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

Citation: *X v Canada Employment Insurance Commission and J. F.*, 2019 SST 383

Tribunal File Number: AD-18-680

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

and

J. F.

Respondents

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 6, 2019

Canada

DECISION AND REASONS

DECISION

[1] The Applicant, X (Employer) can request leave to appeal the General Division decision to the Appeal Division.

[2] The Employer's application for leave to appeal was filed on time.

[3] The Employer's application for leave to appeal is granted because the appeal has a reasonable chance of success based on a reviewable error that the General Division made.

OVERVIEW

[4] J. F. (Claimant) established a claim for Employment Insurance benefits. The Canada Employment Insurance Commission (Commission) denied this claim because it determined that the Claimant was disentitled from receiving benefits because he had lost his employment due to a labour dispute. The Claimant sought reconsideration of this decision, but the Commission maintained its original decision. The Claimant appealed the decision to the General Division of the Tribunal.

[5] The General Division concluded that the Claimant had lost his employment because he was laid off in anticipation of a work stoppage, not because of a stoppage of work attributable to a labour dispute. The General Division also concluded that the Commission had not proven that there was a labour dispute in existence on December 19, 2016, as section 36 of the *Employment Insurance Act* (EI Act) requires, so it allowed the Claimant's appeal.

[6] The Employer now seeks leave to appeal the General Division's decision to the Appeal Division.

[7] In support of its application for leave to appeal, the Employer alleges that it filed its application before the legal deadline. If it did not, it asks the Tribunal to grant an extension of time for it to file its application for leave to appeal. The Employer argues that the General Division erred in its interpretation and application of section 36 of the EI Act and that it failed to

observe a principle of natural justice by not adding the Employer to the proceedings before the General Division.

ISSUES

[8] Can the Employer, who was not a party before the General Division, request leave to appeal the General Division decision under section 55 of the *Department of Employment and Social Development Act* (DESD Act)?

[9] If yes, did the Employer file its application for leave to appeal on time?

[10] Does the Employer's appeal have a reasonable chance of success based on a reviewable error made by the General Division?

ANALYSIS

The Proceedings before the General Division

[11] The Claimant appealed to the General Division regarding the Commission's reconsideration decision to deny him benefits as per section 36 of the EI Act.

[12] The Employer was notified by mail that the General Division had received an appeal of a reconsideration decision by the Commission regarding its employee and that it could be added as a party to the proceeding if it had a direct interest in the decision.

[13] The Employer was informed that an added party to the proceeding had the right to make submissions, participate in the hearing, and be notified of the General Division's appeal decision. It was given time to make a request to be added to the proceedings.

[14] The Employer did not make any inquiries to the General Division regarding the substance of the proceedings.

[15] The added party letter was sent to the Employer at the same address mentioned in the Employer's application for leave.[1]

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[1] AD1-5.

[16] The Employer did not make any requests to the General Division to be an added party to the proceedings.

[17] On January 17, 2018, the General Division sent a notice of hearing to the Claimant and his representative.

[18] On February 22, 2018, the General Division held an in-person hearing. The Claimant, his representative, and the Commission's representative attended the hearing.

The General Division Decision

[19] The issue before the General Division was whether the Claimant should have been disentitled to benefits under section 36(1) of the EI Act.

[20] More precisely, the General Division had to decide whether the Claimant lost his employment or was unable to resume an employment because of a work stoppage attributable to a labour dispute at the factory, workshop, or other premises at which the Claimant was employed.

[21] The General Division concluded that the Claimant had lost his employment because he was laid off in anticipation of a work stoppage, not because of a stoppage of work attributable to a labour dispute. The General Division also concluded that the Commission had not proven that there was a labour dispute in existence on December 19, 2016, as section 36 of the EI Act requires, so it allowed the Claimant's appeal.

Issue 1: Can the Employer, who was not a party before the General Division, request leave to appeal the General Division decision under section 55 of the DESD Act?

[22] The Tribunal sent a letter to the parties requesting that they file submissions on whether the Employer could request leave to appeal the General Division decision to the Appeal Division as per section 55 of the DESD Act. The parties responded, and the Tribunal considered all the submissions filed by the parties before the present decision.

