



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. F. v. Minister of Employment and Social Development*, 2016 SSTADIS 302

Tribunal File Number: AD-15-1265

BETWEEN:

R. F.

Appellant

and

**Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills
Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: August 12, 2016

REASONS AND DECISION

[1] Decision made on the record.

[2] The Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), dismisses the appeal.

INTRODUCTION

[3] The Appellant sought and obtained leave to appeal from the decision of the General Division dated November 5, 2015. The General Division found that the Appellant was not eligible for disability benefits pursuant to paragraph 42(2)(a) of the *Canada Pension Plan*, (*CPP*), (the Application).

[4] The Appeal Division granted leave on the basis that the Appellant may not have been able to fully present his case to the General Division.

ISSUE

[5] The only issue before the Appeal Division is whether, in conducting the hearing, the General Division breached a principle of natural justice.

THE GOVERNING STATUTORY PROVISIONS

[6] Subsection 58(1) of the *Department of Employment and Social Development, (DESD), Act*, sets out the only three grounds of appeal, namely:-

- 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.

SUBMISSIONS

[7] Once leave to appeal is granted the parties have 45 days in which to make submissions or to notify the Appeal Division that they do not intend to make submissions. (*Social Security Tribunal Regulations, SOR/2013-60*, Section 42). The Appeal Division received submissions from both Counsel for the Appellant and the Respondent's representative.

[8] In her submissions, the Respondent's representative took the position that the Appeal Division should allow the appeal and remit the matter back to the General Division for a hearing before a different Member. The Appellant's representative did not make any submissions; instead he filed what he stated was the Appellant's complete medical file.

ANALYSIS

Did the General Division breach a principle of natural justice?

[9] This appeal is concerned with the right to a fair hearing. It also engages the rules of Professional Conduct of the Law Society of Upper Canada, (LSUC)

[10] The Federal Courts have been consistent in their position that the denial of a right to a fair hearing must always render a decision invalid. *Gale v. Canada (Solicitor General)*, 2004 FCA 13. The Appellant argued that he was denied a fair hearing because of the actions of the General Division on the day of the hearing. His counsel submitted that the General Division dismissed his then representative because he was not licensed paralegal, and then proceeded to hold the hearing. Counsel for the Appellant submitted that the General Division should have adjourned the hearing in order to allow the Appellant to find new representation.

[11] In Ontario, the LSUC regulates the practice of law. It licences paralegals to provide certain services to the public. At the same time, the LSUC's Rules of Professional Conduct require lawyers to assist in preventing the unauthorised practice of law.

6.07 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

6.07 (1) A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

[12] While enjoining lawyers to assist in preventing the unauthorised practice of law, the LSUC has not spelt out how this should be achieved. The Tribunal has left the decision and procedure to those Members who are lawyers, licensed by the LSUC. In the exercise of this additional obligation such Members may find themselves facing the decision at the hearing stage. The question raised in this case is, whether the Member should have adjourned the hearing so as to allow the Appellant to retain new representation.

[13] The Appeal Division is of the opinion that the decision is not automatic. Much depends on what transpired at the hearing. For example, an appellant may decide to proceed without the benefit of legal representation and may expressly state his or her intention to do so. In such a case, no breach of natural justice will have occurred. The General Division decision does not reflect that situation. Nor does it mention that the General Division took any action regarding the Appellant's representative.

[14] The audio recording of the hearing was made available to the Appeal Division. On listening to it, the Member came to the understanding that the basis on which leave to appeal was granted was not supported by the recording. In light of the apparent conflict between the audio recording and the basis on which leave to appeal was granted, and also in light of the Respondent's position, the Appeal Division issued an endorsement setting out its understanding. The Appeal Division also asked the parties to make submissions regarding its finding that the recording does not support the basis on which leave to appeal was granted.

[15] In her response, the Respondent's representative submitted that upon listening to the recording the Respondent was confirming the Member's finding. The Respondent's representative stated:-

“I am writing on behalf of the Respondent in reply to the Tribunal Member's endorsement dated July 5th, 2016 and request for submissions.

Following a review of the audio recording of the General Division hearing convened on November 3, 2015 (GT-124556) the Respondent confirms the Member's finding. It is also not the Respondent's understanding that the basis on which leave to appeal was granted was what actually transpired at the hearing. Based on the audio hearing, it appears the Social Security Tribunal General Division Member permitted the Appellant to be represented by his Representative. In fact, it appears from the audio recording that

the Representative did in fact appear for the Appellant for the full duration of the hearing.

Unfortunately the Respondent was not yet in possession of the audio recording from the General Division at the time of filing its submissions. Submissions were due for filing with the SST-AD as of March 7th, 2016. A copy of the audio was not provided to the parties until March 10th, 2016 at that time the Respondent had already filed its submissions.” (AD-4)

[16] The Respondent’s representative concluded by asking that the appeal be dismissed.

