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

Citation: *A. P. v Canada Employment Insurance Commission*, 2017 SSTGDEI 197

Tribunal File Number: GE-16-3284

BETWEEN:

A. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Employment Insurance Section

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

DATE OF DECISION: April 12, 2017

REASONS AND DECISION

INTRODUCTION

[1] On July 13, 2014, the Appellant applied for sickness benefits. After some exchanges with the Commission, he received a decision from the Commission on May 31, 2016, that he is entitled to receive the maximum 15 weeks of sickness benefits.

[2] The Appellant requested that the Commission reconsider its decision regarding the number of weeks of sickness benefits allowed. On July 26, 2016, the Commission advised the Appellant that the decision is maintained.

[3] On August 27, 2016, the Appellant appealed to the General Division of the Social Security Tribunal (Tribunal).

[4] As the Appellant was raising a Charter Challenge against the *Employment Insurance Act* (Act), the tribunal initiated its Charter Process. A prehearing conference was held on October 27, 2016, during which the Appellant was explained the Charter process. He was given until December 28, 2016 to file his notice pursuant to paragraph 20 (1) (a) of the Tribunal's regulations. He received two extension of time to file this notice, the first one being January 31st, 2017 and the second one being February 28, 2017. When the Appellant did not file his notice pursuant to paragraph 20 (1) (a) of the Tribunal's Regulations, then on March 2, 2017, the Tribunal ended the Charter Process and declared that the appeal would continue as a regular appeal.

[5] During the Charter Process, the parties filed various motions. These motions we adjudicated upon by the Tribunal in two separate decisions and are included in this file. The first one is dated January 25, 2017 and the second is dated March 29, 2017.

[6] Despite the request made by the Tribunal to the Appellant, and while filing dozens of letter, he never filed representations on the notice of intent to summarily dismiss his appeal, sent by the Tribunal on March 3, 2017

ISSUE

[7] The Tribunal must decide whether the appeal should be summarily dismissed.

THE LAW

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

[9] Section 22 of the *Social Security Tribunal Regulations* states that before summarily dismissing an appeal, the General Division must give notice in writing to the Appellant and allow the Appellant a reasonable period of time to make submissions.

[10] Paragraph 12(3)(c) of the *Employment Insurance Act* (EI Act) stipulated that the maximum number of weeks for which benefits may be paid in a benefit period because of a prescribed illness, injury or quarantine is 15.

EVIDENCE

[11] The evidence filed by the respective parties is quite lengthy, but most of it is procedural in nature and the evidence on the merits is more limited. The Tribunal will first describe the evidence on the merits, and then it will enumerate the evidence filed on procedural matters.

Filed on the merits of the case

[12] We find most of the relevant evidence in the GD3 document, filed by the Commission.

[13] Besides the usual documents that are not subject to specific representations by the parties, we find the initial application for benefits of July 13, 2014, the initial decision of May 31, 2016, the request for reconsideration and the reconsideration decision of July 26, 2016. There are also a "Notice of Constitutional question" sent by the Appellant dated February 20, 2016 (pages GD3-11 and following), memos to the file by the Commission relating to conversation with the Appellant of May 11, 2016 and the two more in the following days, where it was explained to the Appellant the requirements to obtain sickness benefits, which he obtained successfully for the

full possibility of 15 weeks of coverage. We also find the Notice of Appeal filed by the Appellant on August 27, 2016, in which the Appellant is complaining that he should, receive more weeks in addition to his 15 weeks, as if he had been in receipt of regular Employment Insurance benefit he would have obtain a “further 25 weeks” of benefit in order to obtain a total of 40 weeks of benefits.

Filed on the procedural aspects of the case

[14] The Tribunal will not enumerate every single letters sent by the respective parties to this appeal, but will concentrate of the important and substantive correspondence and documentation.

[15] The Commission sent a letter (GD8) in response to the Appellant that the Commission’s lawyer cannot represent the Appellant, as he do demands. The Appellant then complained to the Tribunal in a letter dated October 4, 2016 (GD9) about the Commission’s lawyer’s professional conduct. In a letter to the Tribunal dated October 5, 2016 (GD10), the Appellant is asking that the Commission filings of his various requests to the Ontario Human Rights Tribunal be set aside, including the fact that he has been declared a vexatious litigant by the Ontario Human’s Rights Tribunal. The Commission filed a letter dated October 22, 2016 (GD12), in which it included a decision of the Law Society of Upper Canada dismissing his professional complaint against the Commission’s lawyer.

