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

[TRANSLATION]

Citation: *D. G. v. Canada Employment Insurance Commission*, 2017 SSTGDEI 22

Tribunal File Number: GE-16-1958

BETWEEN:

D. G.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

DECISION BY: Me Dominique Bellemare, Vice-Chairperson, General Division – Employment Insurance Section

DATE OF DECISION: February 20, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant challenges the constitutionality of the legislation at the basis of the Respondent's, the Canada Employment Insurance Commission (Commission), decision to deny her benefits. An initial decision was rendered by the General Division. The Appellant appealed that decision. The Appeal Division upheld the General Division's decision, but returned the appeal to the General Division only for the purpose of resolving the Charter argument the Appellant had put forward.

[2] The Tribunal set in motion its challenge process under the Charter. The parties received an order dated June 14, 2016, from the Tribunal, setting out the procedures for the parties regarding the content of their submissions and the timelines to make them. On October 7, 2016, the Appellant submitted her factum to the Tribunal. In the days that followed, the Tribunal expressed its satisfaction and asked the Respondent to do the same. It had until January 7, 2017, to submit its factum. Instead of sending its factum to the Tribunal, the Respondent sent a request to the Tribunal asking that the Appellant's case be summarily dismissed.

[3] The Respondent’s request that the Tribunal summarily dismiss the Appellant's appeal was not the subject of a hearing, and the Tribunal rendered its decision on the record.

ISSUE

[4] Should the Commission's request for a preliminary dismissal, counter to the Appellant's factum, be granted?

EVIDENCE

[5] In accordance with the process for handling Charter cases filed with the Tribunal, the Tribunal first held a pre-hearing conference on July 7, 2016, and the same day, following the pre-hearing conference, the Tribunal rendered an interlocutory decision that included an order

regarding the timelines to be met by the parties, as well as the items to file before the Tribunal. Thus, the Tribunal ordered the Appellant to:

a) confirm the provision(s) of the *Employment Insurance Act* at issue;

b) confirm the rights and freedoms that were allegedly violated (for example, identify the specific provision(s) of the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*);

c) set out the factual basis for the constitutional challenge;

d) provide any further explanation how the provision(s) of the *Employment Insurance Act* violate the protected rights and freedoms;

e) confirm the remedies sought;

f) provide a copy of all supporting evidence, including affidavit and expert evidence; and

g) provide a copy of all relevant case law and other authorities relied upon, if applicable.

[6] On October 12 and 14, the Appellant submitted her factum, which included, according to her, the items required by the Tribunal.

[7] For its part, the Commission had until January 7, 2017, to file its own factum along with its comments.

[8] Rather than making submissions and arguments, the Commission filed a motion asking the Tribunal to summarily dismiss the Appellant's appeal and, alternatively, if the Tribunal dismissed the motion, the Commission asked for an extension of time to file its submissions and arguments.

PARTIES' ARGUMENTS

[9] The Appellant did not make any submissions regarding the Commission's motion.

[10] The Respondent made the following submissions:

a) This appeal has no reasonable chance of success.

b) The file submitted by the Appellant to the Tribunal does not permit the Tribunal to make a decision on the constitutionality of subsection 21(3) of the *Employment Insurance Act* (Act) because it is devoid of sufficient fact-based evidence.

c) The Appellant is merely alleging, without proof, that subsection 21(3) of the Act violates her equality rights guaranteed under subsection 15(1) of the *Canadian Charter of Rights and Freedoms* (Charter).

d) In order for differential treatment to be discriminatory under section 15 of the Charter, the impugned legislation must first and foremost create a distinction that is based on an enumerated or analogous ground.

e) However, if the Act provides for different processing of the earnings received by the claimant during the unemployment period, the earnings are not based on an enumerated or analogous ground. They are established based on the type of benefits received, which are determined by taking into account the claimant's availability and ability to work when he or she applied for benefits or when the benefits are paid.

f) Therefore, the Respondent asks that the appeal be dismissed on a summary basis as mandated by subsection 53(1) of the *Department of Employment and Social Development Act* (DESDA). Section 4 of the *Social Security Tribunal Regulations* (Regulations) also provides that the Tribunal can determine any matter relating to the proceeding.

ANALYSIS

[11] The relevant legislative provisions are reproduced in an appendix to this decision.

[12] Parliament has provided in section 53 of the DESDA that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. To date, this appears to be the first time that the Employment Insurance Section of the Tribunal's General Division has received such a request from the Commission or from a party. In fact, only the Tribunal would bring about this process by sending a notice of intent to summarily dismiss (section 22 of the Regulations) before summarily dismissing an appeal, to allow the appellant to present their submissions. It is therefore an unusual situation to have a party file a motion to summarily dismiss.

[13] The issue is interesting, if only from a procedural point of view. Indeed, can a party, and not the Tribunal, request the dismissal (summary or not) of an appeal?

[14] Summary dismissal is set out in section 22 of the Regulations. It is a power specific to the General Division, and it occurs at the instigation of the Tribunal—not one of the parties. It is the General Division that advises the appellant of the intention to summarily dismiss the appeal and, after the appellant has been given a reasonable period of time to make submissions after sending the notice of summary dismissal, renders its decision. This tool is therefore not available to the parties and they cannot access it.

[15] However, can a party request that the Tribunal dismiss an appeal or even a document or submissions? In this case, the Tribunal could consider the Commission's request as a simple motion to dismiss the appeal and not to summarily dismiss the appeal. Indeed, what the Commission is arguing is that the Appellant has not complied with the requirements of the Tribunal's order of June 14, 2016. Therefore, the appeal would be dropped because, one must recall, it is the only issue before the General Division.

