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

Citation: *A. D. v. Canada Employment Insurance Commission,* 2016 SSTADEI 291

Tribunal File Number: AD-16-228

BETWEEN:

A. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Appeal Decision

DECISION BY: Shu-Tai Cheng

HEARD: On the Record

DATE OF DECISION: June 3, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant applied to the Canada Employment Insurance Commission (Commission) for employment insurance (EI) benefits in February 2015. The Commission notified him that he did not qualify to receive EI benefits, because he has insufficient insurable hours of employment. The Appellant made a request for reconsideration. The Commission advised him, by letter dated March 21, 2015, that he required 1103 hours of insurable employment in the qualifying period, whereas he had only accumulated 1014 hours.

[2] The Appellant appealed to the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) on April 15, 2015. He requested that the Tribunal allow his appeal because he was suffering from mental health issues, was unable to correspond for a period of time and he was penalized when he was ill. Because of this, he should only have to accumulate 700-910 insurable hours to qualify for benefits.

[3] On August 10, 2015, the GD dismissed the appeal summarily on the basis that the Appellant's qualifying period is the 52 weeks prior to his application for EI benefits, namely from February 2, 2014 to January 31, 2015, and there is no dispute that the Appellant accumulated 1014 hours of insurable employment during his qualifying period when he required 1103 hours. The GD noted that the Appellant had previously accumulated a violation and, as a result, was required to have an increased number of insurable hours to qualify for benefits. The GD also noted that the *Employment Insurance Act* does 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 January 28, 2016. His reasons for appeal can be summarized as follows:

a) He was suffering from mental health issues at the time of the penalties;

b) He paid his first penalty; and

c) He is still suffering from mental health issues but is on medication and doing better now.

[5] The Respondent filed submissions as follows:

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

b) A very serious violation was imposed on a 2012 claim and a subsequent violation on a 2014 claim;

c) These resulted in the Appellant needing increased insurable hours in order to qualify for regular benefits;

d) The second violation was overturned, and consequently the Appellant required 1103 insurable hours;

e) He accumulated only 1014 hours in the benefit period;

f) The GD had no discretion regarding the number of hours required to qualify for benefits;

g) The Appellant provides no new information and does not set out any grounds on which the GD erred; rather, he restates his argument before the GD;

h) The role of the AD is not to rehear the case but to determine if there was a reviewable error as set out in subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act); and

i) There was no error in the GD decision.

[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) 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 back to the GD, confirm, reverse or modify the GD's decision.

LAW AND ANALYSIS

[8] The Appellant appeals a decision dated August 10, 2015, whereby the GD summarily dismissed his 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 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. Office of the Umpire*, 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 (AG) v. Paradis; Canada (AG) v. Jean*, 2015 FCA 242, the Federal Court of Appeal indicated that this approach is not appropriate when the AD of the Tribunal is reviewing appeals of employment insurance decisions rendered by the GD.

[14] The Federal Court of Appeal, in *Canada (AG) v. Maunder*, 2015 FCA 274, referred to *Jean, 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. The *Maunder* case related to a claim for disability pension under the *Canada Pension Plan*.

[15] In the recent matter of *Hurtubise v. Canada (AG)*, 2016 FCA 147, the Federal Court of Appeal considered an application for judicial review of a decision rendered by the AD which had dismissed an appeal from a decision of the GD. The AD had applied the following standard of review: correctness on questions of law and reasonableness on questions of fact and law. The AD had concluded that the decision of the GD was "consistent with the evidence before it and is a reasonable one…" The AD applied the approach that the Federal Court of Appeal in *Jean, supra*, suggested was not appropriate, but the AD decision was rendered before the *Jean* decision. In *Hurtubise*, the Federal Court of Appeal did not comment on the standard of review and concluded that it was "unable to find that the Appeal Division decision was unreasonable."

[16] There appears to be a discrepancy in relation to the approach that the AD of the Tribunal should take on reviewing appeals of employment insurance decisions rendered by the GD, and in particular, whether the standard of review for questions of law and jurisdiction in employment insurance appeals from the GD differs from the standard of review for questions of fact and mixed fact and law.

[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 and without reference to "reasonableness" and "correctness" as they relate to the standard of review.

