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

Citation: *S. C. v. Canada Employment Insurance Commission,* 2016 SSTADEI 70

Tribunal File Number: AD-15-381

BETWEEN:

**S. C.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD: On the Record

DATE OF DECISION: February 8, 2016

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] On November 25, 2015, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds of breach of natural justice, errors of law and erroneous findings of fact. The decision of the General Division (GD) appealed from relates to the refusal of an extension of time for the Appellant to file an appeal before the GD.

[2] The Tribunal requested the parties' submissions on the mode of hearing, whether one is appropriate and, also, on the merits of the appeal.

[3] The Appellant filed detailed submissions which included the following arguments:

a) The GD made erroneous findings of fact, in particular that the Appellant had no continuing intention to pursue the appeal and that he had no arguable case; and

b) The GD failed to observe a principle of natural justice in that the Appellant was deprived of his right to a fair appeal process.

[4] The Respondent filed submissions which request that the AD dismiss the Appellant's appeal on the merits or that the matter be returned to the GD.

[5] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity of the issue(s) under appeal; and

b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] In light of the parties' submissions, it is unnecessary to hold an oral hearing at the AD.

## ISSUES

[7] Whether the GD made an error of law, erroneous findings of fact or breached a principle of natural justice in arriving at its decision.

[8] Whether the AD should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

**LAW AND ANALYSIS**

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (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;
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> (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] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(a), (b) and (c) of the DESD Act.

[11] In particular, the decision granting leave to appeal stated:

> [18] The GD decision refers to *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883, *Muckenheim v. Canada (Employment Insurance Commission)*, 2008 FCA 249, *Canada (Attorney General) v. Larkman*, 2012 FCA 204, *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Fancy v. Canada (Minister of Social Development)*, 2010 FCA 63.
>
> [19] However, it is insufficient to simply recite the jurisprudence and correctly identify the legal test(s), without properly applying them. The GD must correctly identify the legal test(s) and apply the law to the facts. The GD must also respect the principles of procedural fairness.
>
> …
>
> [22] The GD decision concluded:

> [30] The claimant failed to meet three of the criteria for which an extension may be granted. He did not indicate a continuing intention to pursue the appeal, did not have an arguable case and provided no reasonable explanation for the delay.
>
> [31] The extension of time within which to bring the appeal is refused.

[23] Although the GD referred to the *Larkman* case, it does not appear to have considered whether the interests of justice would be served by allowing an extension of time. Rather, the GD seems to have mechanically applied the *Gattallero* factors, which, if made out, would be an error of law. Further, it concerns me that the GD concluded that the appeal had no merit in such a cursory manner.

[24] The Applicant's submissions on erroneous findings of fact, namely that the GD found that there was no evidence of communications except an incomplete appeal, no evidence of the Applicant's continuing intention to pursue the appeal and no reasonable explanation for the delay are worthy of further consideration. These finding seem at odds with the GD file as detailed in paragraphs [6] to [8] above.

[25] The Applicant's assertion that the GD failed to observe a principle of natural justice also warrants further review.

[26] The Federal Court in its recent decision *Canada (A.G.) v. Bossé*, 2015 CF 1142, noted that the issue of natural justice, specifically a breach of procedural fairness, was determinative of an application for judicial review of a refusal of leave to appeal by the AD. The Court criticized certain forms of the Tribunal, the instructions for completing the forms and the guidance given by the Tribunal to applicants/appellants. The Court found a breach of procedural fairness in the treatment of the application by the Tribunal.

[27] In the present matter, the process to appeal the Commission's reconsideration decision was confounding and inaccessible to the Applicant, and the treatment of his Application by the Tribunal forms a reasonable basis upon which to assert a breach of procedural fairness and natural justice.

[28] On the grounds that there may be a breach of natural justice, errors of law and erroneous findings of fact made in a perverse and capricious manner or without regard to the material before the GD, I am satisfied that the appeal has a reasonable chance of success.

[12] The Respondent argues that the GD reviewed all the evidence and submissions and gave an explanation on each of the criterion enunciated in *Muckheim, supra*, and it concluded that the Appellant failed to meet three of the criteria (continuing intention, reasonable explanation and arguable case) for which an extension may be granted. However, the Respondent also states that it (the Commission) actually found a reasonable explanation for the delay and confirms that there is no prejudice to the other party in allowing the extension.

[13] The GD found that there was no continuing intention to pursue the appeal on the basis that there was no evidence of any communications from the Appellant from January 29, 2015 (reconsideration decision) to May 8, 2015 (completed appeal) except an incomplete appeal. This finding was wrong. The incomplete Notice of Appeal to the GD was filed on March 19, 2015. The Appellant called the Tribunal, sent a fax to the Tribunal, and spoke to or attempted to speak to the Tribunal numerous times in March and April 2015. The Appellant's newly engaged Representative also communicated, in writing, with the Tribunal in April 2015.

[14] The GD found that the Appellant provided no evidence to explain the delay in filing his appeal with the Tribunal. This finding was also wrong. The Applicant's communications in March and April 2015 were attempts to provide missing information and an explanation, and his Representative's April 30, 2015 submissions provided a detailed explanation for the delay, including the sequence of events from December 2014 on.

[15] The GD concluded that the Applicant did not have an arguable case. However, there is no analysis of the merits of the case, only a cursory statement "the claimant did not have an arguable case". Reasons should be understandable, sufficiently detailed and provide a logical basis for the decision. The reasons in the GD decision on this issue were not.

[16] The GD mechanically applied the *Gattallero, supra*, factors which is an error of law. The findings of fact made by the GD on continuing intention and explanation for delay were wrong.

[17] Therefore, the GD decision was based on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it and on errors of law.

[18] Subsection 59(1) of the DESD Act sets out the powers of the AD. It states:

> 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.

[19] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter has not been heard on the merits and may require the parties to present evidence, a hearing before the GD is appropriate.

**CONCLUSION**

[20] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng
Member, Appeal Division