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

[TRANSLATION]

Citation: *M. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 261

Tribunal File Number: AD-16-431

BETWEEN:

M. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 18, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Canada Social Security Tribunal ("the Tribunal") grants leave to appeal before the Appeal Division.

INTRODUCTION

[2] On February 12, 2016, the Tribunal's General Division ("the SST-GD") allowed the Claimant's appeal in part. It held that:

(a) the Applicant is considered a self-employed person or an individual engaged in a business within the meaning of subsection 30(5) of the *Employment Insurance Regulations* ("the EI Regulations") (and that the presumption under subsection 39(1) was not overcome and that the claimant worked full weeks starting on August 12, 2007); and

(b) the Applicant did not knowingly make false or misleading representations.

[3] In December 2012, the Canada Employment Insurance Commission ("the Commission") found that the Claimant ("the Applicant") could not be considered as unemployed from August 13, 2007, and that he had knowingly made false representations. The Commission issued a warning but did not ask the Applicant to pay a penalty. An overpayment of $13,536.00 was established.

[4] The Applicant appealed from that decision to the Board of Referees ("the Board"). In June 2013, the Board found that the disentitlement imposed was justified because the Applicant had not proved that he was unemployed and that the imposition of a non-monetary penalty was also justified.

[5] In July 23, 2013, the Applicant filed an appeal with the Tribunal's Appeal Division ("the AD"). On May 19, 2015, the AD allowed the appeal and referred the matter back to the SST-GD for a new hearing.

[6] The hearing before the SST-GD was held via teleconference on December 9, 2015. The SST-GD rendered its decision on February 12, 2016.

[7] The Applicant filed an application for leave to appeal ("the Application") before the Appeal Division on March 15, 2016, within the prescribed time limit.

ISSUES

[8] Does the appeal have a reasonable chance of success?

THE LAW AND ANALYSIS

[9] Subsections 56(1) and 58(3) of the Department of Employment and Social Development Act provide that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and that the Appeal Division "must either grant or refuse leave to appeal".

[10] Subsection 58(2) of the Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

[11] 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.

[12] The Tribunal will grant leave to appeal if it is satisfied that the Applicant has demonstrated that one of the aforementioned grounds of appeal has a reasonable chance of success.

[13] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the Department of Employment and Social Development 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.

[14] The Applicant states in his Application that:

(a) the SST-GD erred in law in analyzing the six factors set forth in subsection 30(3) of the EI Regulations without determining whether the Claimant was engaged in a business or worked as a self-employed person during the benefit period;

(b) the SST-GD erred in law in preferring indirect hearsay evidence (remarks the Claimant allegedly made to the Commission's investigator, which were denied), evidence that moreover was in admissible, to the Claimant's legal and admissible testimony at the hearings;

(c) the claimant was deprived of his right to make full answer and defence given the very long time that had elapsed since the claim for benefits was filed in June 2007 and of the possibility to produce adequate documentary evidence, particularly concerning his job searches; the long delay was due in particular to the prolonged inaction by the Employment Insurance Commission, which demanded repayment more than five years (December 2012) after the initial claim was made, when the Claimant had already destroyed relevant documentation; and

(d) the SST-GD made obvious and decisive errors in interpreting the factors set forth in subsection 30(3) of the EI Regulations, particularly with regard to the time spent and the financial success of the business.

[15] Since and application for leave to appeal is a preliminary step to a hearing on the merits (in the event that a hearing is necessary), the parties do not have to prove their case. The Tribunal will grant leave to appeal if it is satisfied that one of the grounds of appeal has a reasonable chance of success.

[16] With respect to the Appellant's argument that the GD did not determine whether he was engaged in a business or worked as a self-employed person during the benefit period, the SST-GD held, at paragraph [27] of his decision, that, in August 2007, "the Claimant's objective was to make this self-employed work his principal means of livelihood." The SST-GD thus determined that he was engaged in a business or worked as a self-employed person during the benefit period.

[17] The Applicant contends that the SST-GD preferred indirect hearsay evidence (remarks the Claimant allegedly made to the Commission's investigator, which are denied), evidence which moreover is inadmissible, to his testimony at the hearings. Remarks made during interviews are admissible in evidence, contrary to the Applicant's argument.

[18] As regards the Applicant's argument that the SST-GD erred in interpreting the factors set forth in subsection 30(3) of the EI Regulations, particularly with regard to the time spent and the financial success of the business, the Applicant filed submissions on the financial success of the business and the time spent before the SST-GD.

[19] The role of the SST-GD includes determining the weight to be assigned to the evidence brought before it. It is not up to the Member of the Appeal Division who has to determine whether to grant leave to appeal to reweigh and reassess the evidence submitted before the General Division. Mere repetition of the arguments already made before the General Division is not sufficient to show that one of the above grounds of appeal has a reasonable chance of success.

[20] As for the Applicant's argument that he was deprived of his right to make full answer and defence, as a result of the very long time that had elapsed since his claim for benefits was filed in June 2007, and of the possibility to produce adequate documentary evidence, the Applicant pursued that argument before the General Division: see subparagraph [12] (a) of the SST-GD's decision.

[21] The SST-GD noted that the Respondent referred to the delay in providing its written submissions (see subparagraph [14] (u)), but the SST-GD's finding in paragraph [22] appears to

concern only the question whether the Applicant had documents to support the information he had provided:

> [Translation]
>
> The Tribunal finds that the Claimant was initially contacted by the Commission on December 28, 2011, regarding the 2008 year (GD2-95). At that time, the Claimant was questioned in connection with 2008 and still had the necessary documents in hand, since the four-year period had not expired. He did not provide answers in writing to the written questions put to him but reported to the Service Canada Centre on two occasions. According to the information contained in the investigator's report, and even though the Claimant does not disagree with the information it contains, the Claimant provided the transactions report himself and explained the difference between date of sale and cashing date (GD2-99). The Claimant gave the Tribunal similar explanations, adding that the report probably contained certain errors. The Tribunal notes that the Claimant did not mention to the investigator any errors in connection with the report when he handed it over to him.

[22] In paragraphs [53] and [54] of its decision, the SST-GD noted that "the Commission did not impose a penalty on the claimant because more than 36 months had elapsed between the decision rendered following the Commission's investigation and the claim for benefits" and that section 41.1 of the EI Act "provides that a warning may be issued within 72 months after the day on which the act or omission occurred." The GD found that the Applicant had not knowingly made false or misleading representations, but it did not analyze the effect of the delay between the claim for benefits and the reconsideration of the claim.

[23] An appeal is not a new hearing on the merits of the Applicant's claim for employment insurance benefits.

[24] Having reviewed the appeal filed, the General Division's decision and the Applicant's arguments, the Tribunal finds that:

(a) on the grounds of appeal summarized in subparagraphs [14] (a), (b) and (d), the appeal has no reasonable chance of success; and

(b) as for the ground of appeal summarized in subparagraph [14] (c), the Applicant has raised a question pertaining to an error in law the response to which may lead to the setting aside of the decision under review.

[25] The appeal has a reasonable chance of success as a result of an error in law described in paragraph [20] above.

CONCLUSION

[26] Leave to appeal is granted, but is limited by the findings outlined in paragraphs [22] to [25] above.

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

[28] I invite the parties to make submissions on the following questions: whether a hearing is appropriate; if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division