[23] The Tribunal was unable to locate any decisions that interpret the meaning of "any person who is the subject of the decision" as set out in section 55 of the DESD Act. In fact, there is very

little of substance that has been said about section 55 of the DESD Act since its coming into force in 2013.

[24] The lack of guidance in existing case law means that what these words mean will come down to a question of statutory interpretation. When faced with questions of statutory interpretation, according to the Supreme Court of Canada, a decision-maker must consider the ordinary meaning of the words in its immediate context and the scheme as a whole.[2]

[25] The Tribunal notes that section 112(1) of the EI Act allows a claimant or other person who is the subject of a Commission decision—or the claimant's employer—to file a request to the Commission for a reconsideration of that decision.

[26] In comparison, section 113 of the EI Act allows a party who is dissatisfied with a reconsideration decision that the Commission made under section 112 to appeal to the General Division of the Social Security Tribunal. "Party/person" is not defined for the purpose of these sections.

[27] Although the definitions contained in the *Social Security Tribunal Regulations* (SST Regulations) do not apply here, the Tribunal notes that, according to the definitions contained in section 1 of the SST Regulations, a party to a proceeding before the General Division, Employment Insurance Section, is the appellant before the General Division (in this case, the Claimant), the Commission, and any person added as a party added under section 10 of the SST Regulations.

[28] Section 55 of the DESD Act appears to be more restrictive than sections 112 and 113 of the EI Act. It indicates that "Any decision of the General Division may be appealed to the Appeal Division by <u>any person who is the subject of the decision</u> and any other prescribed person" [emphasis added].

[29] By contrast, the repealed section 115(1) of the EI Act allowed the following parties to appeal a Board of Referees decision to the Umpire without requesting permission to appeal:

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[2] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

a) the Commission;

b) a claimant or other person who is the subject of a decision of the Commission;

c) the employer of the claimant; or

d) an association of which the claimant or employer is a member.

[30] Therefore, under the legislation in force since 2013, the employer does not have as of right, authority to bring an appeal to the Appeal Division and is not specifically mentioned in section 55 of the DESD Act as a person who can appeal a General Division decision.

[31] Section 55 of the DESD Act gives the right to appeal to the Appeal Division to any person who is the subject of the decision and any other prescribed person. However, there are no regulations defining "other persons" for the purpose of this section.

[32] The Tribunal must therefore ask itself: Who is a person subject to the decision of the General Division?

[33] The ordinary meaning of "subject to" in a legal context means "conditional or dependent on something" (Black's Law Dictionary, online, 2nd edition). According to Merriam-Webster Dictionaries, "subject to" means "affected by or possibly affected by something, liable or prone to suffer something."

[34] In summary, the person who is subject to the decision of the General Division is a person who is dependent on its decision, affected or possibly affected by it, and liable or prone to suffer something from it.

[35] The issue before the General Division was whether the Claimant should have been disentitled to benefits under section 36(1) of the EI Act. More precisely, the General Division had to decide whether the Claimant lost his employment, or was unable to resume an employment, because of a work stoppage attributable to a labour dispute at the factory, workshop or other premises at which he was employed.

[36] Section 36 of the EI Act is based on the premise that the government should take a neutral stance in a labour dispute and not support one side by providing unemployment insurance

benefits during a labour dispute.[3] The General Division rendered its decision in the context of a collective bargaining relationship between the bargaining agent of the Claimant and the Employer.

[37] For the above-mentioned reasons, the Tribunal is of the view that the Employer—even if it did not request to be an added party before the General Division—is a person that is dependent on the General Division decision, affected or possibly affected by it, and liable or prone to suffer something from it and therefore the subject of the decision of the General Division as per section 55 of the DESD Act.

[38] In view of the above, the Tribunal concludes that the Employer, in the present circumstances, can request leave to appeal the General Division decision.

Issue 2: Did the Employer file its application for leave to appeal on time?

[39] Yes. The Employer filed its application for leave to appeal on time.

[40] The General Division communicated its decision to the Employer on August 22, 2018. The Employer then filed its application for leave to appeal on September 18, 2018.

[41] Therefore, the Employer's application for leave to appeal was received within the 30 days after the day on which the General Division decision was communicated to the Employer under section 57 of the DESD Act.