[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, he alleges that the result is unfair because he was very sick at the time the violation was imposed, he was recently diagnosed with cancer and his financial situation is poor.

Legal Test for Summary Dismissal

[20] 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.

[21] 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.

[22] 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 3 and 17 of its decision.

[23] 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.

[24] The GD asked the question "… whether the appeal should be summarily dismissed" at paragraph 2 of its decision.

[25] The GD decision does not state what legal test was applied to arrive at its conclusion to summarily dismiss the appeal.

Decision of the GD

[26] While the GD did not state the legal test applied, it did explain the basis upon which it summarily dismissed the appeal:

> [18] In order to qualify for Employment Insurance benefits, an insured person must have experienced an interruption of earnings from employment, and must also have acquired, in his qualifying period, at least the number of hours of insurable employment set out in the table within that subsection, in relation to the regional rate of unemployment where the person normally resides.
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> [19] The Appellant had a previous very serious violation. The required number of insurable hours of employment was increased pursuant to 7.1 of the Act to qualify benefits due to that violation. He was required to have additional hours of insurable employment in his Qualifying Period to establish a claim for benefits. As he resided in an economic region with an unemployment rate of 7.8% the Appellant was required to have 1103 hours of insurable employment to qualify for benefits.
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> [20] The Appellant had accumulated 1014 hours of insurable employment in his Qualifying Period.
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> [21] There is no evidence of additional Records of Employment or of insurable hours of employment in the docket.
> …
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> [23] The Member finds that the Appellant had accumulated 1014 hours of insurable employment in his Qualifying Period and 1103 hours were required for him to qualify for benefits. The Appellant did not qualify for benefits as he had not accumulated enough insurable hours of employment.
>
> [24] The Member finds that the Appellant has insufficient hours of insured employment to establish a claim pursuant to section 7.1 of the Act.
>
> [25] The Member finds the Act provides no discretion and the appeal has no reasonable chance of success.

[27] Because the GD member did not identify the legal test applicable to a summary dismissal and did not apply that legal test to the facts, the GD decision is based on an error of law.

[28] The legal test applicable to a summary dismissal is the first question that needs to be answered. Whether there was an error in law or other error in the Commission's decision on the specific issues would follow.

[29] Given the error of law on the preliminary question of the legal test applicable to summary dismissal, the AD is required to make its own analysis and 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: *Housen v. Nikolaisen*, [2002] SCR 235, 2002 SCC 33 at paragraph 8, and subsection 59(1) of the DESD Act.

Application of Legal Test for Summary Dismissal

[30] Despite having erred in not identifying and applying the applicable legal test, paragraphs 18 to 21, 23 and 24 of the GD decision are correct, and I agree with the findings stated in them.

[31] 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.

[32] There appears 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 (*J. S. v. Canada Employment Insurance Commission*, 2015 SSTAD 715) , AD-14-131 (*C. D. v. Canada Employment Insurance Commission*, 2015 SSTAD 594) , AD-14-310 (*M. C. v. Canada Employment Insurance Commission*, 2015 SSTAD 237) , AD-15-74 (*J. C. v. Minister of Employment and Social Development*, 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 (*C. S. v. Minister of Employment and Social Development*, 2015 SSTAD 974), AD-15-297 (*A. P. v. Minister of Employment and Social Development*, 2015 SSTAD 973), and AD-15-401(*A. A. v. Minister of Employment and Social Development*, 2015 SSTAD 1178): 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 (*K. B. v. Minister of Employment and Social Development*, 2015 SSTAD 929): the AD did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[33] I find that the application of the two tests cited in paragraph 32 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.

[34] Neither the GD nor the AD of the Tribunal can vary the qualifying conditions under subsection 7(2) of the *Employment Insurance Act*, no matter the circumstances.

[35] It is clear from the record that the Appellant has 1014 insurable hours and requires 1103 insurable hours to qualify to receive benefits. Regardless of the evidence or arguments that could be presented at the hearing, the appeal on this issue is bound to fail.

[36] After reviewing the appeal of the Appellant, the GD record and decision, the previous decisions of the AD relating to summary dismissals, and by applying the legal test applicable to a summary dismissal, I hereby reject the appeal.

CONCLUSION

[37] The appeal is dismissed.

Shu-Tai Cheng
Member, Appeal Division