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

Citation: *D. N. v. Canada Employment Insurance Commission,* 2016 SSTADEI 81

Tribunal File Number: AD-15-902

BETWEEN:

D. N.

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 10, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 18, 2015, the Appeal Division 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 advised in writing that he had no further submissions.

[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;
>
> (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:

> [20] 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.
>
> [21] 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.
> …
>
> [24] The GD decision concluded:
>
> > [26] 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.
> >
> > [27] The extension of time within which to bring the appeal is refused.

[25] 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.

[26] The Applicant's submission that his appeal was not filed late suggests erroneous findings of fact. The GD found that the appeal was filed late. Its findings 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 also worthy of further consideration. These findings seem at odds with the GD file as detailed in paragraphs [3] to [9] above.

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

[28] 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.

[29] In the present matter, the Applicant attempted to complete his appeal by providing a copy of the reconsideration decision on March 25, 2015 to a SC Centre, 8 days after the date of the Tribunal letter asking him to do this "without delay". He called the Tribunal for confirmation that the document had been received from the SC Centre on April 24, 2015 and was advised that it had not. He faxed a SC date stamped copy of the reconsideration decision to the Tribunal on April 27, 2015.

[30] A few weeks later, the Tribunal advised the Applicant that his appeal was late and that a Tribunal Member would need to decide whether to grant an extension of time. He was not asked for submissions on an extension of time or for an explanation of the delay. He maintained throughout that his NoA was not late and that the reconsideration decision was filed within days of his being advised it was required to complete his appeal.

[31] The treatment of his appeal to the GD by the Tribunal forms a reasonable basis upon which to assert a breach of procedural fairness and natural justice.

[12] The Respondent submits that the extension of time should have been allowed by the GD. However, it maintains that the case has no reasonable chance of success and submits that the AD should dismiss the appeal on the merits or refer the matter back to the GD.

[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 February 17, 2015

(reconsideration decision) to April 27, 2015 (completed appeal) except an incomplete appeal. This finding was wrong. The incomplete Notice of Appeal to the GD was filed on March 4, 2015. The Tribunal advised the Applicant by letter of March 17, 2015 that the appeal was incomplete. Upon receipt of that letter by regular mail, the Appellant filed the missing information at a Service Canada Centre on March 25, 2015. The Appellant called the Tribunal to confirm that the document had been received, and when he was advised that it was not in the Tribunal file, he sent the same document by fax to the Tribunal. The missing document was date stamped received by the Tribunal on April 27, 2015; it also bears the Service Canada date stamp of March 25, 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 maintained throughout that the Application was not late. The Applicant's communications in March and April 2015 were attempts to provide the missing information and the sequence of events explains the delay in completing the Application. Further, there were many telephone calls or attempts to call between the Appellant and the Tribunal in May, June and July 2015.

[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. It is not necessary for me to decide whether the treatment of the Appellant's appeal to the GD by the Tribunal breached the principles of procedural fairness.

[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