[16] On October 27, 2016, the Tribunal held a prehearing conference in which it explained the Charter Challenge Process that must be following in order to challenge a disposition of the *Employment Insurance Act* and its Regulations. Following that, the Tribunal sent the same day a letter to the Appellant asking him to file by no later than December 29, 2016, his notice pursuant to paragraph 20 (1) (a) of the Tribunal’s Regulations in respect to his Charter Challenge.

[17] On November 3, 3016, the Commission’s lawyer sent a letter (GD15) stating that it cannot abide by the Appellant’s demand that they represent him. On November 24, 2016, the Commission sent a letter (GD16) requesting an order from the tribunal that the Appellant ceases to contact them directly and to direct all communications to the Tribunal. The Commission filed a further letter to the Tribunal dated November 23, 2016 (GD17), attaching an email from Ms McLean of the Commission in response to one of the Appellant’s allegation. The Appellant sent

a letter to the Tribunal on December 5, 2016, asking for an extension of 90 days to file his notice as requested in the October 28, 2016 letter to the Tribunal.

[18] The Appellant send an email to the Commission (GD19) asking for the Commission to change its counsel. On December 13, 2016, the Commission's lawyer sent a letter (GD22) stating the she does not have an obligation to represent him, and that she is representing the Commission. In this letter the Commission agrees to the extension of time. On December 8, 2016, the Commission filed a motion to the Tribunal asking that the Appellant ceases to contact them directly. On December 21, 2016, the Commission sent a letter (GD24) enclosing the dismissal of the Barreau du Québec of the complaint filed by the Appellant against the Commission's lawyer. On January 2, 2017, but faxed on January 6, 2017, the Appellant sent a letter (GD25), being his submissions on the four motions filed by the respective parties. On January 5, 2017, the Commission's lawyer sent a letter (GD26), regarding the request made by the Appellant's to examine the decision-maker in his file, but questions the relevancy of it.

[19] On January 25, 2017, the Tribunal rendered its decision on the four motions filled by the respective parties. The Tribunal dismissed the Appellant's motion to put the file into abeyance until he has completed his complaints to the various bars against the Commission's lawyer. The Tribunal granted in part his motion for an extension of time, until February 28, 2017, to file his notice pursuant to paragraph 20 (1) (a) of the SST regulations. The Tribunal granted the Commission's motion that the Commission has not obligations to pay for his legal fees, not to provide him with a lawyer. The Tribunal dismissed the Commission's motion that the Appellant ceases to contact them directly.

[20] The Appellant sent a letter on February 23, 2017, but faxed on February 26, 2017 (GD27A), complaining about the January 25, 2017 Tribunal decision on the four motions. The Appellant sent a further letter on February 28, 2017(GD27B), asking for more time to file his motion. This letter was 8 pages long. There was also mention of some reference to the Charter Challenge by the Appellant.

[21] On March 2, 2017, the Tribunal sent a letter indicating that as the Appellant had not filed his notice pursuant to paragraph 20 (1) (a) of the Tribunal's Regulations, then the appeal would proceed as a regular appeal. On March 3, 2017, the Tribunal sent a Notice of its Intent to

Summarily Dismiss the Appellant's appeal, but that the Appellant had to until April 3, 2017, to send his representations on this issue.

[22] On March 3, 2017, the Commission's lawyer sent a letter (GD30) indicating that the Appellant had failed to send his notice as required by the Tribunal. On March 9, 2017, the Appellant sent a letter (GD31) asking the Tribunal to rescind its decision of March 3, 2017 to send a Notice of its Intent to Summarily Dismiss his appeal. On March 10, 2017, the Appellant sent a letter (GD32 to request that the Commission provides him with funds to fix his teeth in order to increase his employability. On March 20, 2017, the Appellant sent a letter to the Tribunal (GD33) in order to obtain the name of the decision-maker in interlocutory decisions that he received in the form of a letter. On March 22, 2017 (GD36) the Appellant sent a letter to complain against the Commission's lawyer. On March 24, 2017, the Appellant sent a letter (GD37) to the Tribunal that some of his letters had not been brought to the attention of the member assign to his file prior to the member rendering interlocutory decisions to end his Charter Challenge Process and to send a notice of intent to summarily dismiss his appeal. He also asked for a prehearing conference to discuss the issues.

