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

Citation: *A. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 392

Tribunal File Number: AD-17-330

BETWEEN:

A. B.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: November 9, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 12, 2016, the Canada Employment Insurance Commission (Commission) verbally informed the Appellant that he did not qualify for additional benefits under Bill C-15 because his benefit period would have had to commence in the period between January 4 and July 2, 2015.

[2] The Appellant requested a reconsideration on July 14, 2016, in which he asserted that the intent of the new legislation was to benefit long-tenured workers living in specific economic regions and, as a long-tenured oil industry worker living in a specific region, he met those criteria. He also noted that his benefits were paid in the period between September 2015 and April 2016 and that he therefore fell within the eligibility period.

[3] On August 9, 2016, the Commission issued a reconsideration decision in which its earlier decision of July 12, 2016, was upheld.

[4] The Appellant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal), which determined on February 13, 2017, that the Appellant's appeal had no reasonable chance of success, and it summarily dismissed the appeal.

[5] The Appellant appealed the summary dismissal to the Appeal Division on April 19, 2017.

[6] This appeal proceeded by On the Record for the following reasons:

a) The Member had determined that no further hearing would be required.

b) The *Social Security Tribunal Regulations* require that appeals proceed as informally and as quickly as circumstances, fairness and natural justice permit.

THE LAW

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

> (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.

[8] Section 53(1) of the DESD Act, provides that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of appeal.

ISSUE

[9] I must determine whether the General Division erred in fact or in law in summarily dismissing the Appellant's appeal.

ANALYSIS

[10] In respect of this appeal, the Appellant characterizes the General Division's reliance on the date that he initially filed his application to determine the beginning of his benefit period, as a failure to observe a principle of natural justice. The Appellant has not explained in what way the General Division failed to observe a principle of natural justice by upholding the Commission's decision in this respect. Rather, the Appellant views it as unfair that he might have been entitled to more weeks of benefits, had he simply delayed his application.

[11] The fact that the Appellant may not have clearly articulated the basis for his appeal does not mean the appeal must necessarily fail. *Karadeolian* v. *Canada (Attorney General)*, 2016 FC 615, considered a case in which the applicant had not provided clearly articulated grounds for appeal. The Federal Court noted at paragraph 10 that, "[…] the Tribunal must be wary of

mechanistically applying the language of section 58 of the Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like [the appellant]."

[12] I recognize that this is not a leave to appeal application; however, I consider the principle to also apply to the context of an appeal of a General Division decision summarily dismissing the appeal. Like the application for leave to appeal a regular appeal decision, this is the Appellant's first opportunity to challenge the basis for the General Division decision. Furthermore, the process for summarily dismissing an appeal is such as to deny the Appellant a full opportunity to present his case. I have therefore also given some consideration to alternate grounds of appeal.

[13] In summarily dismissing the appeal, the General Division found that the appeal had no reasonable chance of success. An Appeal Division decision recently equated "no reasonable chance of success" to an outcome that is not "manifestly clear." On appeal to the Federal Court, the Appeal Division decision was upheld. *Miter* v. *Canada (Attorney General)*, 2017 FC 262. The Federal Court of Appeal has also considered what is meant by "no reasonable chance of appeal" on several occasions in the context of its own summary dismissal procedure. In *Lessard-Gauvin c. Canada (Attorney General)*, 2013 FCA 147; *Sellathurai v. Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 1; and *Breslaw v. Canada (Attorney General)*, 2004 FCA 264, the legal test applied was this: 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?

[14] I must determine whether the General Division erred in concluding that the appeal had no reasonable chance of success and in summarily dismissing the appeal as a result. In order to do so, I must find that the General Division committed one of the subsection 58(1) errors described above.

[15] The Commission had denied the Appellant's request to be considered for additional benefits on the basis that his benefit period was established on August 3, 2014. In order to benefit from subsections 12(2.1) to 12(2.6), his benefit period would have had to begin between January 4, 2015, and October 29, 2016 (referred to as "the eligibility period"). August 3, 2014,

does not fall within the eligibility period and, therefore, the Appellant could not possibly meet the criteria. The General Division's finding that the Appellant had no reasonable chance of success is necessarily predicated on the Appellant's benefit period having starting on August 3, 2014.

[16] If it is possible that the benefit period could have fallen within the eligibility period, then it could not be said that the outcome is "plain and obvious" or "manifestly clear" and that the General Division would have erred in law in its application of the test.

[17] In his original Notice of Appeal, the Appellant stated: "My two week waiting period started August 2, 2015 to August 15, 2015. My 'Benefit Period' then started from August 16, 2015." Explaining to the General Division why he believed his appeal should not be summarily dismissed, the Appellant claimed that his waiting period for benefits had commenced on August 2, 2015, and that he had received benefits from August 16, 2015, to April 23, 2016. His first "key argument" is that his claim was "delayed" and that he was required to "reapply" as set out in the Commission's letter of October 17, 2014, which followed his initial application.

[18] The General Division correctly noted that the eligibility for the additional benefits sought by the Appellant is established with reference to the start of the benefit period and not to the start of benefits in accordance with section 12(2.3) of the *Employment Insurance Act*, and it makes a clear finding at paragraph 5 that the Appellant's benefit period commenced on August 4, 2014.

[19] In support of this finding, the General Division relies on two facts: first, the Commission said so in its letter of October 17, 2014; and second, the Appellant first applied for benefits shortly after he had stopped working on July 31, 2014.

