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

Citation: *J. A. v. Canada Employment Insurance Commission*, 2016 SSTADEI 193

Tribunal File Number: AD-15-1318

BETWEEN:

J. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Appeal Decision

DECISION BY: Shu-Tai Cheng

HEARD ON: On the record

DATE OF DECISION: April 11, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance (Commission) for benefits in June 2009. She received benefits but was notified by the Commission, in January 2012, that her benefits were cancelled retroactively because her record of employment was deemed invalid, she made false representations and a notice of debt and violation was issued. The Appellant requested reconsideration in July 2015. The Commission advised her that it would not be reconsidering the earlier decision because after considering the explanation she provided about the delay in requesting reconsideration, the Commission had determined that it did not meet the requirements of the *Reconsideration Request Regulations*.

[2] The Appellant appealed to the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) on September 15, 2015.

[3] On November 4, 2015, the GD dismissed the appeal summarily on the basis that the Tribunal is bound by the *Employment Insurance Act* and *Employment Insurance Regulations* and does not have any authority to vary the legal requirements set out in the law.

[4] The Appellant filed an application to appeal to the Appeal Division (AD) of the Tribunal, on August 26, 2015, giving notice that she wished to appeal the decision of the GD on the following basis:

a) She was new to Canada when she applied for EI benefits and did not know the rules;

b) She did not receive the Commission's letter in 2009;

c) She is financially unable to pay the amount said to be owed;

d) She is willing to pay a reduced amount which is based on her ability to pay; and

e) She would like a Tamil interpreter because she needs help to read and reply to letters in English.

[5] The Tribunal advised the Appellant, by letter dated January 5, 2016, that:

> … the Tribunal will provide the services of an interpreter during its hearings, but does not provide such services for the filing of documents. The parties are responsible for obtaining the services of an interpreter to help them translate the documents sent by the Tribunal. Parties are also responsible for the quality and accuracy of the translation they obtain, as well as for all costs and expenses related to the translation of documents.
>
> In order to enable you to obtain assistance in responding to the acknowledgement letter sent to you on December 15, 2015, the Member assigned to your file is delaying making a decision on this matter until **February 5, 2016**.
>
> In addition, please be advised that the Member assigned to your file is prepared to consider a further extension of time, **if received prior to February 5, 2016**. Please keep in mind that the Tribunal must receive your request for a further extension of time prior to February 5, 2016. Otherwise, the Member assigned to your file may decide the matter in dispute on the basis of the material filed as of February 5, 2016, without further notice to you.

[6] The Appellant did not reply to this letter.

[7] The Respondent filed submissions on the appeal to the AD which can be summarized as follows:

a) The issue under appeal is a 3½ year delayed request for reconsideration;

b) The Appellant was aware of the decisions for which she requested reconsideration and has not provided a reasonable explanation for the delay in submitting her request for reconsideration;

c) Her explanation for the delay is that she was fearful of contacting the Commission as a result of the fraud she had committed;

d) There were no mitigating circumstances to explain the lengthy delay in submitting her request for reconsideration and she did not demonstrate a continuing intention to request reconsideration of the decisions;

e) Her reasons for appealing are due to financial difficulties in repaying the debt;

f) The GD correctly determined that the appeal does not have a reasonable chance of success; and

g) There are no grounds to appeal the decision of the GD, and the Commission respectfully requests that the appeal to the AD be dismissed.

[8] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity of the issue under appeal; and

b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[9] The AD must decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD, confirm, reverse or modify the decision.

LAW AND ANALYSIS

[10] The Appellant appeals a decision dated November 26, 2015 of the GD, whereby it summarily dismissed her appeal on the basis that it was satisfied that the appeal did not have a reasonable chance of success.

[11] No leave to appeal is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESD Act), as there is an appeal as of right when dealing with a summary dismissal from the GD. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

Standard of Review

[12] The Respondent submits that the applicable standard of review for questions of law is correctness, and the applicable standard of review for questions of mixed fact and law is that of reasonableness: *Pathmanathan v. Canada (AG)*, 2015 FCA 50 (paragraph 15).

