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

Citation: *M. E. v. Canada Employment Insurance Commission*, 2016 SSTADEI 557

Tribunal File Number: AD-16-1169

BETWEEN:

M. E.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: November 23, 2016

Canada

REASONS AND DECISION

DECISION

[1] The Tribunal refuses leave to appeal to the Appeal Division of the Social Security Tribunal.

INTRODUCTION

[2] On August 23, 2016, the General Division of the Tribunal determined that the Applicant's claim for EI benefits could not be considered to have been made on August 24, 2014, as per the Applicant's antedate request filed under section 10(4) of the *Employment Insurance Act* (*Act*).

[3] The Applicant requested leave to appeal to the Appeal Division on September 29, 2016 after the decision of the General Division was deemed communicated to him on September 6, 2016.

ISSUE

[4] The Tribunal must decide if the appeal has a reasonable chance of success.

THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (the *"DESD Act"),* "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

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

ANALYSIS

[7] 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.

[8] In regards to the application for permission to appeal, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[9] The Applicant, in support of his application for leave to appeal, submitted initially that he was appealing the decision of the General Division for failing to observe a principal of natural justice or otherwise acting beyond its jurisdiction. However, no details were submitted in support of said application.

[10] On October 3, 2016, a correspondence was sent by the Tribunal to the Applicant requesting that he explain in detail why he was appealing the decision of the General Division with a deadline of November 3, 2016. The Applicant replied to the request of the Tribunal on November 3, 2016.

[11] In his reply, the Applicant states that the appeal is based on a *Canadian Charter of Rights* (*Charter*) challenge. He submits that he is entitled to EI benefits since premiums were paid for. He pleads that recent changes were made in Alberta to the EI benefits to accommodate hardships in the oil and gas industry but that no consideration was given to the hardships incurred from August 24, 2014 to June 1, 2015 when there was no employment income but there was sufficient hours of employment to August 14, 2104 to qualify for EI benefits. He submits his conference call notes (General Division hearing) and his request for reconsideration application in support of his application for leave.

[12] The Applicant first argues that his appeal is based on a *Charter* challenge. In view of this argument, the Tribunal proceeded to listen to the recording of the hearing before the General Division. The Tribunal found that no *Charter* argument was raised by the Applicant before the General Division. The Applicant, to explain the delay to apply for benefits, simply testified that he did not know he could apply and that he was trying to find work.

[13] The general rule is that, except in cases of urgency, constitutional questions cannot be raised for the first time in the reviewing court if the administrative decision- maker under review had the power and the practical capability to decide them - *Erasmo v. Canada (A.G.)*, 2015 FCA 129.

[14] There is no doubt that the General Division had the power and the practical capability to decide a *Charter* challenge and the Tribunal finds that there is no urgency in the present case, as interpreted by case law, that would justify a derogation to the general rule. Furthermore, the evidentiary record before the Appeal Division is simply insufficient to decide a *Charter* issue.

[15] The General Division concluded that there was no evidence of any exceptional circumstances that prevented the Applicant from making enquiries about his rights and obligations, and/or applying for benefits at any time between the time he lost his employment at TD Williamson on August 20, 2014 and the time he made his application for EI benefits on August 18, 2015.

[16] By filing, in support of his leave to appeal, his conference notes and his reconsideration application, the Applicant is basically asking this Tribunal to re-evaluate and reweigh the evidence that was put before the General Division which is the province of the trier of fact and not of an appeal court. It is not for the Member deciding whether to grant leave to appeal to reweigh the evidence or explore the merits of the decision of the General Division.

[17] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Applicant in support of his request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[18] The Tribunal refuses leave to appeal to the Appeal Division of the Social Security Tribunal.

Pierre Lafontaine
Member, Appeal Division