Issue 3: Does the Employer's appeal have a reasonable chance of success based on a reviewable error made by the General Division?

[42] For the following reasons, the Tribunal is of the view that the Employer's appeal has a reasonable chance of success. Therefore, it will not consider all the grounds of appeal that the Employer has raised at the leave to appeal stage. At the hearing, the Tribunal will, however, consider all grounds of appeal that the Employer has raised.

[43] Section 58(1) of the DESD Act specifies the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division: failed to observe a

[3] *Letourneau c. Commission de l'emploi et de l'immigration du Canada*, A-1082-84.

principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[44] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Employer to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Employer does not have to prove its case; instead, it must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, it must show that there is arguably some reviewable error on which the appeal might succeed.

[45] Therefore, before the Tribunal can grant leave, it needs to be satisfied that the reasons for appeal fall within any of the grounds of appeal listed above and that at least one of the reasons has a reasonable chance of success.

[46] The Employer argues that the General Division erred in law by ignoring evidence and through its application of the legal test of section 36 of the EI Act, that it did not appropriately consider evidence, and that it did not observe a principal of natural justice.

[47] The General Division determined from the evidence that a strike vote was taken that resulted in 100% of those in attendance voting to give their union the authority to call for a strike. The Employer, through its bargaining committee in the next room, was informed of this vote and, within minutes, the Employer “locked out” the unionized workers.

[48] The Employer submits that the General Division erred when it concluded from the evidence that the Claimant had lost his employment because he was laid off in anticipation of a work stoppage, not because of a stoppage of work attributable to a labour dispute. It argues that the General Division ignored the fact that there was a lockout and therefore a work stoppage attributable to a labour dispute, within the meaning of section 36 of the EI Act.

[49] The Tribunal notes that the General Division found that the parties were still negotiating and that there was no imminent strike since the strike vote had not been sanctioned by Unifor head office. Therefore, it concluded that there was no labour dispute. However, federal case law

has held that a labour dispute is not limited to a strike and may be initiated by the employer by way of a lockout.[4] The Tribunal is of the view that the General Division may have failed to consider relevant case law regarding the interpretation of section 36 of the EI Act and therefore may have erred in law.

[50] Furthermore, the General Division seems to have determined that there was no work stoppage because there was no evidence to show that the Employer's facility ever fell below the 85% threshold of production. It appears to have referred to section 53 of the *Employment Insurance Regulations*, which only applies when a decision-maker must determine whether the work stoppage has terminated. The Tribunal is of the view that this could constitute an error in law.

[51] The Employer also submits that the General Division based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner.

[52] The Employer puts forward that the General Division made crucial findings of facts in its decision based on the testimony of the Claimant's witness, Caroline Wrice, that the General Division had itself put into question.[5] The Employer submits that these facts in support of the General Division decision were not available from any other source than this witness that the General Division had determined not to be credible.

[53] The Employer therefore submits that reaching a finding of fact in the absence of sufficient evidence or evidence not appropriately considered is an error of fact that is capricious and perverse.

[54] The Tribunal notes that, in support of its decision that there was no labour dispute, the General Division considered that there was no imminent strike since the strike vote had not been sanctioned by Unifor head office. In order to come to that conclusion, the General Division relied on the testimony of Caroline Wrice, testimony that the General Division put into question

[4] *Canada (Attorney General) v. Guillemette*, A-342-79.
[5] Para. 23 of the General Division decision.

itself.[6] The Tribunal is of the view that this finding of fact could be considered to have been made in a capricious and perverse manner.

[55] After reviewing the appeal docket and the General Division decision and considering the Employer's arguments in support of its request for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Employer has set out reasons that fall into the grounds of appeal described above and that could possibly lead to the reversal of the disputed decision.

CONCLUSION

[56] The Employer can request leave to appeal the General Division decision to the Appeal Division.

[57] The Employer's application for leave to appeal was filed on time.

[58] The Employer's application for leave to appeal is granted because it has a reasonable chance of success based on a reviewable error that the General Division made.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	Blair Mitchell, Representative for the Applicant Dean G. Lindsay, representative of the Claimant / Respondent

[6] Paras. 43, 44, 46, and 48 of the General Division decision.