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

Citation: *H. S. v. Canada Employment Insurance Commission,* 2016 SSTADEI 174

Tribunal File Number: AD-16-123

BETWEEN:

H. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 1, 2016

REASONS AND DECISION

INTRODUCTION

[1] On November 29, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal from a reconsideration decision of the Canada Employment Insurance Commission (Commission). The Commission had determined that the Applicant had received the correct number of entitlement weeks during his benefit period based on subsection 12(2) of the *Employment Insurance Act* (Act). The claimant sought reconsideration of the Commission's decision, and the Commission maintained its decision by letter dated September 26, 2015.

[2] A teleconference hearing was held by the GD on November 26, 2015. The GD decision was sent to the Applicant under cover of letter dated November 30, 2015.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 6, 2016; it states that the GD decision was received by the Applicant on December 12, 2015. The Application was filed within the 30 day limit.

ISSUE

[4] The AD of the Tribunal must decide if the appeal has a reasonable chance of success.

SUBMISSIONS

[5] The Applicant submitted in support of the Application that GD failed to observe a principal of natural justice or otherwise acted beyond or refused to exercise its jurisdiction. In particular, the Applicant argued that the GD failed to give consideration to:

a) His not being paid benefits for the date of departure and the date of return for his trip abroad (departure at 6:15pm on 26th February 2014 with return at 1:55pm on 27th March 2014); and

b) His 'window' of 52 weeks to claim 42 weeks of EI entitlement.

LAW AND ANALYSIS

[6] Subsection 52(1) of *Department of Employment and Social Development* (DESD) *Act* states that an appeal of a decision made under the *Employment Insurance Act* must be brought to the General Division of the Tribunal within 30 days after the day the decision is communicated to the Appellant.

[7] According to subsections 56(1) and 58(3) of the 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".

[8] 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".

[9] 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.

[10] The Applicant attended the GD hearing. The Respondent did not attend the hearing but did file written submissions.

[11] The issue before the GD was whether the Applicant received the correct number of entitlement weeks during his benefit period.

[12] The GD stated the correct law when considering weeks of entitlement, at pages 2 and 3 of its decision. It found that the formula for calculation of the number of weeks of entitlement

had been correctly applied by the Commission and that the Applicant had received the correct number of entitlement weeks during his benefit period.

[13] The GD decision stated:

> [18] The Member finds that the Act is very specific. There is no intervention permitted. An Appellant's insurable hours and regional rate of employment determine the maximum weeks of benefits that are to be paid.
>
> [19] On his application for benefits the Appellant lived in the Toronto Region. At the time of his application the Unemployment rate was 8.5%. Based on that regional rate and his insurable hours of employment, pursuant to Schedule 1 in subsection 12(2) of the Act, in applying the formula the Appellant was entitled to a maximum 42 weeks of benefits.
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> [20] The Member finds that the formula was correctly applied and the Appellant received the correct number of entitlement weeks during his benefit period pursuant to the Act.

[14] The Applicant's submissions in support of having a 52 week period within which to claim 42 weeks of EI entitlement, while framed as a breach of natural justice, reargue the facts and submissions that were before the GD. The GD is the trier of fact and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[15] On the issue of benefits paid or not paid on the date of departure and date of return from the Applicant's trip abroad, the GD decision stated that the Commission determined that the Applicant was not entitled to benefits from February 26, 2014 to March 27, 2014, although he had been paid benefits during this period. The GD decision does not state whether February 26, 2014 and March 27, 2014 were counted as two days or one day of disentitlement.

[16] The Federal Court of Appeal, in *Canada (AG) v. Picard*, 2014 FCA 46, held that "a person who is outside of Canada for a fraction of a complete day is not counted as a "period" outside of Canada under paragraph 37(b) of the Act".

[17] Based on the departure time on February 26, 2014 and return time on March 27, 2014 stated by the Applicant, the Applicant appears to have been outside of Canada for 28 days and about 19 hours. The Applicant argues that he was not paid EI benefits for both February 26,

2014 and March 27, 2014, which would be a period of 29 days (counting both the date of departure and the date of return).

[18] The GD decision does not appear to have reviewed this issue. If the calculation of the Commission was incorrect because it did not properly apply the *Picard* case, then the GD would have based its decision on an error of mixed fact and law.

[19] 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, specifically whether the *Picard* case was properly applied to his situation.

[20] On the ground that there may be an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[21] The Application is granted.

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

[23] 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