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

Citation: *F. A. v. Canada Employment Insurance Commission,* 2017 SSTADEI 196

Tribunal File Number: AD-17-187

BETWEEN:

F. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: May 9, 2017

DATE OF DECISION: May 11, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On February 10, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) concluded that the Appellant's appeal was to be summarily dismissed since he had accumulated only 46 hours of insurable employment, while 665 hours were required for him to qualify for benefits. On February 24, 2017, the Appellant filed an appeal of the General Division's summary dismissal decision.

TYPE OF HEARING

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

- The complexity of the issue(s) under appeal.
- The fact that the credibility of the parties was 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.

[4] The Appellant attended the hearing. The Respondent did not attend, although it did receive the notice of hearing.

THE LAW

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

[6] The Tribunal must decide whether the General Division erred when it summarily dismissed the Appellant's appeal.

SUBMISSIONS

[7] The Appellant submitted the following arguments in support of the appeal:

- He accumulated over 700 hours of insurable employment from June 2015 to March 2016.
- His employer did not declare all his insurable employment hours.
- He only got 15 weeks of benefits when he should have received 38 weeks of regular benefits.
- He wants the Respondent to convert his claim from sickness to regular benefits.

[8] The Respondent submitted 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.

- The standard for a preliminary dismissal of appeal is high. The Respondent recognizes that "no reasonable chance of success" is not defined in the DESD Act for the purposes of the interpretation of subsection 53(1) of the DESD Act; however, the Federal Court of Appeal has clarified that an appeal should be summarily dismissed only when the failure is "pre-ordained" no matter what evidence or arguments might be presented at a hearing.

- In the present case, the failure was "pre-ordained" no matter what evidence or arguments would have been presented by the Appellant at a hearing. In light of this, the General Division committed no error in summarily dismissing the Appellant's appeal under subsection 53(1) of the DESD Act with the conclusion that it has no reasonable chance of success.

STANDARD OF REVIEW

[9] The Appellant did not make any submissions regarding the applicable standard of review.

[10] The Respondent submitted that the Appeal Division does not owe any deference to the General Division's conclusions with respect to questions of law, whether or not the error appears on the face of the record. However, for questions of mixed fact and law and questions of fact, the Appeal Division must show deference to the General Division. It can only intervene if 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—*Pathmanathan v. Office of the Umpire*, 2015 FCA 50.

[11] The Tribunal notes that the Federal Court of Appeal in the case of *Canada (Attorney General) v. Jean*, 2015 FCA 242, indicates in paragraph 19 of its decision that "[w]hen 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."

[12] The Federal Court of Appeal further indicated the following:

> 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.

[13] The Court concluded that "[w]here 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."

[14] The mandate of the Tribunal's Appeal Division as described in *Jean* was later confirmed by the Federal Court of Appeal in *Maunder v. Canada (Attorney General)*, 2015 FCA 274.

[15] 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

[16] The Tribunal must decide whether the General Division erred when it summarily dismissed the Appellant's appeal.

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

[18] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the Tribunal's legislative and regulatory framework, they have considered the issue many times in the context of their own summary dismissal procedure. *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147, and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264, serve as representative examples of this group of cases.

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

> [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…

[20] The Court expressed similar sentiments in *Breslaw*, finding:

> [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.

[21] In view of the above, the Tribunal has 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?

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

[23] In the present case, the General Division fully examined the facts, jurisprudence and submissions and determined that the Appellant did not have the required number of insurable hours to qualify for benefits. The General Division noted at the beginning of its analysis that the appeal had no reasonable chance of success without any other mention of the legal test.

[24] 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.

[25] As stated by the General Division, the Federal Court of Appeal confirmed the principle that subsection 8(1) of the *Employment Insurance Act* (Act) provides for two possible qualifying periods. It specifically requires that the shorter of the two possibilities

be chosen as the applicable qualifying period—*Long v. Canada (Attorney General)*, 2011 FCA 99.

[26] In this case, the Appellant filed a claim for Employment Insurance benefits on June 7, 2016. His qualifying period was established from December 20, 2015, to April 23, 2016, pursuant to paragraph 8(1)(*b*)of the Act because he had qualified for a previous benefit period effective December 20, 2015 (GD3-27). The evidence before the General Division demonstrates that the Appellant had accumulated only 46 hours of insurable employment during his qualifying period, while he needed 665 hours of insurable employment to qualify for regular benefits.

[27] The Tribunal agrees that it was plain and obvious on the face of the record that the appeal to the General Division was bound to fail. As such, the General Division member's determination that this appeal should be summarily dismissed was correct.

[28] Furthermore, in response to one of the Appellant's arguments, the Tribunal would like to point out that the Canada Revenue Agency has exclusive jurisdiction to decide how many hours of insurable employment a claimant possesses for the purposes of the Act—*Canada (Attorney General) v. Romano*, 2008 FCA 117, *Canada (Attorney General) v. Didiodato*, 2002 FCA 34, *Canada (Attorney General) v. Haberman*, 2000 FCA 150.

CONCLUSION

[29] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division