Citation: ***D. C. v. Culliton Inc. and Canada Employment Insurance Commission*****,**
2015 SSTAD 1235

Date: October 21, 2015

File number: AD-15-1025

APPEAL DIVISION

Between:

D. C.

Applicant

and

Culliton Inc.

Respondent

and

Canada Employment Insurance Commission

Added Party

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] D. C. (Applicant) applies to the Appeal Division of the Social Security Tribunal of Canada (Tribunal) for leave to appeal the decision of the General Division (GD) dated August 14, 2015 and issued on August 19, 2015. The GD allowed the appeal of Culliton Inc. (Respondent) where the Canada Employment Insurance Commission (Commission) had determined that the Applicant had just cause for voluntarily leaving her employment with the Respondent pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act).

[2] The Applicant and the Respondent attended the in person hearing held on August 13, 2015. The Commission did not attend but filed written representations conceding the appeal.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on September 17, 2015. The Application was filed within the 30 day time limit.

[4] The grounds of appeal stated in the Application are:

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.

[5] The Applicant relies, in particular, on the following reasons:

a) During the hearing on August 13, 2015, the recording of testimony was breached when it malfunctioned and an absence of testimony would impair a decision;

b) The GD refused to consider prior Umpire case law and recognize it as precedential, in particular CUB 49237 and CUB 66126; and the GD did not consider Federal Court of Appeal decision #A-339-06 on the same issue; and

c) When there is a direct contradiction, ignoring clear oral evidence in preference for hearsay written statements can amount to erroneous finding of fact by the GD.

ISSUE

[6] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[7] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (DESD) *Act*, "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[8] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[9] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

> (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.

[10] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

Failure to Observe a Principle of Natural Justice

[11] The Applicant submits that the GD failed to observe a principle of natural justice when the recording of the hearing malfunctioned.

[12] The Supreme Court of Canada (SCC), in *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 795, determined that the failure to record is not necessarily a breach of natural justice if there is no legal obligation to record. The SCC held that in the absence of a legal obligation to record, courts must determine whether the file record allows it to properly dispose of the application. If so, the unavailability of the recorded hearing will not violate the rules of natural justice. The SCC concluded that the evidence, in conjunction with the application, provided a more than adequate record of reviewing the factual findings of the decision-maker to determine whether the respondent's claim was grounded.

[13] The DESD Act, the EI Act, and the *Social Security Tribunal Regulations* do not impose a legal obligation on the Tribunal to record hearings.

[14] Although the Tribunal does not have a legal obligation to record its hearings, it does record its hearings when possible.

[15] The in person hearing in this matter was recorded.

[16] The Federal Court of Appeal (FCA), in *Canada (AG) v. Scott* 2008 FCA 145, held that the Umpire could not use the unavailability of the tapes as a ground for setting aside a decision of the Board of Referees unless it could be shown that the absence effectively denied the respondent her right of appeal before the Umpire. Since that had not been established, the FCA quashed the Umpire's decision.

[17] In *Patry v. Canada (AG)* 2007 FCA 301, the Board of Referees failed to provide an audio recording of the hearing. The Umpire ruled that the failure to provide a tape recording did not invalidate the proceedings. The FCA confirmed the Umpire's decision.

[18] In this case, audio recordings are available. The recording of the hearing is in two parts and totals more than one and a half hours of recording time. However, the Applicant argues that

there was a malfunction during part of the recording of testimony and that the absence of some testimony would impair a decision.

[19] The issue, then, is limited to whether the absence of a portion of the testimony from the audio recordings effectively denies the Applicant her right of appeal to the Appeal Division.

[20] On this limited issue of the alleged breach of natural justice, the matter warrants further review and I am satisfied that the appeal has a reasonable chance of success.

Errors of Fact and Law

[21] The Applicant asserts errors of fact and law as follows:

a) The GD did not consider prior CUB decisions and one FCA decision; and

b) There was direct contradiction in the evidence and the GD ignored clear oral evidence in preference for hearsay written statements.

Prior CUB and FCA decisions

[22] With respect to the CUB decisions, the GD did not mention CUB 49237 or CUB 66126 in its decision. However, CUB decisions are not binding on the GD. The GD was not required to treat these cases as legal precedents.

[23] As for FCA decision #A-339-06, it is the appeal of CUB 66126: *Canada (AG) v. Cloutier* 2007 FCA 161. The FCA was not persuaded that the Umpire had made a reviewable error in declining to reverse the decision of the Board of Referees.

[24] The GD did not refer to the *Cloutier* case in its decision, although the Applicant relied on it during argument in the GD hearing. It appears that the GD Member did not find that the *Cloutier* case was applicable to this matter.

[25] I have reviewed the *Cloutier* decisions of the Umpire and the FCA, and I find that the facts in *Cloutier* are distinguishable from this matter. In particular, in *Cloutier*, it was impossible for the claimant to continue in his employment and apply for apprenticeship jobs through his

union because of the hiring process used by both employers, and the Board considered this when it found that the claimant had no reasonable alternative but to leave his employment.

[26] As such, I am not satisfied that the appeal has a reasonable chance of success based on these arguments.

Evidentiary Issues

[27] As for ignoring evidence or contradictory evidence, the Applicant has not provided details of the testimony or evidence which she asserts were ignored or contradictory.

[28] On review of the GD decision, I note that it refers to the submissions of the Respondent and the Commission. However, it does not refer to the submissions of the Applicant. Further, the decision identifies some testimony as the Respondent's (Appellant's at paragraph 24) when it appears to be that of the Applicant.

[29] Given my review of the GD decision and the record, I find that the evidentiary issues as set out in paragraph [20] b) above warrant further review.

[30] On the ground that there may be errors of mixed fact and law, made in a perverse or capricious manner or without regard for the material before it, as set out in paragraph [20] b), I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[31] The Application is granted as specified in paragraphs [19], [20] and [30] above.

[32] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[33] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division