



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *L. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 207

Tribunal File Number: AD-16-295

BETWEEN:

**L. S.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division – Summary Dismissal**

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DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 14, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] On January 15, 2016, the General Division of the Canada Social Security Tribunal (“the Tribunal”) summarily dismissed the appeal of the Appellant (the Claimant). The General Division (GD) found that:

- (a) the Claimant’s driver’s licence was suspended for a period of 90 days;
- (b) the competent authorities suspended the Claimant’s driver’s licence because he was driving in an impaired state when they stopped him;
- (c) possession of a valid driver’s licence is an essential condition for employment with the Claimant’s employer;
- (d) the decision to drive after consuming alcohol, knowing that one may, even unknowingly, contravene the provisions of the ACT and the *Criminal Code*, is a wilful act; and
- (e) the appeal has no reasonable chance of success and was therefore summarily dismissed.

[2] The decision was communicated to the Appellant on January 18, 2016 and received by him on January 20, 2016.

[3] The Appellant appealed to the Tribunal’s Appeal Division on February 10, 2016, within the prescribed time limit. The reasons given were that there was an arguable case and that the Appellant was unable to present his arguments at the hearing before the GD. The notice of appeal contains five pages of arguments and refers to the facts from the Appellant’s perspective.

[4] The Respondent contends that the GD did not err in deciding to dismiss the appeal summarily.

[5] This appeal was decided on the record for the following reason: the need to proceed as informally and quickly as possible according to the Tribunal's Regulations on circumstances, fairness and natural justice.

## **ISSUE**

[6] The Tribunal must determine whether it should dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division or confirm, rescind or vary the decision.

## **THE LAW AND ANALYSIS**

### **Legislative provisions**

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

[8] 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.

[9] The Tribunal's Appeal Division must be in a position to determine, in accordance with subsection 58(1) of the Act, whether there is a question of law, fact or jurisdiction, or relating to a principle of natural justice the response to which might justify setting aside the decision under review.

### **Legal test for summary dismissal**

[10] The initial determination concerns the claim (for regular employment insurance benefits) that was dismissed by the Respondent because it found that the Claimant was not entitled to regular benefits because he had stopped working for his employer on March 9, 2015, as a result of his own misconduct.

[11] The first issue before the Appeal Division is whether the General Division correctly identified and applied the legal test for summarily dismissing the appeal.

[12] The parties made no submissions respecting the legal test for summary dismissal.

[13] Although the Federal Court of Appeal has not yet considered the matter of summary dismissal in the context of the Tribunal's legislative and regulatory framework, it has considered the question on several occasions in the context of its own summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, are representative examples of those judgments.

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

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 to summarily dismiss an appeal is a threshold test. It is not appropriate to consider the case on the merits in the parties' absence and then find that the appeal cannot succeed. The question to be asked for summary dismissal is as follows: Is it plain and obvious on the record that the appeal is clearly bound to fail?

[17] For further clarity, the question to be asked is not whether the appeal must be dismissed after considering the facts, the case law and the parties' arguments. Rather, it must be

determined whether the appeal is bound to fail regardless of the evidence or arguments that might be submitted at a hearing.

### **Decision of the General Division**

[18] The General Division sent notice of its intention to proceed by summary dismissal on December 17, 2015. The notice read as follows:

[Translation]

Because the misconduct may be a violation of an act as a result of which an essential condition of employment ceases to be met, even though the actions resulting in the misconduct were taken outside working hours.

Because, to constitute misconduct, the Claimant's actions had to constitute a breach of a duty that is express or implied in the Claimant's contract of employment.

Because possession of a driver's licence was an essential condition of his employment.

If you believe this appeal should not be summarily dismissed, the Tribunal must receive your detailed written submissions explaining why your appeal has a reasonable chance, no later than January 15, 2014.

[19] In a letter dated January 13, 2016, which the Tribunal received on January 14, 2016, the Appellant objected to the notice, referring to five pages of written submissions.

[20] The General Division summarily dismissed the appeal on January 15, 2016.

[21] The General Division member reviewed the sections and subsections of the applicable acts, the case law, the evidence in the file, the appeal application and the Appellant's submissions regarding the notice of summary dismissal and concluded as follows:

[Translation]

[15] In view of the evidence and the submissions in the file, the Claimant's appeal has no reasonable chance of success. The evidence in the file shows that the competent authorities suspended the Claimant's driver's licence because he was driving while impaired (exhibit GD3-24) when stopped by the competent authorities. As a result of his being stopped, the Claimant's driver's licence was suspended for a period of 90 days (Exhibit GD3-24). In this case, the employer states that his employees sign a statement of driver's licence validity and undertake to inform the employer without delay of any change to or suspension of their driver's licence (Exhibit GD3-36). The employer further states that it is an essential condition of employment with the employer that employees hold a valid driver's licence (Exhibit GD3-36).

[16] Subsection 30(1) provides that claimants who lose their employment by reason of their own misconduct are disqualified from receiving benefits. The Tribunal also relies on *Brisette* (A-1342-92), a case similar to this one, in which the Court clearly held that the decision to drive after consuming alcohol, knowing that one may contravene, even unintentionally, the Act and the *Criminal Code*, is a wilful act. Again in *Brisette* (A-1342-92), the Court further explained that the misconduct need not be committed in the workplace or in the course of the employment relationship. The Court then held that, to commit misconduct, a claimant must be employed by the employer and the alleged action, the loss of a driver's licence in this instance, must constitute a breach of duty that is express or implied in the Claimant's contract of employment.

### **Error of the General Division**

[22] The General Division considered the matter on the merits in the absence of the parties and concluded that the appeal could not succeed.

[23] After examining the facts, the case law and the arguments of the parties, the General Division concluded that the appeal must be dismissed. It did not determine whether the appeal was bound to fail, regardless of the evidence or arguments that might be presented at a hearing.

[24] The General Division did not apply the proper test to find that the appeal had to be summarily dismissed. This is an error of law reviewable under paragraph 58(1)(b) of the *Department of Employment and Social Development Act*.

[25] I note that Parliament has adopted a legislative and regulatory framework that does not authorize the Employment Insurance Section of the General Division to make decisions on the record, even though the Income Security Section of the General Division is authorized to do so.

[26] Since Parliament does not speak in vain, I must conclude that it wanted to ensure that, as a general rule, appellants in the Employment Insurance Section of the General Division have an opportunity to be heard. Summary dismissal should not be expanded to circumvent that intention.

[27] Since the General Division did not apply the proper test, I am allowing the appeal. It is appropriate to refer the matter back to the Tribunal's General Division.

## **CONCLUSION**

[28] The appeal is allowed and the matter is referred back to the Tribunal's General Division for reconsideration in accordance with these reasons.

Shu-Tai Cheng  
Member, Appeal Division