



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *D. C. v. Canada Employment Insurance Commission*, 2016 SSTADEI 65

Tribunal File Number: AD-15-1025

BETWEEN:

**D. C.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

and

**Culliton Inc.**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: February 5, 2016

## REASONS AND DECISION

### INTRODUCTION

[1] On October 21, 2015, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds that a breach of natural justice may have occurred and certain evidentiary issues warranted further review.

[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 on the merits.

[4] The Respondent filed submissions which recommend that the Appellant be given the opportunity to present her case to the General Division (GD) as a case *de novo*.

[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.
- b) The Member has determined that no further hearing is required.
- c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

### ISSUE

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

[7] If yes, the AD of the Tribunal must decide whether it 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

[8] 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;
- (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.

[9] 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.

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

[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.

...

[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.

[11] The Respondent agrees that there may be a breach of natural justice and that the additional information submitted by the Appellant to the GD was not referenced or noted in the GD decision. Therefore, the Respondent recommends that the matter be returned to the GD to be heard *de novo*.

[12] The GD decision on page 7 makes reference to additional information submitted by the employer. The corresponding documents were in the record at GD10-1 to GD10-5. There is no reference made to the additional information submitted by the Appellant, although the additional documents corresponding to her additional information were in the record at GD9-1 to GD9-5. This lends itself to a conclusion that the GD ignored evidence or that its decision was insufficient in this respect.

[13] No submissions were made on whether the additional information submitted by the Appellant was referred to or considered by the GD during the time that the recording malfunctioned.

[14] Also, the GD decision appears to have attributed some testimony to the wrong party.

[15] Because of an absence of a portion of the hearing from the audio recordings, the Appellant is unable to establish from the audio recording that the GD ignored certain evidence or attributed testimony to the wrong party.

[16] In the circumstances, the absence of a portion of the testimony from the audio recordings effectively denies the Applicant her ability to appeal to the AD.

[17] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter will require the parties to present evidence, a hearing before the GD is the appropriate form of hearing.

## **CONCLUSION**

[18] 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