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

Citation: *R. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 491

Tribunal File Number: AD-16-967

BETWEEN:

R. L.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 20, 2016

DATE OF DECISION: September 27, 2016

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On June 7, 2016, the General Division of the Tribunal concluded that the appeal of the Appellant was to be summarily dismissed since she had insufficient hours of insured employment to establish a claim pursuant to the *Employment Insurance Act*.

[3] On July, 25, 2016, the Appellant filed an appeal of the summary dismissal decision of the General Division after receiving communication of the decision on June 10, 2016.

TYPE OF HEARING

[4] The Tribunal held a telephone hearing for the following reasons:

- The complexity of the issue under appeal.
- The credibility of the parties is not anticipated being a prevailing issue.
- The information in the file, including the need for additional information.
- The requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness, and natural justice permit.

[5] The Appellant was present and represented by Wendy Lavine. The Respondent was represented by Warren Dinham.

THE LAW

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

ISSUE

[7] The Tribunal must decide if the General Division erred in fact and in law when it summarily dismissed the appeal of the Appellant.

ARGUMENTS

[8] The Appellant submits the following arguments in support of the appeal:

- She recognizes that according to the *Act*, there is a minimum requirement for hours worked in order to claim eligibility;

- Her long work history aside, her accumulated premiums paid aside, she is seeking a just decision in her case;

- She was led to believe that she was eligible for EI Benefits upon termination of her employment by the very fact that premiums were deducted from her wages. In addition, she was never advised by her employer that she needed to work a minimum number of hours in order to claim EI Benefits;

- Since she was never advised of this, she believes that she should not be penalized by the system;

- She has paid EI premiums with every paycheque, she has never received any benefits and when she was found to be without work and without the extra income upon which she relied to support herself, she is denied benefits;

- She submits that the true unemployment rate for her age group (87+) is much higher than the accepted rate used for El decisions as the Respondent does not consider her age population in her calculations and therefore the rate is prejudicial, innacurate, misleading and based on inappropriate data;

[9] The Respondent submits the following arguments against the appeal:

- The General Division considered all the evidence and found that the Appellant had insufficient hours of insurable employment to qualify for benefits;

- Neither the General Division nor the Appeal Division can vary the legislated qualifying conditions under subsection 7 (2) of the *Act*;

- The Appellant accumulated 377.5 hours of insurable employment in her qualifying period when 910 hours were required in order for her to qualify for EI benefits;

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

STANDARD OF REVIEW

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the applicable standard of review regarding questions of law is the standard of correctness and that the standard of review applicable to questions of fact and law is reasonableness - *Pathmanathan v. Office of the Umpire*,2015 FCA 50.

[12] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "when it acts as an administrative appeal tribunal for decisions rendered by the General Division of the Social

Security Tribunal, the Appeal Division does not exercise a superintending power similar to that exercised by a higher court".

[13] The Federal Court of Appeal further indicated that "not only does the Appeal Division have as much expertise as the General Division of the Social Security Tribunal and thus is not required to show deference, but an administrative appeal tribunal also cannot exercise the review and superintending powers reserved for higher provincial courts or, in the case of "federal boards", for the Federal Court and the Federal Court of Appeal".

[14] The Court concluded that "when it hears appeals pursuant to subsection 58(1) of the *Department of Employment and Social Development Act*, the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act".

[15] The mandate of the Appeal Division of the Social Security Tribunal as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada*, 2015 FCA 274.

[16] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, 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, the Tribunal must dismiss the appeal.

ANALYSIS

[17] Although the appeal of the Appellant was filed late, in the interest of justice, the Tribunal will decide if the General Division erred when it summarily dismissed the appeal of the Appellant.

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

[19] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the *Social Security Tribunal* legislative and regulatory framework, they have considered the issue many times in the context of their own

summary dismissal procedure. *Lessard-Gauvin v. Canada (AG)*, 2013 FCA 147, and *Breslaw v. Canada (AG)*, 2004 FCA 264, serve as representative examples of this group of cases.

[20] In *Lessard-Gauvin*, the court stated that:

> "[8] 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…"

[21] The court expressed similar sentiments in *Breslaw*, finding that:

> "[7] …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."

[22] In view of the above, the Appeal Division as determined that the correct test to be applied in cases of summary dismissal is the following:

- Is it plain and obvious on the face of the record that the appeal is bound to fail?

[23] To be clear, the question is not whether or not the appeal must fail after a full airing of the facts, jurisprudence, and submissions. Rather, the true question is whether or not that failure is pre-ordained no matter what evidence or arguments might be presented at the hearing in support of the written representations in appeal.

[24] In the present case, the General Division examined the evidence submitted by the Appellant, and determined that she did not have the required insurable hours to qualify for benefits. No mention was made by the General Division as to whether or not the appeal had no reasonable chance of success.

[25] Although the General Division did not explicitly state the correct test to be applied, it is clear to the Tribunal that the General Division had an appreciation of the purpose of summary dismissals, keeping in mind the high threshold required to summarily dismiss an appeal, and properly considered whether the case before it met that high threshold.

[26] The Appellant had 377.5 hours of insurable employment between December 7, 2014 and December 5, 2015. She needed 910 hours of insurable employment to qualify for benefits. The Appellant was considered a new entrant or re-entrant (NERE), in accordance with subsection 7(4) of the *Act*, since she did not have at least 490 hours of labour force attachment in the 52 week period preceding the qualifying period.

[27] Neither the General Division nor the Appeal Division can vary the legislated qualifying conditions under subsection 7 (2) of the *Act*. Only Parliament as the authority to make such legislative changes and, at the time of the present decision, the NERE requirement had not been abolished by Parliament.

[28] In view of the above, the Tribunal agrees with the General Division that it was plain and obvious on the face of the record that the appeal was bound to fail. As such, the General Division Member's determination that this appeal should be summarily dismissed was correct.

CONCLUSION

[29] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division