[13] The Federal Court of Appeal has determined, in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, that the standard of review for questions of law and jurisdiction in employment insurance appeals from the Board of Referees (Board) is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[14] Until recently, the AD had been considering a decision of the GD a reviewable decision by the same standards as that of a decision of the Board.

[15] However, in *Canada (Attorney General) v. Paradis; Canada (Attorney General) v. Jean*, 2015 FCA 242, the Federal Court of Appeal suggested that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of EI decisions rendered by the GD.

[16] The Federal Court of Appeal, in *Canada (Attorney General) v. Maunder*, 2015 FCA 274, referred to *Paradis, supra* and stated that it was unnecessary for the Court to consider the issue of the standard of review to be applied by the AD to decisions of the GD.

[17] I am uncertain how to reconcile this seeming discrepancy. As such, I will consider this appeal by referring to the appeal provisions of the DESD Act.

[18] Subsection 58(1) of the DESD Act sets out the grounds of appeal as follows:

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.

[19] The Appellant does not dispute any of the factual findings made by the GD. Rather, she alleges that she did not receive the Commission's 2009 letter and she is not able to pay a large sum of money every month.

[20] The Commission's reconsideration letter was dated January 9, 2012, not in 2009. There is no dispute that the Appellant received the reconsideration letter. She submitted a "Request for Taxpayer Relief" to the Commission, in February 2012, and the Commission notified her that the form was a Canada Revenue Agency (CRA) form and not their form. The Commission also advised her that if she disagreed with the reconsideration decision, she should file an appeal. The Appellant requested reconsideration in July 2015.

Legal Test for Summary Dismissal

[21] Subsection 53(1) of the DESD Act allows the GD to summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[22] The powers of the AD include but are not limited to substituting its own opinion for that of the GD. Pursuant to subsection 59(1) of the DESD Act, the AD may dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

[23] Here, the GD correctly stated the legislative basis upon which it might summarily dismiss the appeal, by citing subsection 53(1) of the DESD Act at paragraphs 5 and 16 of its decision.

[24] However, it is insufficient to simply recite the wording related to a summary dismissal set out in subsection 53(1) of the DESD Act, without properly applying it. After identifying the legislative basis, the GD must correctly identify the legal test and apply the law to the facts.

[25] The GD applied the test "assuming the facts pleaded are true, and the pleading discloses no reasonable cause of action then the appeal should be dismissed" at paragraphs 22 and 26 of its decision.

[26] Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act, the Tribunal notes that it is a concept that has been used in other areas of law and has been the subject of previous decisions of the AD.

[27] There appear to be three lines of cases in previous decisions of the AD on appeals of summary dismissals by the GD:

a) Examples AD-13-825 (2015 SSTAD 715), AD-14-131 (2015 SSTAD 594), AD-14-310 (2015 SSTAD 237), AD-15-74 (2015 SSTAD 596): the legal test applied was: Is it plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing? This was the test stated in the Federal Court of Appeal decisions in *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 1, and *Breslaw v. Canada (AG)*, 2004 FCA 264.

b) Examples AD-15-236 (2015 SSTAD 974), AD-15-297 (2015 SSTAD 973), AD-15-401: the AD has applied a differently articulated legal test: Whether there is a "triable issue" and whether there is any merit to the claim using the language of "utterly hopeless" and "weak" case, in distinguishing whether an appeal was appropriate for a summary dismissal. As long as there was an adequate factual foundation to support the appeal and the outcome was not "manifestly clear", then the matter would not be appropriate for a summary dismissal. A weak case would not be appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it; and

c) Example AD-15-216 (2015 SSTAD 929): the AD did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

Decision of the GD

[28] The GD explained the basis upon which it summarily dismissed the appeal as follows:

> [22] Subsection 53(1) of the DESD Act requires that an appeal be summarily dismissed if the General Division is satisfied that the appeal had no reasonable chance of success. While "no reasonable chance of success" has not been defined for the purposes of the DESD Act, it has been interpreted by the courts in other contexts. The Supreme Court of Canada, in examining the legal test to be applied on motions to strike third party notices, purports if the facts are plain, obvious, assuming the facts pleaded are true, and the pleading discloses no

reasonable cause of action then the appeal should be dismissed (R. v. Imperial Tobacco Canada Ltd, 2011 SCC paragraph 17).

