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

Citation: *K. G. v. Canada Employment Insurance Commission,* 2016 SSTADEI 248

Tribunal File Number: AD-16-396

BETWEEN:

K. G.

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: May 5, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance (Commission) for employment insurance (EI) benefits in July 2015. The Commission notified her that she did not qualify to receive EI benefits, because she required 700 hours of insurable employment in the qualifying period, whereas she had only accumulated 508 hours. The Appellant made a request for reconsideration and, on October 28, 2015, the Commission advised her that the earlier decision was maintained.

[2] The Appellant appealed to the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) on November 24, 2015. She requested that the Tribunal allow her appeal because it is unfair that she has paid into the employment insurance program for over twenty years and has been denied EI benefits even though she lost her job through no fault of her own.

[3] On January 21, 2016, the GD dismissed the appeal summarily on the basis that the Appellant's qualifying period is the 52 weeks prior to her application for EI benefits, namely from July 20, 2014 to July 18, 2015, and there is no dispute that the Appellant accumulated only 508 hours of insurable employment during her qualifying period when she required 700 hours. The GD also noted that the *Employment Insurance Act* (EI Act) and Federal Court of Appeal jurisprudence do not allow for any discretion with respect to the number of hours a claimant requires in order to qualify for benefits.

[4] The Appellant filed an application to appeal to the Appeal Division (AD) of the Social Security Tribunal, on March 7, 2016, giving notice that she wished to appeal the decision of the GD. Her reasons for appeal can be summarized as follows:

a) She has been working since she was sixteen years old and has never needed EI;

b) In 2015, she had to apply for EI, because she was laid off from her job due to no fault of her own; and

c) She has paid more than enough into the EI program that she should be covered to receive benefits.

[5] The Respondent filed submissions which can be summarized as follows:

a) The Appellant's appeal before the GD had no reasonable chance of success and was summarily dismissed;

b) The evidence is undisputed that the Appellant's qualifying period was from July 20, 2014 to July 18, 2015, the 52 week period prior to her benefit period, that the Appellant had resided in the Edmonton (47) region where the regional rate of unemployment, at the time the Appellant had filed her claim, was 5.9 %. As such, pursuant to subsection 7(2) of the EI Act, the Appellant required an accumulation of 700 of insurable hours in which to qualify for regular benefits;

c) The Appellant had only accumulated a total of 508 insurable hours in her qualifying period;

d) The Appellant had accumulated hours in the period June 2013 to June 2014 which was prior to her qualifying period and these hours were used to establish a previous claim;

e) Neither the GD nor the AD of the Tribunal can vary the qualifying conditions under subsection 7(2) of the EI Act;

f) The GD decision was reasonable and compatible with the evidence on file; and

g) There is nothing in the GD's decision to suggest that the GD was biased against the Appellant in any way or that it did not act impartially; nor is there any evidence to show that there was a breach of natural justice present in this case.

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

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

b) Pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*, the AD Member has determined that no further hearing is required; and

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

ISSUE

[7] 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

[8] The Appellant appeals a decision dated January 21, 2016 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.

[9] 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 the AD is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations*.

Standard of Review

[10] 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).

[11] 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 is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[12] 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.

[13] 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.

[14] 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.

[15] 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.

[16] 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.

[17] The Appellant does not dispute any of the factual findings made by the GD. Rather, she alleges that the result is unfair because losing her job was not her fault, it is the first time she has applied for EI and she has paid into the EI program for many years.

Legal Test for Summary Dismissal

[18] 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.

[19] 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.

[20] 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.

[21] 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.

[22] The GD applied the test “whether failure of the appeal is pre-ordained no matter what evidence or arguments might be presented at the hearing” at paragraph 22 of its decision.

[23] 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.

[24] 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

[25] The GD decision applied the test in paragraph [24] a) above, although articulated in different words. The GD explained the basis upon which it summarily dismissed the appeal as follows:

> [17] The Appellant was advised in writing of the Tribunal's intent to summarily dismiss the appeal and, pursuant to section 22 of the *Social Security Tribunal Regulations*, was given a reasonable period of time to make further submissions. No submissions were received.
>
> [18] To receive regular EI benefits, the Appellant must meet the requirements set out in section 7 of the EI Act.
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> [19] In the present case, there is no dispute that the Appellant is ***not*** a new entrant or re-entrant pursuant to subsection 7(4) of the EI Act. As a result, subsection 7(2) applies to her claim and the Appellant must meet the minimum requirements set out in the table in paragraph 7(2)(b) of the EI Act. Given that the Appellant resides in the Employment Insurance Economic Region of Edmonton, where the unemployment rate was 5.9% the week preceding the benefit period, the Appellant requires 700 hours of insurable employment during her qualifying period in order to qualify for EI benefits pursuant to paragraph 7(2)(b) of the EI Act.
>
> [20] The Appellant's qualifying period is the 52 weeks prior to her application for EI benefits, namely from July 20, 2014 to July 18, 2015. There is no dispute that the Appellant accumulated only 508 hours of insurable employment during her qualifying period.
>
> [21] The Tribunal acknowledges the Appellant's frustration at not being able to receive EI benefits during her difficult year. However, the EI Act does not allow any

> discretion with respect to the number of hours a claimant requires in order to qualify for benefits, and the Tribunal does not have discretion to vary the clear wording in the legislation, no matter how compelling the circumstances. The Federal Court of Appeal has confirmed the principle that the requirements set out in section 7 of the EI Act are not in the discretion of the decision maker to vary – even if a claimant is short one (1) hour of meeting the qualifying conditions (*Attorney General (Canada) v. Lévesque, 2001 FCA 304*). This principle applies no matter how compelling the circumstances (*Pannu 2004 FCA 90*). The Tribunal is supported in its analysis by the Supreme Court of Canada's statement in *Granger v. Canada (CEIC), [1989] 1 S.C.R. 141*, that a judge is bound by the law and cannot refuse to apply it, even on grounds of equity.
>
> [22] In the present case, the failure of the appeal is pre-ordained no matter what evidence or arguments might be presented at a hearing.

[26] I find that the GD Member did identify one of the applicable legal tests to establish whether or not summary dismissal was required, and I agree with the findings stated in paragraphs [17] to [22] of the GD decision.

[27] Further, I find that the application of the two tests cited in paragraph [24] 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.

[28] Neither the GD nor the AD of the Tribunal can vary the qualifying conditions under subsection 7(2) of the EI Act, no matter how compelling the circumstances.

[29] 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.

CONCLUSION

[30] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division