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

Citation: *Canada Employment Insurance Commission v. B. B.*, 2016 SSTADEI 118

Tribunal File Number: AD-16-125

BETWEEN:

Canada Employment Insurance Commission

Appellant

and

B. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: March 1, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on December 18, 2015. The GD allowed the Respondent's appeal where the Commission had determined that he (the Respondent) would not be paid benefits because he failed to serve his two week waiting period pursuant the *Employment Insurance Act* (EI Act) and the *Employment Insurance Regulations* (EI Regulations).

[2] The Respondent requested reconsideration of the Commission's decision. The Commission maintained its original decision on the basis that the Respondent could not serve his waiting period because his earnings were greater than 125% of his benefit rate.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on January 7, 2015. The Application was filed within the 30 day time limit.

[4] The grounds of appeal stated in the Application are that the GD erred in law as follows:

a) The Respondent had earnings in each week of his claim and the amounts reported were greater than 125% of his benefit rate; therefore, he was not able to serve his waiting period;

b) The GD concluded that his earnings cannot prevent him from serving the waiting period and should, rather, be deducted in accordance with subsections 19(1) of the EI Act and 39(2) of the EI Regulations;

c) The sections of the EI Act and EI Regulations that the GD Member relied on refer to the allocation of earnings in the waiting period. In the present case, because the Respondent did not serve his waiting period, the earnings he reported are not "earnings in the waiting period";

d) The GD ignored the requirements of section 13 of the EI Act; and

e) It transgressed the provisions of subsection 19(1) of the EI Act and subsection 39(2) of the EI Regulations, when it modified the allocation of the Respondent's earnings and, as a result, waived his waiting 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

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

[11] The GD found, at pages 12 and 13 of its decision, that:

> [39] The facts show that the Appellant had a period of unemployment during the period of January 2, 2015 to January 26, 2015. The Appellant returned to work on January 27, 2015. On February 25, 2015, while working, the Appellant filed a claim for regular benefits.
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> [40] The Commission determined that the claim commencement date was February 8, 2015. As such, the Commission argued that the waiting period could not be served because the Appellant was earning a salary. The Appellant reported earnings of over $514.00 per week. As the Appellant's reported earnings in each week of his benefit period (February 8, 2015 to April 18, 2015), he was unable to serve of the required waiting period.
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> [41] The Tribunal finds that the Appellant is not entitled to be paid benefits in a benefit period until a two week waiting period has been served. In accordance with the Commission's established commencement date, the waiting period should have been served the week beginning February 8, 2015, and the week beginning February 15, 2015.
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> [42] The Tribunal respectfully disagrees with the Commission's interpretation of the legislation. The Tribunal finds that earnings cannot, in accordance with the legislation, prevent the Appellant from serving the waiting period because when interpreted together with sections 19(1) and 39(1) and 39(2) the earnings are to be deducted dollar for dollar in the first three weeks following the waiting period.
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> [43] The Tribunal finds that it is unclear how the Commission came to the conclusion that earnings during the waiting period can prevent the waiting period from being served. As no benefits are payable during the waiting period, and the above noted provisions say the earnings are deducted during the waiting period—it is not possible for earnings in the waiting period to reduce benefits tin the waiting period to $0.
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> [44] Additionally, to determine the allowable earnings in the waiting period (i.e. the amount of earnings that a claimant can have before benefits are reduced to $0) the Commission appears to rely on 19(2). Again, the Tribunal does not see the legal authority for this. Rather section 19(1) deals with earnings in the waiting period and 19(2) deals with earnings in any other week (i.e. any week other than the waiting period).

> [45] Finally, the Tribunal finds that the fact that 39(2) contemplates the maximum amount to be deducted in respect of a claimant's earnings for any one week in the claimant's waiting period is an amount equal to the claimant's rate of weekly benefits (which means, if the maximum is deducted $0 benefits are payable) contradicts the Commission position that earnings in the waiting period prevent the waiting period from being served. If the earnings prevented the serving of the waiting period, then logically, how could the amounts be considered earnings "in the waiting period" for the purposes of deducted from the first 3 weeks that follow the waiting period?
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> [46] The Tribunal finds that the Appellant has demonstrated that earnings should not have prevented him from serving his waiting period.

[12] On the basis of these findings, the GD allowed the Respondent's appeal in part and ordered that the Respondent's earnings be deducted from the benefits payable.

[13] While the GD stated the legislative provisions relevant to the issues on appeal, the Applicant argues that the GD's findings ignored the requirements of section 13 of the EI Act and transgressed the provisions of subsection 19(1) of the EI Act and subsection 39(2) of the EI Regulations.

[14] The GD's determination that the Respondent's earnings should not have prevented him from serving his waiting period led to the determination that the only provision that applies is Regulation 39(2) which clearly instructs the Commission to deduct waiting period earnings in "an amount equal to the claimant's rate of weekly benefits".

[15] The primary issue on appeal is related to interpretation of the legislation, in particular section 13 and subsection 19(1) of the EI Act and subsection 39(2) of the EI Regulations.

[16] 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 grounds and reasons for appeal which fall into the enumerated grounds of appeal.

[17] On the basis that there may be an error of law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[18] The Application is granted.

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

[20] 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