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

Citation: *R. H. v. Canada Employment Insurance Commission,* 2016 SSTADEI 150

Tribunal File Number: AD-14-167

BETWEEN:

R. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal decision

DECISION BY: Pierre Lafontaine

HEARD ON: March 15, 2016

DATE OF DECISION: March 16, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 3, 2014, the General Division of the Tribunal concluded that:

> - The appeal of the Appellant was to be summarily dismissed since the appeal on the refusal of the Respondent to grant an extension of time to request reconsideration under paragraph 112(1)(b) of the *Employment Insurance Act* (the *"Act"*) had no reasonable chance of success.

[3] On March 14, 2014, the Appellant filed an appeal of the summary dismissal decision of the General Division.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties is not anticipated being a prevailing issue.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant and the Respondent were not present at the hearing. The Tribunal is satisfied that the Appellant received notice of the hearing on November 4, 2015. The Respondent had previously advised the Tribunal that it would not be present at the hearing.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

ISSUE

[7] The Tribunal must decide if the General Division erred when it summarily dismissed the appeal of the Appellant.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- His initial ROE shows that he accumulated 600 insurable employment hours;
- He was advised in writing by the Respondent on February 4, 2009 that he could not receive benefits as his ROE shows that he had accumulated 584 hours of insurable employment between December 23, 2007 and December 20, 2008 and he requires 600 hours to qualify;
- He questions why his insurable hours went from 600 to 584 hours;
- He later submitted that his insurable hours were actually 960 hours following a mistake by his employer when completing his ROE;

- This was a medical leave; one of which he had no control over;

- He has contributed to the EI program for many years and if he is not entitled to his EI benefits, he wants to opt out of the program.

[9] The Respondent submitted the following arguments against the appeal:

- In the case in hand, the General Division considered all the evidence and applied the correct legal test. The General Division found that the Respondent showed that the Respondent's discretion was properly exercised and given the clarity of the legislation and the case law, the Tribunal was satisfied that the Appellant's appeal had no reasonable chance of success;

- The Appellant was duly notified of the decision on February 4, 2009. He delayed until January 3, 2013 to provide the new information to support his claim. In addition, the employer did not amend the record of employment to show that they had made an error. They simply submitted a letter stating that the Appellant's total hours worked equaled to 960 hours. The employer re-submitted the same copy of the record of employment which they provided in January 2009;

- The Appellant admitted he had received the decision mailed to his last known address in 2009. The Appellant was advised in that letter to contact the Respondent if he had any additional information which could change the decision, or would like add more details;

- The Appellant was also notified that he had 30 days following the receipt of the notice to file an appeal in writing. Unfortunately, the Appellant waited four years before providing the additional information the Respondent referred to in the letter sent to him on February 4th, 2009;

- The General Division committed no error in fact or law in summarily dismissing the appeal with the conclusion that the Appellant's appeal had no reasonable chance of success. The decision to summarily dismiss the appeal, pursuant to section 53(1) of the *DESD Act*, was reasonable;

- There is nothing in the General Division decision to suggest that it was biased against the Appellant in any way, or that it did not act impartially; nor that there is any evidence to show there was a breach of natural justice present in this case.

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review. The Respondent submits that the applicable standard of review applicable to questions of fact and law is reasonableness - *Canada (PG) v. Hallée*, 2008 FCA 159.

[11] The grounds of appeal in section 58 of the *DESDA Act* are identical to the grounds of appeal applicable to the former Employment Insurance Umpires in subsection 115(2) of the *Act*. Therefore, the Federal Court of Appeal jurisprudence on the nature of the appeal regarding former EI Umpires is relevant and persuasive.

[12] The Tribunal is of the opinion that the degree of deference the Appeal Division accords to the General Division decisions should be consistent with the deference accorded to the decisions of former board of referees by the Employment Insurance Umpires. An appeal before the Appeal Division is not an appeal in the usual sense of that word but a circumscribed review – *Canada (AG) c. Merrigan*, 2004 CAF 253.

[13] The Tribunal acknowledges that the Federal Court of Appeal determined that the standard of review applicable to a decision of a board of referees (now the General Division) or an Umpire (now the Appeal Division) regarding questions of law is the standard of correctness - *Martens c. Canada (AG)*, 2008 FCA 240 and that the standard of review applicable to questions of fact and law is reasonableness - *Dunsmuir v. New Brunswick*, 2008 SCC 9, *Canada (PG) v. Hallée*, 2008 FCA 159.

ANALYSIS

[14] The Tribunal proceeded with the appeal hearing in the absence of the Appellant and the Respondent since it was satisfied that the parties had received proper notice of the hearing, in accordance with section 12(1) of the *Social Security Tribunal Regulations*.

[15] The Tribunal must decide if the General Division erred when it summarily dismissed the appeal of the Appellant.

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

[17] 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 (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, serve as representative examples of this group of cases.

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

> "[8] 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…"

[19] The court expressed similar sentiments in *Breslaw*, finding that:

> "[7] …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."

[20] In view of the above, the Appeal Division of the Tribunal as established that the correct test to be applied in cases of summary dismissal is the following:

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

[21] 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 or arguments might be presented at the hearing in support of the written representations in appeal.

[22] In the present case, the General Division examined the record and the Appellant's representations in appeal and determined that no evidence or arguments supported the conclusion that the Respondent had not exercised its discretion judicially when it refused to grant an extension of time to request reconsideration under paragraph 112(1)(b) of the *Act.*

[23] Furthermore, the Tribunal would like to point out that pursuant to section 90(1) of the *Act*, only an officer of the *Canada Revenue Agency* (*CRA*) authorized by the Minister can make a ruling on how many hours an insured person has had in insurable employment.

[24] It is well established in jurisprudence that the *CRA* has exclusive jurisdiction to make a determination on how many hours of insurable employment a claimant possesses for the purposes of the *Act* - *Canada (AG) v. Romano*, 2008 FCA 117, *Canada (AG) v. Didiodato*, 2002 FCA 34, *Canada (A.G.) v. Haberman*, 2000 FCA 150.

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

[26] The Tribunal agrees 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

[27] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division