



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *C. A. v. Canada Employment Insurance Commission*, 2016 SSTADEI 89

Tribunal File Number: AD-15-922

BETWEEN:

C. A.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

HEARD ON: On the Record

DATE OF DECISION: February 15, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 21, 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 Respondent filed submissions which recommend that in the interest of procedural fairness and natural justice, the matter be returned to the GD to be heard on the substantive issue, which is the allocation of earnings.

[4] The Appellant filed submissions which argue that errors were made in the "Evidence" section of the GD decision.

[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 the circumstances, it is unnecessary to hold an oral hearing at the AD.

ISSUES

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

[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 paragraph 58(1)(a) of the DESD Act.

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

[22] 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.

[23] 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 [3] to [5] above.

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

[25] 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.

[26] I note that the NoA before the GD is dated November 4, 2014 and date stamped November 4, 2014, by the Tribunal. The NoA was filed with the GD of the Tribunal within the appeal period with 10 pages of documents attached, but it was missing a copy of the reconsideration decision and box C (reasons for appeal) was not completed. The Appellant was asked, by letter dated November 21, 2014, to provide a copy of the reconsideration decision and reasons for the appeal “without delay”, and she did so on December 5, 2014.

[27] The November 21, 2015 Tribunal letter warned that if the requested information was not provided “within the timeframe specified above”, the Applicant would be required to request an extension of time.

[28] While I would have thought that the information being provided on December 5, 2014 was “without delay” and “within the timeframe specified”, the Applicant was required to request an extension of time and provide an explanation for the delay. She complied.

[29] In the circumstances, whether the treatment of the Applicant’s appeal before the GD breached the principles of procedural fairness should be considered.

[30] 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 notes that the Appellant was not late in submitting her appeal, although incomplete, to the GD and that she complied with the Tribunal’s requests and promptly submitted the required documents and information. Further, the Respondent submits that the matter should be returned to the GD to be heard on the merits.

[13] The GD decision stated:

The claimant’s Request for Reconsideration was rejected on October 6, 2014. The claimant appealed to the Tribunal on December 5, 2014. There is no evidence of any other communication with or from the claimant during the period from October 6, 2014 to December 5, 2014.

This finding of fact was wrong. The Appellant filed her Notice of Appeal (NoA) with the GD on November 4, 2014, within the appeal period. The NoA included 10 pages of documents attached.

[14] Regarding a reasonable explanation for the delay, the GD stated: “The claimant provided no evidence to explain the delay in filing her appeal with the Tribunal.” This finding was also wrong. The Applicant maintained throughout that the Application was not late. The Applicant provided the missing information promptly after being asked to do so by the Tribunal, and the sequence of events explains the delay in completing the Application.

[15] The GD then refused to grant an extension of time based on a mechanical application of the *Gattallero* factors (*Canada (Minister of Human Resources Development) v. Gattallero*, 2005 FC 883). This is an error of law.

[16] 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.

[17] Therefore, the GD decision was based on erroneous findings of fact that the GD made in a perverse or capricious manner or without regard for the material before it and an error of law. In addition, the GD failed to observe a principle of natural justice, specifically 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