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

Citation: *X v Canada Employment Insurance Commission and O. R.*, 2020 SST 696

Tribunal File Number: AD-20-729

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

O. R.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 13, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because I am not satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[2] The Applicant, H. M. (Employer), operated a medical clinic. He is seeking leave to appeal the General Division's decision dated July 16, 2020. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division denied the Employer's request to be added as a party to an appeal. The appeal involved O. R., a former employee (Claimant). The Claimant appealed to the General Division for Employment Insurance benefits. The Employer opposed her appeal.

[4] The Employer argues that the General Division made an important error about the facts. The Employer also argues that the General Division misapprehended the law. He asks the Appeal Division to let him participate in the appeal at the General Division.[2]

[5] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success on either of the Employer's two grounds so I am refusing leave to appeal.

ISSUES

[6] The issues are as follows:

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] The proceedings at the General Division have concluded, but the Employer is pursuing an appeal of another decision that the General Division made. In this other decision, the General Division decided that the Claimant was not disqualified from receiving regular employment insurance benefits.

Issue 1: Is there an arguable case that the General Division misapprehended the law regarding any direct interest the Employer has in the General Division's decision?

Issue 2: Is there an arguable case that the General Division made an important error about when the Tribunal delivered a letter to the Employer?

ANALYSIS

The Appeals Process

[7] An appeal at the Appeal Division of the Social Security Tribunal is a two-step process. First, the Appeal Division has to decide whether an applicant's reasons for appeal fall into at least one of the types of errors listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) Did not hold a fair hearing or the process was unfair;

(b) Did not decide an issue that it should have decided, or it decided something that it did not have the power to decide;

(c) Made an error of law when making a decision; or

(d) Based its decision on an important error of fact.2

[8] The appeal has to have a reasonable chance of success. This is a relatively low bar because applicants do not have to prove their case at this stage of the appeal process. As long as the Appeal Division is satisfied that there is an arguable case, it is sufficient to grant leave to appeal.

[9] If there is an arguable case, then the Appeal Division moves to the second step of the appeals process. At the second step, the Appeal Division has to decide whether the General Division made an error under section 58(1) of the DESDA.

[10] The Employer argues that he has an arguable case because the General Division made errors under section 58(1) of the DESDA.

Issue 1: Is there an arguable case that the General Division misapprehended the law regarding any direct interest the Employer has in the General Division's decision?

[11] No. I find that the Employer does not have an arguable case that the General Division misapprehended the law regarding any direct interest the Employer had in the General Division's decision.

[12] The *Social Security Tribunal Regulations* (Regulations) lets the Tribunal add any person as a party to a proceeding. The Tribunal may do this if the person has a direct interest in the decision.[3] Neither the DESDA nor the Regulations define a "direct interest."

[13] The Employer advised the Tribunal that he wished to be added as a party to the General Division proceedings. His statement was quite brief. He argued that he had a direct interest because of pending litigation with the Claimant.[4] The Claimant has a court case against the Employer for damages for wrongful dismissal.

[14] The General Division denied the Employer's request. It did this for two reasons:

i. It found that the Employer had not shown that he had a direct interest in the appeal, and

ii. It found that the Employer was late when it asked to be added as a party to the proceedings.

[15] The General Division found that that litigation was irrelevant to the matters before the Tribunal. The proceedings before the General Division related to the *Employment Insurance Act.* In particular, it related to whether the Claimant qualified for Employment Insurance benefits.

[16] The General Division found that its decision would not be binding on other administrative tribunals or any judicial proceedings.

[17] Further, the General Division determined that its decision would not impose any legal obligations on or prejudicially affect the Employer. The General Division found that its decision would not directly impact the Employer because "all potential remedial action will be required

[3] See section 10(1) of the *Social Security Tribunal Regulations*.
[4] See Employer's letter dated July 9, 2020, to the Social Security Tribunal.

by the Commission and not the employer." The General Division also found that its decision would not keep the parties from pursuing matters in other forums.

[18] Given these considerations, the General Division found that the Employer did not have a direct interest in the appeal.

[19] The Employer argues that the General Division misapprehended the law when it defined a "direct interest."

[20] The Employer argues that when the General Division was deciding whether he had a direct interest in the proceedings, it failed to consider the doctrine of *res judicata*. *Res judicata* may prevent the rehearing or re-litigation of matters in the wrongful dismissal court case that the Claimant has against the Employer.

[21] The Employer cites *Minott v O'Shanter Development Company Ltd.*[5] There, the Court of Appeal for Ontario listed the three requirements for issue estoppel, a form of *res judicata*. For issue estoppel to arise, the issues must be the same, the judicial decision must be final, and the parties must be the same.

[22] The Employer claims that all three requirements for *res judicata* are met in his case:

- He argues that the issues are the same. The General Division decided that the Claimant did not voluntarily leave her job. The Employer argues that the General Division decided that he had constructively dismissed the Claimant from her job. The Employment states that he and the Claimant are litigating the very same issue in superior court.

