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

Citation: *M. D. v. Canada Employment Insurance Commission,* 2017 SSTADEI 243

Tribunal File Number: AD-17-91

BETWEEN:

M. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: June 8, 2017

DATE OF DECISION: June 21, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On December 7, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) concluded that the Appellant's appeal was to be summarily dismissed since she had accumulated fewer than 595 hours of insurable employment during her qualifying period and, therefore, had fallen short of the hours required for her to qualify for benefits pursuant to section 7 of the *Employment Insurance Act* (Act).

[3] On January 30, 2017, the Appellant filed an appeal of the General Division's summary dismissal decision after receiving it on December 28, 2016.

TYPE OF HEARING

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

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

[5] The Appellant attended the hearing. The Respondent did not attend, despite having received the notice of hearing.

THE LAW

[6] 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

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

SUBMISSIONS

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

- She believes the calculation of the "weeks unable to work," which decided her extension period, was unjust in her particular medical case.

- She worked whenever she was physically capable.

- It is unfair to discard an entire week from her extension calculation due to the nature of her nerve disorder.

- She is requesting that the weeks be calculated by "days not worked" rather than weeks without a working shift.

- She is requesting that, to complete her claim, the Tribunal go as far back as needed to retrieve the hours for which she had paid Employment Insurance.

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

- The General Division committed no error in summarily dismissing the Appellant's appeal under subsection 53(1) of the DESD Act on the basis that it had no reasonable chance of success.

- 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 the Appellant might have presented at a hearing.

STANDARD OF REVIEW

[10] The Appellant made no submissions regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the General Division's conclusions with respect to questions of law, regardless of whether 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 intervene only 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.

[12] 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."

[13] 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.

[14] 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."

[15] 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.

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

[18] 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."

[19] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the Social Security Tribunal's legislative and regulatory framework, it has considered the issue many times in the context of its own summary dismissal procedure. *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147, and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264, serve as 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 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?

[23] 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 on appeal.

[24] The Appellant filed a claim for special benefits (sickness, maternity and parental) on May 10, 2016. Based on the information that the Respondent has on file, the Appellant had accumulated 472 hours of insurable employment during her qualifying period (April 19, 2015, to April 16, 2016), while she needed 600 hours of insurable employment to qualify for special benefits (GD3-30).

[25] The Appellant made a request for reconsideration of the Respondent's decision and on July 13, 2016, the Respondent modified the insured hours (based on additional Records of Employment) to 519 insurable hours but, nonetheless, maintained its initial decision because the Appellant still lacked the 600 hours needed to qualify for special benefits. The Appellant subsequently provided additional information and, based on that information (GD7-2 to GD7-4), the Respondent, pursuant to subsection 8(2) of the Act, extended the qualifying period by nine weeks and amended the start date of the qualifying period to February 15, 2015, which, as a result, captured some additional hours of insurable

employment, thus bringing the total insured hours to 579 out of the 600 insurable hours needed.

[26] The General Division examined the evidence and determined that the Appellant did not have the required number of insurable hours to qualify for benefits. 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.

[27] The Appellant argues that the calculation of the "weeks unable to work," which decided her extension period, was unjust in her particular medical case. She worked whenever she was physically capable of doing so. It is unfair to discard an entire week from her extension calculation due to the nature of her nerve disorder. She wants the weeks to be calculated by "days not worked" rather than weeks without a working shift.

[28] Paragraph 8(1)(*a*) of the Act indicates that the qualifying period of an insured person is the 52-week period immediately before the beginning of a benefit period under subsection 10(1).

[29] However, paragraph 8(2)(*a*) of the Act permits an extension of the qualifying period by the aggregate of any weeks during the qualifying period for which the person proves, in such manner as the Respondent may direct, that throughout the week the person was not employed in insurable employment because the person was incapable of work because of a prescribed illness.

[30] A week is determined by section 1 of the Act to be "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period."

[31] Unfortunately for the Appellant, her calculation method to extend the qualifying period would be contrary to the Act, which clearly states that the person must prove that **throughout the week**, they are not employed in insurable employment because they are incapable of work because of a prescribed illness.

[32] The Tribunal finds that the appeal's failure before the General Division was "pre-ordained" no matter what evidence or arguments the Appellant might have presented at a hearing. As such, the General Division's determination that this appeal should be summarily dismissed was correct.

CONCLUSION

[33] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division