[16] In the Tribunal’s view, it can. Indeed, on this matter, the Tribunal agrees with the Commission's position—section 4 of the SST Regulations allows it to determine any matter concerning the proceeding. Therefore, the request is admissible on its face, even in terms of form, but as a request for a simple dismissal and not for a summary dismissal.

[17] As for the merits of the request, it is a matter of determining whether, at this stage, the Appellant's appeal must be dismissed without the constitutional issue being debated before the Tribunal.

[18] Jurisprudence provides us with some insight into the use of a dismissal procedure. The Federal Court of Appeal in *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, tells us this:

> *"The standard for a preliminary dismissal of an appeal is high. This Court will summarily dismiss an appeal only 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: Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness), 2011 FCA 1 (CanLII), 414 N.R. 278, 98 Imm. L. R. (3d) 165 at paras. 7-8; Yukon Conservation Society v. National Energy Board, [1979] 2 F.C. 14 (F.C.A.) at p. 18; Canada (Citizenship and Immigration) v. Arif, 2010 FCA 157, 405 N.R. 381, 321 D.L.R. (4th) 760 at para. 9."* [Our emphasis]

[19] In a ruling of the Supreme Court, ***R v. Imperial Tobacco Canada Ltd.*** (2011 SCC 42, [2011] 3 SCR 45) (paragraphs 17 to 25), the Court examined the legal test to be applied on motions to strike third party notices under rule 19(24) of the British Columbia Supreme Court Rules. It must be emphasized here that this is a different procedure than that of the summary dismissal studied by the Federal Court of Appeal in *Lessard-Gauvin*, *supra*. This rule provides that:

> *"At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that: it discloses no reasonable claim or defence as the case may be…and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs."*

[20] Even if it is a decision that does not have the weight of "jurisprudence" since the *stare decisis* rule does not apply, my colleague Shu-Tai Cheng from the Tribunal's Appeal Division rendered a very interesting decision in 2015TSSDA1132, analyzing the various tendencies of

the Tribunal's Appeal Division with regard to summary dismissals. Once again, these are decisions dealing with summary dismissals and not simple dismissals. She wrote as follows:

> *"There appear to be three lines of cases in previous decisions by the Appeal Division on appeals of summary dismissals by the General Division, namely:*
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> *Examples AD-13-825, AD-14-131 AD-14-310, AD- 5-74: 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 c. Canada (AG), 2013 FCA 147, Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness), 2011 FCA 1 (CanLII), and Breslaw v. Canada (AG), 2004 FCA 264 (CanLII).*
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> *Examples AD-15-236, AD-15-297, AD-15-401: the Appeal Division 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 is an adequate factual foundation to support the appeal and the outcome is not obvious, then the matter is not appropriate for a summary dismissal. A weak case is not appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.*
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> *Examples AD-15-216 and AD-15-260: the Appeal Division did not articulate a legal test beyond citing subsection 53(1) of the Department of Employment and Social Development Act."* [Our emphasis]

[21] Jurisprudence therefore teaches us that these types of motions for dismissal, whether for summary or simply dismissal, while they are necessary for good conduct and for the effective use of judicial and quasi-judicial resources, must be used with caution. Whether we are using the criterion of the Federal Court of Appeal in ***Lessard-Gauvin***, supra, or of the Supreme Court in ***Imperial Tobacco***, supra, or the various streams existing at the ribunal's Appeal Division,

2015TSSAD1132, *supra*, they contain the notion that the appeal has no chance of success," is "doomed to fail," has "no valid request or defence," is an "utterly hopeless" or "weak" case.

[22] The bar is therefore high. Cases in which the Tribunal has used this procedure are found in situations where the legal basis makes success impossible. However, that is not the case here. The Tribunal cannot find application to any of the qualifiers established by the jurisprudence mentioned above.

[23] In its order of July 7, 2016, the Tribunal ordered the parties to file their respective factums within the allowable timeline. The Tribunal is of the view that in order for such a request to be granted, one party must have failed to meet the conditions of the SST Regulations or of a Tribunal order or interlocutory decision.

[24] In this case, in its interlocutory decision and order of July 7, 2016, the Tribunal had asked that the Appellant file submissions containing the seven items mentioned in paragraph 5, above. The Appellant's factum contained 350 pages, only five of which contained arguments and evidence. The Commission finds that this is unsatisfactory.

[25] The Tribunal is of the view that the Appellant has met the requirements (including the constitutional arguments) to allow the appeal to proceed. Indeed, included are the seven items required by the Tribunal. A reader could find that the arguments lack weight or are not sufficiently developed. It is possible, but at this stage, the Tribunal does not want to and cannot rule on the adequacy of the arguments, without allowing the parties to argue their positions at an oral hearing before the Tribunal. The Tribunal finds that, as filed, the Appellant's document meets the minimum requirements. Had the Respondent failed to follow the Tribunal's order, the appeal would have been dropped, because the constitutional issue could not have been heard.

[26] The Commission may wish that all constitutional debates would happen with parties with large resources and with knowledgeable legal debates. The Tribunal is an administrative tribunal where the issues are sometimes less financially impressive, but they re nevertheless important for Employment Insurance claimants, and claimants have the right to present constitutional arguments.

[27] For these reasons, the Commission's request for dismissal is refused. In fact, in the wording of the Commission's request, most of the arguments submitted are a rebuttal of the Appellant's arguments on the constitutional issue.

[28] However, and due to the principles of natural justice, the Tribunal grants the Commission's second request— an extension of time of 45 additional days to file its factum on the merits of the constitutional issue, as of the notification date of this decision.

CONCLUSION

[29] The primary request for the dismissal of the Appellant's appeal is refused. Furthermore, the Tribunal grants the Respondent 45 additional days from the notification of this decision to file its factum.

Me Dominique Bellemare, Vice-Chairperson,
General Division – Employment Insurance Section