the record that the appeal is bound to fail?

[17] To be clear, the question is not whether or not the appeal must fail after a full airing of the facts, jurisprudence, and submissions. Rather, the true question is whether or not that failure is pre-ordained no matter what evidence in support of the written arguments made by the Appellant could be presented at a hearing. Almost by definition, a summary dismissal should not require a lengthy decision.

[18] In the case at hand, the General Division member was faced with an appeal that did not set out any factual basis for the contention that the Appellant was entitled to benefits. Given that there was no evidence filed to show that the Appellant had sufficient hours to qualify, the General Division member had no choice but to send notice of their intention to proceed by way of summary dismissal in accordance with s. 22 of the *Social Security Tribunal Regulations*.

[19] In response to this notice, the Appellant provided additional submissions requesting that she receive benefits because she had insurable hours in a number of previous years. No additional evidence was adduced suggesting that the Appellant had sufficient insurable hours to qualify for benefits as required by the *Employment Insurance Act*.

[20] In its decision, the General Division found that as the Appellant had insufficient insurable hours to qualify for benefits, her appeal must be summarily dismissed.

[21] Although the General Division did not explicitly state the correct test to be applied, it is clear to me that it had an appreciation of the purpose of summary dismissals, bore in mind the high threshold required to summarily dismiss an appeal, and properly considered whether the case before them met that high threshold.

[22] Having considered the docket and the submissions of the parties, I find that it was plain and obvious on the face of the record that the appeal to the General Division was bound to fail. As such, the General Division member's determination that this appeal should be summarily dismissed was correct.

CONCLUSION

[23] For the reasons above, the appeal is dismissed.

Mark Borer

Member, Appeal Division