[23] On March 29, 2017, the Tribunal rendered a further decision on the two motions brought by the Appellant, and this after having reviewed the documents GD 27A and 27B. The Tribunal dismissed the Appellant's motions to end the Charter Challenge Process and to "cancel" its notice to summarily dismiss his appeal.

[24] On April 9, 2017, the Appellant sent a letter to the Tribunal (GD38), acknowledging receipt of the March 29, 2017 Tribunal decisions on the two motions. In this letter he complained of the Tribunal's decision of March 29, 2017, but did not file any representations regarding the notice to summarily dismiss his appeal, as requested by the Tribunal.

SUBMISSIONS

[25] The Appellant submitted that:

a) He did not file any submissions regarding the Tribunal's notice to summarily dismiss his appeal.

b) On the merits of his case, the Appellant stated that he should, receive, in addition to his sickness benefits, further weeks that would be equal to a full regular benefits. In his words he should have received 40 weeks of benefits, therefore a further 25 weeks in addition to his 15 weeks of sickness benefits, but to be paid as sickness benefits as he is not in a position to work due to his health.

c) He filed many complaints against the various interlocutory decisions rendered by the Tribunal, as explained in the evidence section above.

d) He thinks that the Commission should grant him more weeks of sickness benefits, as it would be in contradiction with Section 15 of the *Charter of rights and Freedoms.*

[26] The Respondent submitted that:

a) A person who qualifies for employment insurance sickness benefits is entitled to be paid such benefits for every working day in the benefit period. This does not necessarily mean that he or she will receive them for the full duration of the benefit period. In this respect, the Act has placed a specific limit on the payment of sickness benefits.

b) Paragraph 12 (3)(c) of the Act, clearly indicates that the maximum number of weeks for which benefits may be paid in a benefit period because of a prescribed illness, injury or quarantine is 15.

c) In this case, the claimant was paid the maximum fifteen weeks of sickness benefits from August 10, 2014 to November 22, 2014. Therefore the claimant cannot receive any more sickness benefits in this benefit period.

d) The claimed argued that he should be entitled to all the weeks of benefit entitlement that had been calculated for his claim based on subsection 12(2) of the Employment Insurance Act. The claimant reported, however, that he was not capable of working throughout his entire benefit period

(GD3-16). Therefore, he also cannot prove entitlement to regular benefits under paragraph 18(a) of the Act and no further sickness benefits can be paid pursuant to subsection 12(3)(c) of the Act.

e) The Commission submits that the jurisprudence supports its decision. The Federal Court of Appeal confirmed the principle that paragraph 12(3)(c) of the Act allows for a maximum payment of 15 weeks of sickness benefits, see ***Brown v. Canada (AG)***, 2010 FCA 148. In a similar case, Umpire Marin upheld the principle that the Act does not provide for an extension of the maximum period to receive sickness benefits, nor does it confer on a Tribunal or an Umpire the discretion to enlarge that period, regardless of a claimant's particular circumstances, see ***CUB 76759***.

ANALYSIS

[27] Subsection 53(1) of the DHRSD Act states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[28] In this case, the Claimant was advised in writing of the Member's intent to summarily dismiss the appeal and pursuant to Section 22 of the *Social Security Tribunal Regulations,* the Appellant was given notice in writing of this intention and was provided a reasonable period of time to make submissions. This was sent March 3, 2017, and the Appellant acknowledged having received this as evidenced by his numerous letters sent in reference to this notice, see GD31, GD37and GHD 38, as well as the Tribunal's decision of March 29, 2017. The Appellant did not make any further submissions on this matter.