- He argues that the General Division's decision represents a final judicial decision. He notes that the Ontario Superior Court of Justice has held that decisions of the Board of Referees) are final judicial decisions.[6] The Board of Referees is the predecessor to the General Division. So, if decisions of the Board of Referees are final, so too are decisions of the General Division.

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[5] *Minott v O'Shanter Development Company Ltd.*, 1999 CanLII 3686 (ON CA).
[6] *Gebreselassie v VCR Active Media Ltd.*, 2007 CanLII 45710 (On SC), at para. 54.

The Employer also argues that he does not have standing as a party to the proceedings. As a result, he has no ability to appeal the General Division's decision. Under these circumstances, the General Division's decision counts as a final judicial decision too.

- The Employer argues that the parties are the same. Although the General Division did not add him as a party, he is the Claimant's employer in both cases. He also notes that he participated in the Employment Insurance process early on, when he asked the Commission to reconsider its initial decision.

[23] The Employer argues that the doctrine of *res judicata* causes him prejudice. He faces prejudice because *res judicata* will mean the General Division's findings stands, although he did not get a chance to participate in the General Division hearing. The General Division's decision will affect him in the Claimant's wrongful dismissal action against him. It will mean that he will be unable to defend himself in the Claimant's wrongful dismissal case against him.

[24] In other words, the Employer argues that he has a direct interest in the outcome of the General Division proceedings. He argues that he has a direct interest because of *res judicata* and because of pending litigation. So, if the General Division failed to consider the issue of *res judicata* against the backdrop of pending litigation, he argues that the General Division could not possibly have properly considered whether he has a direct interest in the proceedings.

[25] The Employer's arguments presume that all three requirements for *res judicata* have been met. But, the parties in both proceedings are not the same, as the Employer did not appear as a party in the proceedings before the General Division.[7]

[26] The Employer filed a request for reconsideration. But, the Court of Appeal considered this level of involvement to be of "limited participation." The Court of Appeal said that this type of limited participation is not enough to make an employer a party to proceedings for the purposes of *res judicata*.[8]

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[7] *Minott, supra.*
[8] *Ibid.*

[27] The Court of Appeal recognized that employers ordinarily do not appear on applications for Employment Insurance benefits or even on appeals. They do not usually appear because the stakes are small and they do not have a direct financial interest in the outcome. The Court of Appeal noted, however that employers could be responsible for repaying any benefits that a Claimant received. This could arise under section 46 of the *Employment Insurance Act*.

[28] Under section 46 of the *Employment Insurance Act,* an employer could be liable to repay any benefits received by an employee who succeeds in a wrongful dismissal action. However, an employer does not have a direct interest simply because he might bear some liability under section 46. The Claimant would have to succeed in her wrongful dismissal action before section 46 is ever triggered.

[29] Even if all three requirements for issue estoppel are met, that does not guarantee that issue estoppel will actually be applied to prevent a matter from being heard again. The Court of Appeal held in *Minott* that courts always have the discretion to refuse to apply issue estoppel. Courts can refuse to apply the doctrine when applying it would be unfair or unjust.

[30] The Court of Appeal wrote:

> Applying issue estoppel to the findings of an administrative tribunal to foreclose a subsequent civil proceeding may also be unfair or work an injustice. Its application to findings made in proceedings under the *Employment Insurance Act* is a good example … the courts must consider the appropriateness of applying [issue estoppel] to the findings of a tribunal under the Act to prevent those findings from being relitigated in a subsequent action for wrongful dismissal.[9]

[31] The Court of Appeal said that there were numerous concerns with applying issue estoppel. For instance, it said that one cannot automatically equate misconduct under the *Employment Insurance Act* with just cause for dismissal. It seems that the Employer could make a similar argument, that any findings the General Division made regarding the Claimant's departure from her employment does not equate with a constructive dismissal.

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[9] *Ibid*.

[32] Ultimately, the Court of Appeal concluded that because of the "very different characteristics of decision making under the [Employment Insurance] Act, the findings of these tribunals should not automatically be imported into a subsequent civil action."[10]

[33] Even so, while the General Division may not have named the doctrine of *res judicata*, it is evident that it considered the impact that its decision could have on other proceedings. As I noted above, the General Division concluded that, "[its] decision is not binding upon other administrative tribunals or any judicial proceedings." It said this, knowing that there was litigation between the Claimant and the Employer.

[34] In summary, without naming the doctrine of *res judicata*, the General Division did in fact consider the impact of its decision on other proceedings. Even if the General Division did not fully address the issues relating to *res judicata*, it is doubtful that *res judicata* would apply in other proceedings such as the wrongful dismissal action because it does not appear that all three requirements have been met. Finally, even if all three requirements have been met, courts still have the discretion not to apply *res judicata*.

