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

Citation: *A. C. v. Canada Employment Insurance Commission*, 2016 SSTADEI 66

Date: February 5, 2016

File number: AD-15-1087

APPEAL DIVISION

Between:

A. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] A. C. (Applicant) applies to the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) for leave to appeal the decision of the General Division (GD) dated August 25, 2015 and issued on August 27, 2015. The GD dismissed her appeal where the Canada Employment Insurance Commission (Commission) had determined that she did not rebut the presumption of non-availability while attending a full time course.

[2] The Applicant and her father, acting as a witness and representative, attended the teleconference hearing held on July 16, 2015. The Commission did not attend but filed written representations.

[3] The Applicant filed an application for leave to appeal (Application) to the AD with Service Canada on September 25, 2015. The Application was stamped received by the Tribunal on October 6, 2015. The Application was treated as filed within the prescribed time limit.

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

a) The GD erred in law in making its decision, whether or not the error appears on the face of the record;

b) The Applicant maintains that she is available for work, is currently working for a previous employer, has submitted numerous job applications, and is regularly attempting to contact prospective employers; and

c) If full time employment becomes available, she is willing to drop out of her program.

[5] After filing the Application, the Applicant requested a copy of the audio recording of the GD hearing. The Tribunal advised her that an audio recording was not available due to unforeseen circumstances beyond the Tribunal's control.

[6] The Applicant filed submissions on the lack of availability of a recording of the GD hearing, which can be summarized as follows:

a) She spoke to a telephone agent at the Tribunal and asked for the reason that the recording was not available and the agent suggested that it had been misplaced or destroyed;

b) The recording is a crucial piece of evidence for her appeal; it having been "lost, destroyed or stolen" will compromise her appeal;

c) During the hearing, the GD Member stated that he agreed that she was entitled to EI benefits;

d) She is concerned that her confidentiality has been breached because the recording may have been misplaced or destroyed and her personal information stolen from the recording; and

e) The AD cannot make a fair judgment when it no longer has "all the evidence".

[7] The Commission filed representations on the leave to appeal. Its position is that there are no grounds of appeal which have a reasonable chance of success. The Applicant is asking the AD to review a decision of the GD anew, looking for a different outcome. The Commission also argues that:

a) As for an error of law, the Applicant has not provided details on the error stated to have been made by the GD; the reasons in the Application were argued before the GD and the GD Member considered all the evidence before him; and

b) As for the unavailability of the audio recording, Federal Court of Appeal case law has held that failure to produce a tape recording or a transcript of a hearing does not in itself constitute a breach of the duty of fairness. In order to establish a breach of the duty of fairness, a person must show that the absence of the tape or transcript effectively denied the person a right of appeal or judicial review by preventing the reviewing body from discharging its statutory function. The Applicant did not show that she was prejudiced by the absence of the recording. Also, the appeal file before the AD is adequate to allow the AD Member to properly dispose of the application for leave to appeal.

ISSUE

[8] Whether the Application was filed on time.

[9] If it was not, then the AD must decide whether to extend the time within which the Application may be filed.

[10] Then the AD must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[11] 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.

Was the Application Filed within 30 days?

[12] The GD decision was sent to the Applicant under cover of a letter dated August 27, 2015. The Application states that the Applicant received the decision on August 27, 2015. Since the GD decision was sent to the Applicant by mail, it would not have arrived on the same day that it was sent. As such, I find that the Applicant did not receive the GD decision on August 27, 2015.

[13] Under paragraph 19(1)(a) of the *Social Security Tribunal Regulations*, I deem that the decision of the GD was communicated to the Applicant 10 days after the day on which it was mailed to her on August 27, 2015. Accordingly, I find that the decision was communicated to the Applicant on September 7, 2015, as the ten day mark falls on September 6, 2015 which is a Sunday.

[14] The thirty day limit, counting from September 7, 2015, was October 7, 2015. The Tribunal's date stamp on the Application is October 6, 2015 and there were earlier date

stamps on the Application applied by Service Canada at two of its centers on September 25 and September 30, 2015.

[15] Therefore, the Application was filed within the 30-day time limit and an extension of time is not required.

Leave to Appeal

[16] 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".

[17] 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".

[18] 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;
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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
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> (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.

[19] 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.

Error of Law

[20] While the Application states that the GD erred in law in makings its decision, whether or not the error appears on the face of the record, the Applicant does not describe what exact error of law she is asserting.

