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

Citation: *L. H. v. Canada Employment Insurance Commission,* 2017 SSTADEI 351

Tribunal File Number: AD-17-279

BETWEEN:

L. H.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Pierre Lafontaine

HEARD ON: September 26, 2017

DATE OF DECISION: October 2, 2017

Canada

REASONS AND DECISION

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] On March 9, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) concluded that the Appellant's appeal had to be summarily dismissed since:

> - twelve months had not expired since the day the Appellant had entered into an agreement with the Respondent to participate in the Employment Insurance program for self-employed people, referred to in section 152.07 of the *Employment Insurance Act* (Act).

[3] On March 20, 2017, the Appellant filed an appeal of the General Division's summary dismissal decision.

TYPE OF HEARING

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

- The complexity of the issue under appeal.
- The fact that the parties' credibility is 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.

[5] The Appellant and the Respondent did not attend the hearing although they had 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 the appeal:

- Since 2014, she has been working as a self-employed real estate sales representative;
- She always thought that she would never be able to receive maternity benefits since there were no advertisements or publications regarding the self-employed benefit program;
- That explains why she made an agreement with the Respondent only in May 2016;
- She hopes she can get maternity leave to cover some expenses since she had to stop work to take care of her baby.

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

- The General Division considered all the evidence and found that twelve months had not expired between the date the Appellant entered into an agreement and the date she applied for benefits and, as a result, she did not meet the basic qualifying requirements to establish a claim under section 152.07 of the Act;

- 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

[10] The Appellant did not make any representations regarding the applicable standard of review.

[11] The Respondent submits that the Appeal Division does not owe any deference to the conclusions of the General Division 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

[12] The Tribunal notes that the Federal Court of Appeal in *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] Pursuant to section 12 of the *Social Security Tribunal Regulations*, the Tribunal proceeded with the hearing in the absence of both parties since it was satisfied that they had received the notice of hearing.

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

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

[20] The Tribunal's Appeal Division 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?

[21] To be clear, the question is whether that failure is pre-ordained no matter what evidence or arguments might be presented at the hearing.

[22] The General Division explicitly stated the correct test to be applied, 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.

[23] In the present case, the uncontested evidence before the General Division shows that twelve months had not expired between the date the Appellant entered into an agreement and the date she applied for benefits and, as a result, she did not meet the basic qualifying requirements to establish a claim under section 152.07 of the Act.

[24] As stated by the General Division, the Federal Court of Appeal has confirmed the principle that the qualifying requirements set out in the Act are not in the discretion of the decision-maker to vary—even if a claimant is only just short of meeting the qualifying conditions and no matter how compelling the circumstances.

[25] 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 the appeal should be summarily dismissed was correct.

CONCLUSION

[26] The appeal is dismissed.

Pierre Lafontaine
Member, Appeal Division