[20] Concerning the first fact relied upon, I accept that the October 17, 2014, letter does not explicitly establish a benefit period. It reads as follows:

> "We are writing to inform you about your claim for Employment Insurance benefits starting August 3, 2014. If it was to your advantage, we delayed the start date of your claim.
>
> You received monies on separation from your employer. This income, before deductions, is considered earnings and a total of $157,683.00

> will be applied against your Employment Insurance claim from August 3, 2014 to August 1, 2015.
>
> Due to the length of this allocation, you may wish to stop completing your reports. If you choose to do so and want to renew your claim once this allocation has ended, please reapply for benefits online in the week of July 26, 2015."

[21] The October 17, 2014, letter appears to indicate that, owing to the severance payments received by the Appellant and allocated by the Commission, the claim, or payments on the claim, had been delayed, and that he should reapply at the end of the allocation to renew the claim. It is unlikely that a reasonable claimant would understand this letter to convey that a benefit period has been established. At least a reasonable claimant unsophisticated as to the Employment Insurance Commission's processes would not understand it in this way.

[22] Even if the decision is taken to have established a benefit period as at August 4, 2014, it cannot be considered as proof that the Commission established the benefit period correctly. **In itself**, this letter does not establish, beyond proof or argument, either that a benefit period was established, or that it was appropriately established, outside of the eligibility period that would permit the Appellant to access additional weeks.

[23] The other fact on which the General Division relied is the fact that the Appellant had applied for benefits shortly after he stopped working on July 31, 2014. This was not disputed by the Appellant, so the only question is whether this is determinative of the matter. Does this fact mean that his benefit period could not have been established within the eligibility period?

[24] The General Division did not provide any statutory or judicial authority for its finding that the benefit period had commenced after the initial application, so the General Division would have had to consider it to be presumptively true that the establishment of the Appellant's benefit period flows automatically from the initial application, by operation of law.

[25] Section 9 of the Act stipulates that when an insured person qualifies for benefits and makes a claim, "[…] a benefit period shall be established." According to subsection 10(1) of the Act, the benefit period begins on the later of the Sunday of the week of the initial claim for benefits and the Sunday of the week in which an "*interruption of earnings*" occurs. One of the requirements for an interruption of earnings under subsection 14(1) of the *Employment*

Insurance Regulations (Regulations) is that there be a minimum of seven consecutive days in which no earnings arising from employment are payable *or allocated.*

[26] In this case, the Appellant had a complete severance from employment on July 31, 2014, and his severance pay was allocated to weeks from August 3, 2014, to August 1, 2015. As acknowledged at paragraph 25 by the General Division, "[…] due to an allocation, the Appellant did not begin to serve his waiting period until August 2, 2015" (emphasis added).

[27] Subsection 35(2) of the Regulations states that the earnings to be taken into account for the purpose of determining whether an interruption of earnings is a claimant's entire income. Severance payments have been held to be earnings from employment (See *Staikos* v. *Canada (Attorney General),* 2014 FCA 31). Unfortunately for the Appellant, subsection 35(6) of the Regulations operates to exclude severance payments from consideration under section 14 of the Regulations, "notwithstanding subsection [35(2)]". In other words, the "interruption in earnings" under section 14 must be determined without reference to the allocation of his severance payments. Applying subsection 35(2) to the before the General Division, the Appellant's interruption of earnings could only be the date that he was separated or laid off from employment.

[28] As stated, the benefit period commences on the later of the Sunday of the week of the initial claim for benefits and the Sunday of the week in which an interruption of earnings occurs. In this case, the later date would be his initial claim for benefits. I understand how the Applicant might have understood "reapply" to mean that the initial application was somehow voided, and I have accepted that there was some ambiguity in the October 17, 2014, letter as to whether a benefit period was then established. However, the issue is not whether the commencement of the Appellant's benefit period was clearly communicated: The issue is whether a benefit period began in fact, by operation of law.

[29] The October 17, 2014, letter confirms that the Appellant had made an initial claim for benefits, and that he had qualified. In consequence, the Appellant's benefit period commenced the Sunday of the week of his claim, which would be August 3, 2014. It is therefore not possible that his benefit period commenced within the eligibility period. This is an unavoidable conclusion with reference to the undisputed facts and the application of the law to those facts.

[30] I appreciate that the Appellant does not consider it fair that he might have delayed his application until the commencement of the eligibility period and that he might have qualified for additional benefits by doing so. I cannot address whether the Appellant would still have qualified in this hypothetical circumstance within the scope of this appeal.

[31] However, the issue before me is not whether there is some inequity inherent in the provisions of the Act and Regulations. That is a question for Parliament. It is not an argument with any chance of success on appeal. The issue before me is whether the General Division erred in finding that the appeal had no reasonable chance of success.

[32] I find that the General Division considered all the evidence and the arguments and that it correctly applied the law in reaching its conclusion that Appellant had no reasonable chance of success, and I likewise accept that the Appellant has no reasonable chance of success. The General Division made no error in failing to observe a principle of natural justice as claimed by the Appellant per paragraph 58(1)(*a*) of the DESD Act and no other error in law in applying the test for summary dismissal per 58(1)(*b*). Furthermore, the General Division did not make an erroneous finding of fact as defined in paragraph 58(1)(*c*).

CONCLUSION

[33] The appeal is dismissed.

Stephen Bergen
Member, Appeal Division