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

Citation: *J. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 83

Date: February 10 2016

File number: AD-16-106

APPEAL DIVISION

Between:

J. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On November 23, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on his claim for employment insurance (EI) benefits. The GD held an in-person hearing on November 16, 2015. The Canada Employment Insurance Commission (Commission) had determined that the Applicant required 910 insurable hours to establish a claim for benefits and that he had not accumulated this number. The Applicant sought reconsideration of this decision without success.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on December 23, 2015, within the 30-day time limit.

[3] A brief chronology of the file, before the November 16, 2015 GD hearing, is as follows:

a) The Applicant applied for regular EI benefits (November 2013);

b) The Respondent denied benefits (December 2013);

c) The Applicant submitted a Reconsideration Request (December 2013);

d) The Commission upheld its original decision denying benefits (January 2014);

e) The Applicant appealed the reconsideration decision to the GD of the Tribunal (February 2014);

f) The GD rendered a decision dismissing the appeal (March 2014);

g) The GD decision was appealed to the AD (September 2014); and

h) The AD allowed the appeal and returned the matter to the GD for a new hearing before a different Member (July 2015).

[4] The November 23, 2015 GD decision is the result of the new hearing before the GD.

ISSUE

[5] The AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] According 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 being appealed 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.

[7] 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."

[8] 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."

[9] 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;
>
> (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] The Application relies on each of these grounds of appeal and states that the Applicant is appealing because:

a) The GD failed to observe a principal of natural justice. In particular, the Applicant argues that the GD Member should have given him the opportunity to put forward his views and evidence before making a decision; and

b) The GD based its decision on erroneous findings of fact made in a perverse manner. In particular, the Applicant states that he was receiving benefits during the time he was taking the course from November 2, 2011 to April 14, 2012 (contrary to paragraph [15] of the GD decision) and he met the conditions to have his qualifying period extended (contrary to paragraph [22] of the decision).

[11] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[12] The issue before the GD was whether the Applicant had sufficient hours of insured employment. The GD decision correctly stated the issue as: "Whether the Appellant has sufficient hours of insured employment to establish a claim for employment insurance benefits (benefits) according to section 7 of the *Employment Insurance Act* (Act)."

[13] The Applicant attended the in-person hearing with his legal representative. An interpreter was also present during the hearing.

[14] The GD referred to the relevant legislative provisions and applicable case law, and it found that the Applicant did not have sufficient hours to meet the requirements, according to the Act, to be eligible to receive benefits.

[15] The GD stated the applicable legislative provisions in paragraphs [6], [18], [20] to [22] of its decision. The GD decision acknowledged the evidence of the Applicant and his submissions.

[16] The Applicant argues that the GD decision is based on erroneous findings of fact, specifically:

a) That he was not receiving benefits during the time he was taking the course from November 2, 2011 to April 14, 2012; and

b) That he did not meet any of the grounds for extension of the qualifying period pursuant to subsection 8(2) of the Act.

[17] Paragraph [15] of the GD decision states: "The Appellant was not receiving benefits during the time he was taking the course from November 2, 2011 to April 14, 2012." In the context of the decision and the subject matter, it is clear that "benefits" means EI benefits. This finding of fact is not erroneous, as the Appellant was not receiving EI benefits during that period.

[18] The Applicant argues that the GD did not understand the nature and purpose of the course and the benefits of completing that course, and that the Ontario Ministry of Training Colleges (OMTC) approved him to take the course. In addition, the course was extended by the course provider and he needed to complete the course. The OMTC gave him permission to continue the course after November 19, 2011.

[19] The Applicant's attendance in the course from November 19, 2011 to April 14, 2012 is the main issue. The Applicant argued before the GD that he had been approved by the OMTC to take the course and the course was completed on April 14, 2014, therefore, the hours in the extended period of the course should count towards his insurable hours. The GD found that the Applicant was not referred by the Commission to the course for this period of time and, therefore, any insurable hours that the Applicant "believes he accumulated while doing so, cannot be counted as part of the required number of insurable hours he needs to establish a claim for benefits."

[20] The evidence in the appeal record is that the Applicant was not referred to the course by the Commission, or a designate of the Commission, for the period of time after November 18, 2011. Therefore, the GD did not err on this point.

[21] In terms of extending the qualifying period, subsection 8(2) of the Act does not apply to extend the Applicant's qualifying period. This finding in the GD decision at paragraph [22]

was correct. The reference to “104 weeks of extended period” cited by the Applicant relates to situations of a referral to a course by the Commission, which was not the case here.

[22] As for the Applicant’s assertion that the GD did not give him the opportunity to put forward his views and his evidence, thereby breaching subparagraph 58(1)(a) of the DESD Act, he argues that the GD did not give him an opportunity to respond to its conclusions before rendering a decision. In essence, the Applicant argues a breach of natural justice because the GD Member did not concur with his arguments.

[23] This falls far short of what is needed to form an allegation of prejudice or bias, or a denial of procedural fairness.

[24] In terms of natural justice, an appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[25] The Applicant attended the in-person hearing with his legal representative. An interpreter was also present during the hearing to assist with language interpretation. The Applicant gave evidence and made submissions at the GD hearing and they were duly considered by the GD Member. Nothing in the GD decision or the appeal record suggests that the Applicant was denied a fair hearing or procedural fairness.

[26] I note that the Applicant had success with a similar argument (that the GD did not give him an opportunity to respond to its conclusions before rendering a decision) when he previously filed an appeal with the AD. However, the decision of the AD on July 31, 2015 related to post- hearing information requested by the GD in July 2014 and supplied by the Commission to which the Applicant had not been given an opportunity to respond. The situation is different now.
There was no post-hearing information in relation to the GD decision of November 23, 2015, now under appeal.

[27] The Applicant’s reasons for appeal, as summarized in paragraph [10] above, are an attempt to reargue his case before the AD.

[28] Once leave to appeal has been granted, 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. It is not the role of the AD to re-hear the case *de novo*. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[29] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[30] To have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. While the Applicant has asserted errors and his assertions which have been duly considered, they do not meet the threshold of having a reasonable chance of success on appeal.

[31] After review, I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[32] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division