[35] For these reasons, I am not satisfied that there is an arguable case that the General Division misapprehended the law regarding any direct interest that the Employer has in the General Division's decision.

Issue 2: Is there an arguable case that the General Division made an important error about when the Tribunal delivered a letter to the Employer?

[36] No. I find that the Employer does not have an arguable case that the General Division made an important error about when the Tribunal delivered a letter to the Employer.

[37] The Employer argues that the General Division made an important error about when the Tribunal delivered its June 22, 2020 letter[11] to him. The letter advised the Employer that the Tribunal could add him as a party to the Claimant's appeal. However, the Employer would have to prove that he had a direct interest in the appeal. As well, the Employer had to make his request by July 3, 2020.

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[10] *Ibid*.
[11] See Tribunal's letter dated June 22, 2020, at GD5-1 to GD5-4.

[38] The Employer claims that late delivery of this letter caused him to miss the Tribunal's deadline to ask to be added as a party to the proceedings. He says that the General Division made a mistake when it found that he received the letter at the end of June 2020, at his place of business, and that someone had signed for receipt of the letter.

[39] The Employer claims that he the General Division also made an error when it found that he had enough time to ask the Tribunal to add him as a party to the proceedings.

[40] The General Division based its findings on the courier's proof of service. Because the General Division found that the Tribunal's letter had been delivered on June 30, 2020, it concluded that the Employer could have contacted the Tribunal before July 3, 2020, and asked to be added as a party.

[41] The Employer claims that he received the Tribunal's letter on July 7, 2020, after the Tribunal's deadline had already passed. The Employer asked the Tribunal to add him as a party on July 9, 2020. The General Division found that the Employer did not make his request on time, as he should have made it by July 3, 2020.

[42] The Employer denies that he (or anyone acting on his behalf) received the Tribunal's letter on June 30, 2020. He maintains that his office has been closed since March 2020 due to the pandemic. He denies that anyone could have arranged for service, or that anyone could have signed for receipt of the Tribunal's letter.

[43] The Employer also maintains that he did not receive the Tribunal's letter until July 7, 2020, when a courier left the letter at his home. In his letter dated July 9, 2020, the Employer noted that the "courier listed for this letter is [the son of the Claimant], which may have contributed to [the] delay in receipt of [the June 22, 2020] letter."[12]

[44] The General Division rejected the Employer's statement that the Employer did not receive the Tribunal's letter until July 7, 2020. The General Division also dismissed any suggestion that the Claimant's son delayed delivery of the Tribunal's letter to the Employer.

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[12] See Employer's July 9, 2020, letter at AD1-24.

[45] I do not see any evidence that the Claimant's son was involved in the delivery of the Tribunal's letter. The Employer wrote that the courier listed for the Tribunal's letter is the Claimant's son. The only reference to the Claimant's son appears at the bottom of the Tribunal's letter, which reads:

> c.c.: [Claimant's son's name] – COURIER
>
> c.c.: EI Appeal Processing Centre (Ontario) - EMAIL

[46] However, the "c.c. [Claimant's son's name] – COURIER" does not mean that the Tribunal hired the Claimant's son to deliver the letter to the Employer.

[47] The "c.c." is an abbreviation for "carbon copy." It simply means that the Tribunal copied that particular letter to both the Claimant's son (who acted as her representative) and to the EI Appeal Processing Centre. The Tribunal sent a copy of the letter by courier to the Claimant's son and by email to the EI Appeal Processing Centre.

[48] The General Division recognized that there was conflicting evidence about delivery of the Tribunal's letter. The courier service indicated that it had delivered the letter to the Employer's place of business on June 30, 2020. The Employer denies that he received the letter at his business on that date. He says he received the letter at his home on July 7, 2020. In the face of this conflicting evidence, the General Division was entitled to assess the reliability and credibility of this evidence. Upon assessing this evidence, it could then decide whether to reject or accept that evidence.

[49] The General Division determined that it could rely on the Purolator proof of service over the Employer's statement. There was no reason for it to question the objectivity of the courier because it is an unrelated party to the proceedings.

[50] The courier service provided detailed notes of the dates and times and address to which it attempted service. The proof of service showed that the courier delivered the Tribunal's letter to the same address on the letter. The General Division noted that this address matched the address on the Employer's request to be added as a party. There was no reason to doubt the veracity of

this information. (I note that there does not appear to be any evidence in the hearing file that the Tribunal was aware of the Employer's home address when it couriered its letter to him.)

[51] Evidence supported the General Division's conclusions that the Tribunal delivered its letter to the Employer's place of business on June 30, 2020.

[52] I am not satisfied that the Employer has an arguable case that the General Division made an important error about when he received the Tribunal's letter.

[53] Finally, the Employer also made submissions regarding the Claimant's entitlement to Employment Insurance. These do not relate to this application for leave to appeal before me and therefore I need not address them.

CONCLUSION

[54] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	Daniel Camenzuli (counsel), for the Applicant