[17] Counsel for the Appellant also responded to the Appeal Division’s endorsement. He indicated that he disagreed with the Member’s observation. He reiterated that the General Division Member dismissed the Appellant’s then representative prior to the start of the hearing and before the proceedings were recorded. The full text of his submissions are:-

“Mr. Tom Troy, former representative of Mr. R. F. introduced himself prior to the commencement of the telephone conference hearing, in the presence of Mr. R. F., to the Tribunal Member, and was immediately asked whether he was licensed by the Law Society of Canada, and responded no and was immediately told that he cannot represent Mr. R. F.

You have indicated that you have listened to the recording of the hearing and that it is not the Member’s understating that the basis on which leave to appeal was granted was what actually transpired at the hearing. This is the opinion of the Tribunal Member and whether there was due diligence of the Member to record his conversation with Mr. Tom Troy prior to the hearing, likely breached a principle of natural justice by dismissing Mr. R. F.’s former representative and breached a principle of natural justice by dismissing Mr. R. F.’s former representative and continued to hold the hearing without giving Mr. R. F. the opportunity to obtain alternative representation.

Please refer to my prior submissions, which are self-explanatory and based on same leave of appeal was granted.

Mr. Tom Troy will confirm his dismissal, in writing, prior to the hearing, if required by the Tribunal.” (AD-5)

[18] In this appeal there are two conflicting accounts of what took place at the General Division hearing. The Appellant alleges that the Member ejected his representative from the hearing and prevented him from having the benefit of counsel. His present counsel argues that this is a breach of natural justice. Indeed, if the account is correct, the Appeal Division would have no difficulty in finding that the General Division had breached a principle of natural

justice. However, there is the account of the proceedings as contained in the audio recording of the hearing.

[19] The Appeal Division has had the benefit of listening to the recording of the hearing. It observed that at the outset of the hearing the General Division Member confirmed the identities of the participants. The Member asked them to introduce themselves, starting with the Appellant. He acknowledged the Appellant's representative, Mr. Troy, who identified himself as a representative of the Appellant's labour union. Mr. Troy indicated that he had been helping the Appellant with his application for a CPP disability pension. He also stated that the Appellant's wife was in the room. At point 2:42 the Member asked Mr. Troy whether he was a registered paralegal. At point 2:48 of the recording Mr. Troy answered in the negative but said he had lengthy experience in that type of work.

[20] Mr. Troy explained that he had been doing this type of work (representing union members) for forty-three years: (3:23). He went on to state that he had been doing the same work as a paralegal; and that as a member of the trade union he has been allowed to do so without being a registered paralegal. At this point, the Member thanked the union representative and proceeded with preliminary remarks and subsequently the hearing. (Thank you Mr. Troy 4:22 et seq.) At point 6:20 the Member swore in Mr. Troy (which as the Appellant's representative he ought not to have done). At 7:38 the Member asked Mr. Troy whether he had any preliminary statement. He did. He thanked the Tribunal for giving the Appellant the opportunity to present his case.

[21] The recording of the hearing does not show that the Member ejected the Appellant's representative from the hearing or prevented him from asking questions. He was present from start to finish. He participated in the proceedings. However, the Member asked most of the questions. Mr. Troy interjected at 9:23. He clarified the Appellant's work history, his surgical history, his claim for WSIB; and his training and subsequent hiring as an accounting clerk. He asked the Appellant questions about his medical history. (10:37) At 01:06:45 the Member asked the representative if he was assisting the Appellant with his new WSIB appeal for loss of wages.

[22] At 01:17:17 the Member said he had completed his questions. He indicated that he wanted to hear from the Appellant's wife, who had been present in the room throughout the hearing; and then Mr. Troy; and then he would come back for any comments the Appellant wished to make. The Appellant's wife read from a prepared statement. When she broke down Mr. Troy interjected and asked permission to read the statement (01:19:36). The Member said that would be fine and that he should go ahead. When given the opportunity (01:23:40) the Appellant's representative did not ask him any question. He made submissions about the Appellant's truthfulness and stated that he had seen changes in him over the years.

[23] It is clear from the audio recording that the General Division Member was well prepared for the hearing, and that he "took charge" of it. However, this is not in and of itself a breach of natural justice: *Restrepo Benitez v. Canada (Minister of Citizenship and Immigration and Immigration and Refugee Board)*, 207 FCA 199. (Application for leave to appeal to the Supreme Court of Canada from the judgment of the Federal Court of Appeal dismissed with costs).

[24] The Appeal Division finds that at no time during the hearing did the General Division Member eject the Appellant's then representative. As stated earlier, he was present with the Appellant and his wife throughout the hearing. He participated in it. The Appeal Division finds that the General Division Member's asking the representative whether he had any preliminary statement to make is inconsistent with preventing him from participating in the hearing. So too is his giving the representative the opportunity to ask questions and giving him an opportunity to participate after he had completed his questions. Furthermore, it does not appear that at any time during the hearing the Appellant signalled a desire to have the hearing adjourned so that he could get new counsel. All of which, in the view of the Appeal Division, is inconsistent with the basis on which leave to appeal was granted.

CONCLUSION

[25] For all of the above reasons, the Appeal is dismissed.

Hazelyn Ross
Member, Appeal Division