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

Citation: *B. M. v. Canada Employment Insurance Commission*, 2017 SSTADEI 278

Tribunal File Number: AD-16-1196

BETWEEN:

B. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: July 11, 2017

DATE OF DECISION: July 24, 2017

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a member of the General Division summarily dismissed the Appellant's appeal. In due course, the Appellant appealed to the Appeal Division.

[3] A teleconference hearing was held. The Appellant attended and made submissions, but the Commission did not. Instead, the Commission informed the Tribunal that they would not be attending and that they relied upon their written submissions. No explanation was offered for the Commission's refusal to appeal.

THE LAW

[4] According to subsection 58(1) of the *Department of Employment and Social Development Act* (Act), the only grounds of appeal are that:

> (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.

ANALYSIS

[5] Although the Commission's initial determination under appeal relates to whether or not the Appellant had received earnings that needed to be allocated, the true issue in this case is whether or not the General Division member correctly determined and applied the legal test to be used when summarily dismissing an appeal. For the following reasons, I find that they did.

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

[7] The Appellant argued before me that the Commission refused to reconsider their decision because "they were only looking at it from the standpoint of the law." He acknowledged that he had received a severance payment from his employer and that it had been allocated properly. Regardless, he asked that justice be done and that his appeal be allowed.

[8] The facts of this case are not in dispute. Due to a mistake on the part of the Appellant's employer, an incorrect record of employment was sent to the Commission which resulted in the Commission paying the Appellant benefits. Eventually, the record of employment was corrected and the Commission realized that there were additional earnings to be allocated. Once this was done, an overpayment was created because the Appellant (through no fault of his own) had received more money that he was entitled to.

[9] I have previously dealt with the law surrounding summary dismissals in cases such as *P. G. v. Canada Employment Insurance Commission*, 2015 SSTAD 406, and *A. M. v. Canada Employment Insurance Commission*, 2015 SSTAD 483. I see no reason not to deal with this case in a similar manner.

[10] Although the Act does not elaborate on what constitutes a reasonable chance of success in the context of a summary dismissal, I take judicial notice of Issue 19 of the Senate of Canada publication "Proceedings of the Standing Senate Committee on National Finance." At the morning hearing on May 15, 2012, testimony was given indicating that the intent of the legislation was to limit summary dismissals to cases "where there is 100 per cent [*sic*] inability to move forward."

[11] In support of the above testimony, I note that Parliament has enacted a legislative and regulatory framework that does not allow the General Division's Employment Insurance Section to make determinations on the record, even though the General Division's Income Security Section is permitted to do so.

[12] As Parliament does not speak in vain, I must conclude from this that it was Parliament's intention to ensure that appellants in the vast majority of employment insurance cases before the General Division be given an opportunity to be heard. It may be inferred from this that summary dismissals are not meant to be used routinely.

[13] Although the Federal Court of Appeal has not yet considered the issue of summary dismissals in the context of the Social Security Tribunal 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 examples of this group of cases.

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

> "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…"

[15] The court expressed similar sentiments in *Breslaw*, finding that:

> "…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."

[16] I note that the determination of whether or not to summarily dismiss is a threshold test. It is not appropriate to examine the case on the merits in the parties' absence and to then dismiss the case on the basis that it cannot succeed. Instead, considering the cases cited above, I conclude 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?

[17] To be clear, the question is not whether or not the appeal must fail after a full airing of the facts, jurisprudence, and submissions. Rather, the true question is whether or not that failure is pre-ordained regardless of the evidence or arguments that might be

presented at a hearing. Almost by definition, a summary dismissal should not require a lengthy decision.

[18] In the case at hand, the General Division member was faced with an appeal that, even if accepted as completely accurate and true, did not set out any legal basis for the contention that the initial Commission determination regarding the allocation of earnings was wrong. Given this, in accordance with s. 22 of the *Social Security Tribunal Regulations*, the General Division member had no choice but to send notice of his intention to proceed by way of summary dismissal.

[19] In his response to this notice, the Appellant agreed that the law had been applied correctly to the facts of his case. Instead, he argued (at GD7-1) that "[t]his is a substance vs. form argument, the logic and intent of which cannot and should not be summarily dismissed [*sic*]."

[20] In his decision, the General Division member found that as the Appellant had raised no evidence or argument in support of his objection to the Commission's decision, the appeal did not have a reasonable chance of success. He then summarily dismissed the Appellant's appeal.

[21] It is true that the General Division member did not state the correct test to be applied in cases of summary dismissals. Instead, he simply quoted from the Act and then made a ruling on the merits of the allocation issue.

[22] Notwithstanding this, however, it is clear to me from his decision that the member had an appreciation of the purpose of summary dismissals, that he bore in mind the high threshold required to summarily dismiss an appeal and that he properly considered whether the case before him met that high threshold.

[23] Having considered the docket and the parties' submissions, I find 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.

CONCLUSION

[24] For the reasons above, the appeal is dismissed.

Mark Borer

Member, Appeal Division