[21] The Applicant gave a number of reasons why her appeal should be allowed. Her main argument is that her case is one of availability and she was available. Her submissions, as set out in paragraph [4] b) and c), above, were made before the GD.

[22] The GD stated the correct legal test for availability at paragraph [19] of its decision.

[23] Paragraph [26] of the GD decision states:

> [26] The Appellant, in her appeal to the Tribunal, disputes the Commission's decision because she states that she is now available for work. She believes that getting a job is more important than her educational program. She is currently looking for a full time job, at any hour of the day, and would be willing to leave her program if a full time position or any job became available to her. (GD2-1-6 and GD2A-1-4)

[24] The GD Member went on to give more weight to the initial statements of the Applicant than to contradictory statements given after an unfavourable decision has been rendered. The decision concluded:

> [31] In order to be entitled to benefits, a student must meet the same availability requirements as any other claimant, and that is to be actively seeking employment without restriction. In this case, the information supports that she only wanted to work around her course hours on Saturdays and her intention was to continue with her course, not find full time employment. Unfortunately, this is not sufficient to show availability.
>
> [32] While this Member supports the Appellant's efforts to complete her education and find suitable employment as a result, I find that, having given due consideration to all of the circumstances, she has failed to present evidence of "exceptional circumstances" that would rebut the presumption of non-availability while attending a full time course. She is therefore not eligible to receive benefits.

[25] In the Application, the Applicant attempts to add to her evidence. She states that she is currently working, has submitted job applications on a daily basis and continuously tries to contact prospective employers. None of this new information can be taken into account on appeal to the AD. It is not the role of the AD to re-hear the case anew or accept additional testimony of the parties. New evidence is not admissible on appeal except in limited situations such as those described in *Velez v. Canada (AG)*, 2002 FCA 343.

[26] If leave to appeal is granted, then 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.

[27] The Applicant has not identified any errors in law and none appear on the face of the record. As a result, this ground of appeal does not have a reasonable chance of success.

Failure to Observe a Principle of Natural Justice

[28] The Applicant submits that the GD failed to observe a principle of natural justice because a recording of the hearing is not available.

[29] 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.

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

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

[32] It appears that the teleconference hearing before the GD was recorded but that a copy of the audio recording is not available.

[33] While the Applicant is concerned that there has been a breach of her personal information, this appears to result from a misunderstanding of the nature of the recording.

There was no physical audio recording to misplace, lose, destroy or steal. The recording of a teleconference hearing is made to a secure, confidential file which is stored electronically. No physical audio recording, such as a compact disc, is made unless a request is made by a party for the recording. Access to the electronic file is secured and limited. When the Applicant made her request, the Tribunal determined that no version of electronic recording existed. The recording was not stolen or lost. The Applicant's identity and personal information are not at risk.

[34] 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 from the hearing 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.

[35] 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.

[36] In this case, an audio recording is not available. The Applicant argues that the recording is a "crucial piece of evidence" for her appeal and that the absence of the recording would impair her appeal. In particular, the Applicant argues that the GD Member, during the teleconference hearing, "agreed that she was entitled to EI benefits".

[37] The decision of the GD was rendered in writing on August 25, 2015. Whatever the GD Member may or may not have said during the hearing, the GD decision dismissed the Applicant's appeal and the reasons for this were stated in that decision.

[38] The recording is not "a piece of evidence". While the testimony during the GD hearing does form part of the evidence, that testimony appears to be summarized at paragraph [14] of the GD decision. The decision also summarizes the documentary evidence in the record.

[39] The issue is limited to whether the absence of an audio recording of the GD hearing effectively denies the Applicant her right of appeal to the AD.

[40] The Applicant states that she wanted the audio recording “to see where and how the Tribunal made that decision”. She also states that the absence of the recording denies her the ability to appeal the GD decision. The Respondent argues that the appeal record is adequate for the AD to properly dispose of this Application.

[41] The AD must refuse leave to appeal, if it is satisfied that the appeal has no reasonable chance of success. This does not mean that I must be satisfied that the appeal will succeed in order to grant leave to appeal.

[42] On the limited issue of the alleged breach of natural justice, specifically whether the absence of an audio recording of the GD hearing effectively denies the Applicant her right of appeal to the AD, the matter warrants further review, as I am not satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[43] The Application is granted as specified in paragraphs [28] to [42] above.

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

[45] 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