[23] In this case the facts are clear and not disputed. The Respondent notified the Appellant on January 9, 2012 that her claim for benefits was cancelled as they determined that she used a fraudulent record of Employment to qualify for benefits. The Respondent advised the Appellant that if she disagreed she must file a request for reconsideration within 30 days of receiving the Notice. The Appellant filed a request for reconsideration approximately 3 ½ years from the date of the Respondent notification letter and failed to provide any evidence of any mitigating circumstances to explain the lengthy delay submitting her request for reconsideration.

[24] The Appellant does not dispute that she filed a claim for benefits using a fraudulent record of Employment to obtain those benefits. (GD3-27, 28, 29). Rather, she states that she was new to Canada and did not know it was wrong and further that she is having financial difficulties.

[25] The Tribunal has reviewed the evidence submitted by both parties and finds the appeal has no reasonable chance of success. The investigation by the Tribunal and the evidence provided by the Appellant clearly shows that she used a fraudulent record of employment to qualify for and collect benefits. The Appellant has not provided any contradictory or supporting evidence and failed to prove that there is a reasonable chance of success within the meaning of the Act.

[26] The Tribunal is bound by the provision of the Act and Regulations, and does not have any authority to vary the legal requirements set out in the law. While accepting the facts pleaded as true, the Appellant's claim has failed to demonstrate a reasonable chance of success.

[29] It is not necessary for me to comment for all cases of summary dismissals whether the application of the legal test in *Imperial Tobacco* is correct in law. A motion to strike is different from a decision on summary dismissal, but the criteria are similar. The difference is the application of the words "assuming the facts pleaded are true" to the analysis of whether there is a reasonable chance of success.

[30] The appeal to the GD was based on the Appellant's submissions that she did not have the means to pay the amount of the debt. The decision appealed from was a refusal to extend the period of 30 days to request reconsideration with the Commission. The file contained little explanation for the delay of three and a half years. The Appellant's response to the GD's notice

of intention to dismiss the appeal summarily stated that she was new to Canada, did not know what she did was wrong and that she was having financial difficulties. The Appellant's appeal to the AD repeats the same reasons as her grounds for appeal.

[31] Applying the legal test of *Imperial Tobacco* - Is it plain and obvious, assuming the facts pleaded to be true, does the appeal disclose a ground of appeal that has a reasonable chance of success? – the GD concluded that the appeal had no reasonable chance of success.

[32] I find that the application of the two tests cited in paragraph [27] of this decision leads to the same result in the present case – the appeal has no reasonable chance of success. It is plain and obvious on the face of the record that the appeal is bound to fail, regardless of the evidence or arguments that could be presented at a hearing. It is also clear that this is not a "weak case" but an "utterly hopeless" one, as it does not involve assessing the merits of the case or examining the evidence.

[33] After reviewing the appeal of the Appellant, the GD record and decision, and the previous decisions of the AD relating to summary dismissals, I find that the GD applied the law to the facts correctly. Also, there is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. For these reasons, I dismiss the appeal.

Request by the Appellant

[34] In the Application, the Appellant requests a reduction of the amount of her debt.

[35] The AD is not able to make a determination on this issue as it is not within the Tribunal's jurisdiction. In order to negotiate a repayment arrangement, the Appellant would need contact the CRA's Debt Management Centre.

CONCLUSION

[36] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division