Citation: *E. K. v. Minister of Employment and Social Development,* 2015 SSTAD 360

Appeal No: AD-13-1061

BETWEEN:

E. K.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

SOCIAL SECURITY TRIBUNAL MEMBER: HAZELYN ROSS

TYPE OF HEARING: On the Record

DECISION DATE: March 18, 2015

PARTIES

Appellant	-	E. K.
Respondent's Representative	-	Sylvie Doire

DECISION

[1] The Appeal is dismissed.

INTRODUCTION

[2] On February 26, 2013, a Review Tribunal heard the appeal of E. K. The Review Tribunal issued its decision denying the appeal on April 9, 2013. The Appellant sought and obtained leave to appeal the Review Tribunal decision from the Appeal Division of the Social Security Tribunal ("the Tribunal"), which granted leave in accordance with the provisions of s. 260 of the *Jobs, Growth and Long-term Prosperity Act.*

[3] In her Application for Leave to Appeal, the Appellant raised issues of procedural fairness and contended that the Review Tribunal erred in the assessment of the evidence. She stated that the hearing before the Review Tribunal proceeded in the absence of the Russian interpreter she had requested and that she had not given her consent to the hearing proceeding in this fashion. Accordingly, she had been denied the right to be heard. In her Application for Leave to Appeal the Appellant also made other allegations of misconduct, including being misled about the outcome of the hearing were she to proceed without an interpreter, although she did not state who was responsible for the alleged acts.

[4] The Appellant had been represented by Counsel at the Review Tribunal hearing.

GROUNDS OF THE APPEAL

[5] The Appellant alleged a breach of natural justice in that the absence of the interpreter:

a) prevented her from fully comprehending the tribunal hearing

b) prevented her from effectively expressing her dire situation

c) probably resulted in the General Division discrediting certain of her statements; and

d) resulted in a decision based on erroneous facts.

[6] The Tribunal granted leave to appeal on the basis that," if true, the Appellant's allegation that the hearing proceeded without her consenting to the absence of a Russian interpreter raised questions of a breach of natural justice".

THE APPLICABLE LEGISLATIVE PROVISIONS

[7] For the purposes of this appeal, decisions of the Review Tribunal are considered to be decisions of the General Division. The applicable statutory provisions are found in Sections 58 and 59 of the *Department of Employment and Social Development Act* ("the DESD Act"). Section 58 provides for three grounds of appeal, namely 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.

[8] Section 59 prescribes the powers of the Appeal Division as follows,

> **59.** (1) The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[9] The questions currently before the Tribunal are questions of law, in that they involve a determination of whether or not the Review Tribunal breached a principle of natural justice, namely, the Appellant's right to be heard. It also involves a determination of whether the

Appellant is able to raise a breach of natural justice for the first time at the appeal stage. Consequently, correctness is the applicable standard of review.

THE SUBMISSIONS OF THE PARTIES

The Appellant's submissions

[10] Pursuant to s. 42 of the *Social Security Regulations* both parties made submissions to the Tribunal. The Appellant, who is presently self-represented, made several observations on her medical conditions; the Medical Reports filed; and errors that she perceived the Review Tribunal to have made in its decision. With respect to the issue of the interpreter, the Appellant reiterated her belief that the Review Tribunal ought not to have proceeded without one being present.

The Submissions of the Respondent

[11] On the behalf of the Respondent it was submitted that,

a) The Appellant may not raise the issue of a breach of natural justice for the first time on appeal;

b) In the alternative there was no breach of natural justice i.e. of the right to be heard

ISSUE

[12] The Tribunal must decide the following issues:

1) can the Appellant raise the issue of a breach of natural justice for the first time at the appeal stage?

2) was there a breach of natural justice?

ANALYSIS

Can the Appellant raise the issue of a breach of natural justice for the first time at the appeal stage?

[13] Counsel for the Respondent took the position that the Appellant was precluded from raising a breach of natural justice for the first time at the appeal stage. In the submission of the

Respondent's Counsel, the Appellant ought to have raised a timely objection to any perceived breach of natural justice at the Review Tribunal hearing; there was no indication that she had. Accordingly, the Appellant could not raise the objection at the appeal stage. In making this submission, Counsel for the Respondent relied on the dicta of the Federal Court of Appeal in *Benitez.*[1] *Benitez* was a consolidated appeal challenging Guideline 7 of the Immigration and Refugee Board, which Guideline altered the order of questioning of refugee claimants. Before the Federal Court of Appeal, Counsel for appellant Afua Gyankoma sought to raise several non-Guideline 7 issues which he had not raised before the Federal Court.

[14] When asked why he was raising other issues for the first time in the Federal Court of Appeal, Counsel could only say that perhaps he had made a "tactical error" in not raising them below. Evans, J.A. (writing for the Court) stated,

> [31] An appellant may not normally raise issues for the first time on an appeal, because that would put the appellate court in the position of having to decide an issue without the benefit of the opinion of the lower court. The role of an appellate court is generally confined to examining the decision of the court below for reversible error.

[15] Evans, J. A. went on to note that there are exceptions to this general rule, stating at paragraph 32:

> [32] There are, however, exceptions. For example, in *Stumf v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 590, 2002 FCA 148, this Court set aside a refusal by the Convention Refugee Determination Division (as it then was) ("CRDD") to re-open an abandonment decision, on the ground that a designated representative should have been appointed for one of the refugee claimants, a minor. This issue had not been raised before either the CRDD, or the Federal Court on the application for judicial review.

