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

Citation: *D. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 29

Date: January 20, 2016

File number: AD-15-1289

APPEAL DIVISION

Between:

D. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On November 9, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) allowed in part the Applicant's appeal on a disentitlement imposed pursuant to subsection 18(a) of the *Employment Insurance Act* (EI Act). The Canada Employment Insurance Commission (Commission) had determined that the Applicant was traveling on vacation during periods that he had received benefits, could not be considered to be available for work during those periods, and was also disentitled for benefits for other periods for which he received benefits. These decisions resulted in an overpayment of benefits in the amount of $18,637.00 and a penalty of $4,659.00 for failing to provide this information on his reports.

[2] The Applicant made a request for reconsideration on the question of availability and the Commission, considering the mitigating circumstances, reduced the penalty imposed on the Applicant from a monetary penalty to a warning. As a result the penalty of $4,659 was rescinded. The Commission's decision regarding the Applicant's availability for employment was maintained.

[3] A GD hearing was held by teleconference on November 3, 2015. The Applicant attended, but the Respondent did not.

[4] The GD determined that:

a) There should have been a disentitlement imposed on the Applicant in accordance with subsection 18(a) of the EI Act for failing to prove availability for work while on vacation in Canada from November 8, 2013 to November 13, 2013 and from January 17, 2014 to January 22, 2014; and

b) Outside of the periods of November 8, 2013 to November 13, 2013; January 17, 2014 to January 22, 2014; November 8, 2013 to November 13, 2013 and January 17, 2014 to January 22, 2014 for which the Applicant should have been disentitled from benefits and obligated to repay those benefits, the Applicant was able to prove his availability for

work and should be entitled for his benefits from October 28, 2013 to May 30, 2014 and from August 1, 2014; and

c) Except for the aforementioned vacation periods, there should not have been a disentitlement imposed on the Applicant in accordance with subsection 18(a) of the EI Act as he was able to prove his availability for work.

[5] The GD decision was sent to the Applicant under cover of a letter dated November 9, 2015. The Applicant stated that he received the decision on November 13, 2015.

[6] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on December 2, 2015, within the 30-day limit.

[7] On December 21, 2015, the Tribunal sent a letter to the Applicant with a request to provide missing information. In particular, the Applicant was asked to provide reasons for the appeal and to explain why the AD should give her permission to file an appeal. The letter also stated:

> The Tribunal must receive the missing information identified above in writing together with any submissions you wish to file by January 21, 2016. Please keep in mind, if insufficient detail is submitted, the Member assigned to the file may decide the matter in dispute on the basis of the material filed as of January 21, 2016, without further notice.

[8] The Applicant responded to this request by handwritten letter received by the Tribunal on January 18, 2016.

ISSUES

[9] The AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[10] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant. Further, the AD may allow further time within which an application for leave is to be made, but in no case may

an application be made more than one year after the day on which the decision is communicated to the appellant.

[11] According to subsections 56(1) and 58(3) of the 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."

[12] 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."

[13] 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.

[14] Taking the Application and submissions of January 18, 2016 together, the appeal to the AD is based on the following:

a) The Applicant is appealing the GD decision as it relates to the disentitlement imposed during the vacation periods;

b) This claim for EI benefits was his first and last claim, and he was not aware of his responsibilities; and

c) He should have been informed of his obligations and duties to report when he filed for benefits instead of being paid benefits for a long period and then suddenly notified of disentitlement, overpayment and fine.

[15] The Applicant was asked to provide details on what specific errors in the GD decision he is asserting (with paragraph number and description of exact error). The Applicant reiterated that he should have been formally instructed on the responsibilities of EI claimants and that the sudden notice of debt and fine was "over and above" his rights as a Canadian taxpayer.

[16] The issue being appealed is a disqualification from EI benefits during periods when the Applicant was on vacation, outside Canada and inside Canada.

[17] During the GD hearing, the Applicant advanced similar arguments to those in the Application. The Applicant's evidence was included, in detail, in the GD decision on pages 4 to 7. The Applicant's submissions before the GD were summarized in its decision and considered by the GD.

[18] The GD stated the correct legislative basis and legal tests for availability in its decision.

[19] The Applicant does not state how the GD is alleged to have erred other than repeating his evidence and submissions before the GD and asserting that the GD decision was wrong. In essence, the Applicant seeks to reargue his case before the AD, as it relates to the vacation periods.

[20] While the Applicant submits that the disentitlement and fine are "over and above" his rights, it is unclear whether the Applicant is arguing that there is a breach of natural justice or not.

[21] In terms of natural justice, an appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Nothing in the GD decision or the appeal record suggests that the Applicant was denied a fair hearing or procedural fairness.

[22] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo* or to assess

or reweigh the evidence put before the GD. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[23] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[24] In order to have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[25] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division