[29] In ***The Queen vs. Imperial Tobacco Canada Ltd***, [2011] 3 SCC 45, (paragraphs 17 to 25), the Court has examined the criteria applicable to motions to dismiss in relations to paragraph 19(24) of the Supreme Court Rules of British Colombia. It is important to note that this is a different situation from the decision rendered by the Federal Court of Appeal on summary dismissal in Lessard-Gauvin, quoted below. The Supreme Court stated:

> "*The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This*

Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, Syl Apps Secure Treatment Centre v. B.D., 2007 SCC 38, [2007] 3 S.C.R. 83; Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735".

[30] In ***Lessard-Gauvin***, 2013 FCA 147, the Federal Court of Appeal stated:

"*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: Sellathurai v. Canada (Public Safety and Emergency Preparedness), 2011 FCA 1, 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; Arif v. Canada (Minister of Citizenship and Immigration), 2010 FCA 157, 405 N.R. 381, 321 D.L.R. (4th) 760 at para. 9."*

[31] My colleague Sue-Tai Cheng of the Appeal Division of the Tribunal rendered a very interesting decision (***2015 TSSDA 1132***) on summary dismissals. It says:

"*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.*

Although "no reasonable chance of success" was not further defined in the DESD Act for the purposes of the interpretation of section 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.

There appear to be three lines of cases in previous decisions of the AD on appeals of summary dismissals by the General Division:

a) 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 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, AD-15-297, AD-15-401: 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) Examples AD-15-216 and AD-15-260: the AD did not articulate a legal test beyond citing subsection 53(1) of the DESD Act.

[32] According to paragraph 12(3)(c) of the EI Act, a claimant can receive a maximum of 15 weeks of benefits in a benefit period because of a prescribed illness, injury or quarantine.

[33] In this case, the Claimant was fully paid 15 weeks of sickness benefits, as per the initial decision rendered by the Commission in July 2016, as acknowledged by the Appellant in his request for reconsideration filed with the Commission.

[34] Unfortunately, the EI Act does not allow for any discretion with respect to the duration of sickness benefits. It is clear that a claimant can receive up to 15 weeks of sickness benefits in a given benefit period, see ***Brown***, supra..

[35] As stated by the Supreme Court in ***Imperial Tobacco***, supra, but more importantly by the Federal Court of appeal in ***Lessard-Gauvin***, supra, and supported but the Appeal Division of the Tribunal in ***2015 TSSDA 1132***, supra, the legal test to be applied, albeit a high level one, is that if 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, then the appeal must be summarily dismissed.

[36] The Tribunal is sympathetic to the Appellant's chronic and deteriorating condition, however; it is not within the Tribunal's jurisdiction to ignore or change the clear legislation as it is written, no matter how compelling the circumstances.

[37] It is important to note that the reconsideration decision being appealed is relating to sickness benefits, not regular benefits. The Appellant has not filed a request for regular benefits. And the law is clear: the maximum sickness benefits that a claimant can receive is 15 weeks, and the Appellant has received those 15 weeks. Therefore, as the Charter Process has ended and that the Tribunal cannot entertain a Charter argument, then the appeal is bound to fail as the Appellant has already received the maximum of sickness benefits under Act.

[38] Finally, the Tribunal had not adjudicated on the early motion from the Appellant that the Tribunal should exclude the evidence of the Appellant's past dealing with the Human rights Tribunal of Ontario. This evidence was dealt with in the motions of January 25 and March 29, but has no weight whatsoever regarding the merits of the case, nor to the decision to summarily dismiss. While this point is moot, it is dismissed as the "bad character" allegation raised by the Appellant is not relevant, as the Tribunal adjudicated this case based on the evidence filed regarding the merits of this file. That special motion is therefore dismissed.

[39] As the Appellant did not file anything in response to the notice to summarily dismiss his appeal, other than to complain that his rights were violated. This was the inevitable conclusion as the Charter Challenge Process was terminated. As explained above, the Tribunal finds that the Appellant's appeal has no chance of success and it must be summarily dismissed.

CONCLUSION

[37] The Tribunal finds that the appeal has no reasonable chance of success; therefore the appeal is summarily dismissed

Me Dominique Bellemare
Vice-Chair, General Division - Employment Insurance Section