[16] Counsel for the Respondent also relied on *Mohammadian v. Canada (MCI)* [2] where the quality of interpretation was at issue. Dismissing the application for Judicial Review, Pelletier, J, held that the question of the quality of the interpretation should have been raised before the Convention Refugee Determination Division because it was obvious to the applicant that there

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[1] *Benitez v. Canada (MCI),* 2006 FC 391 at paras. 204-220,
[2] *Mohammadian v. Canada (MCI)* [2000**]** FCJ No. 309 at para. 17.

were problems between him and the interpreter. The Applicant's failure to do so was fatal to his application for judicial review.

[17] Pelletier, J. went on to discuss the common law principle of waiver, noting that "facts are perhaps determinative of the result;" and referring to the statements of Mahoney J.A., in the decision of *Aquino v. Minister of Employment and Immigration*[3]*:* "A more accurate statement might well be that where the applicant is represented by counsel, and where there are manifest problems with interpretation, the claimant cannot say nothing at the hearing, and then raise the matter as a ground of relief in a subsequent application."[4]

[18] Again, at paragraph 22 "there is an obligation on the part of counsel to draw such matters to the attention of the tribunal so that it can be remedied at the hearing itself. Counsel and their clients cannot hedge their bets by ignoring the issue and then raising it in the event of an unfavourable result."[5]

[19] In the instant case, the Appellant had been represented by Counsel at the Review Tribunal hearing. There is no dispute that the Appellant's first language is Russian. There is also no dispute that the Appellant did request the assistance of a Russian interpreter at the hearing. However, what is disputed is whether, when the requested Russian interpreter failed to attend the hearing, the Appellant consented to proceed without the benefit of one. What follows is classic "he said, she said." The Review Tribunal stated in its decision that it was the Appellant's Counsel who asked that the hearing proceed without an interpreter. The Review Tribunal also stated that the Appellant's Counsel assured it that she had been able to communicate with the Appellant in English and that an interpreter had been requested only as "backup".

[20] For its own part the Tribunal noted that the Appellant was able to communicate effectively with the Tribunal in English. Further, the Tribunal noted that the Appellant had been represented by a Barrister and Solicitor, presumably licenced to practice in Ontario and aware of her professional responsibilities. Therefore, the Tribunal finds that, on a balance of probabilities, the Appellant's then legal Counsel did provide the reassurances that the Review Tribunal states she gave. The Tribunal also finds that, on a balance of probabilities, the Appellant did not object

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[3] *Aquino v. Minister of Employment and Immigration* (1992) 144 N.R. 315.
[4] *Mohammadian v. Canada (MCI)* [2000] FCJ No. 309 at para. 17.
[5] *Mohammadian*, supra at para. 22.

to the hearing proceeding without a Russian interpreter and never raised the question throughout the hearing.

[21] This leaves the question of why the Appellant failed to draw the alleged difficulties in the interpretation to the attention of the Review Tribunal. Having been turned down twice before, it is reasonable to assume that the Appellant was aware of the importance of the Review Tribunal hearing. Therefore, the Tribunal finds it would also be reasonable to expect that the Appellant would have signalled that she was having difficulty communicating her situation in English. The Tribunal applies *Benitez* and *Mohammadian* to find that as the Appellant proceeded with the hearing without raising any issues, she implicitly waived any alleged breaches and is precluded from raising such a breach for the first time on appeal.

A breach of natural justice must be raised at the earliest practicable opportunity.

[22] The Tribunal finds additional support for its position in the statements of Marceau, J. in *ECWU Local 916 v. Atomic Energy of Canada Ltd.* [1985] F.C.J. No. 189[6] that "the only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity."[7]

[23] The Appellant's failure to make an objection as to the fairness of her hearing at the time of the hearing constitutes an implied waiver of the right to argue that the hearing was unfair. The Appellant did not object to the hearing proceeding without a Russian interpreter, therefore she cannot now plead that she did not consent to the hearing proceeding in the absence of a Russian interpreter.

Was there a breach of natural justice?

[24] Having found that the Appellant is precluded from raising the question of a breach of natural justice for the first time on appeal, the Tribunal finds that it is not necessary to address this question.

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[6] In regards to the the jurisdiction of a Human Rights Tribunal to continue its inquiry and in regards to a complaint of Local 916 of the Energy and Chemical Workers' Union dated April 27, 1979, filed pursuant to section 11 of the *Canadian Human Rights Act* (S.C. 1976-77, c. 33 as amended) against Atomic Energy of Canada Limited [1986] 1 F.C. 103

[7] Upheld in *Atomic Energy of Canada Ltd. v. Human Rights Tribunal, et al* [1986] S.C.C.A. No. 79

CONCLUSION

[25] The Appellant appeals from the decision of a Review Tribunal dismissing her appeal and finding that a CPP disability pension was not payable to her. Leave to Appeal was granted on the basis that a breach of natural justice may have occurred if the Appellant did not consent to the Review Tribunal hearing proceeding without the Russian interpreter she had requested. The Appellant should have put any problems with language to the Review Tribunal at the earliest opportunity during the hearing. She did not do so and is precluded from raising them for the first time on the appeal.

[26] The appeal is dismissed.

Hazelyn Ross
Member, Appeal Division