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

Citation: *J. Y. v. Canada Employment Insurance Commission,* 2016 SSTADEI 97

Tribunal File Number: AD-16-99

BETWEEN:

J. Y.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: February 18, 2016

REASONS AND DECISION

INTRODUCTION

[1] On November 17, 2015 the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing in this matter and determined that the claimant (Appellant) left his employment due to illness and that the Canada Employment Insurance Commission (Commission or Respondent) correctly converted his regular benefits to sickness benefits. This resulted in a notice of debt to the Appellant.

[2] The Appellant was present at the GD hearing by videoconference. The GD rendered its decision on November 27, 2015 and communicated it to the Appellant by letter of the same date.

[3] The Appellant received the GD decision on November 29, 2015 and filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal, on December 24, 2015, within the 30 day time limit.

[4] On January 23, 2016, the AD of the Tribunal requested submissions from the parties on whether leave should be granted or refused.

[5] The Appellant had filed written submissions with the Application. The Respondent filed written submissions, on February 3, 2016, stating that the Appellant has grounds for appeal under section 58(1)(a) of the *Department of Employment and Social Development Act* (DESD Act) and asking that leave to appeal be granted and the matter be referred back to the GD of the Tribunal to be heard anew.

ISSUE

[6] If the appeal is determined to have a reasonable chance of success, the AD must decide whether to dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

LAW AND ANALYSIS

[7] Pursuant to subsections 57(1) and (2) of the DESD Act, an application for leave to appeal must be made to the AD, in the case of a decision made by the GD Employment Insurance Section, 30 days after the day on which it is communicated to the appellant, and 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.

[8] 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".

[9] 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".

[10] 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.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division. 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.

[12] 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.

[13] The Appellant referred in the Application to two of the grounds of appeal in subsection 58(1) of the DESD Act, namely, paragraphs 58(1)(a) and (c). In particular, the Appellant alleges that:

a) The GD was aware of his language limitations and request for a Mandarin interpreter for the hearing, but no interpreter was provided;

b) The GD Member responded to the Appellant's stated language concerns at the hearing by concluding that his "English was fine";

c) This denied the Appellant a fair hearing;

d) The Appellant relies on others to translate English documents for him;

e) He was unaware that he had right to seek legal representation before the GD, and neither Service Canada nor the Commission had told him this;

f) He was unaware that he had a right to submit and lead evidence and this was not explained to him during the GD hearing;

g) The GD Member directed the Appellant to submit further medical evidence, which he did after the hearing, then the GD Member used the further evidence against the Appellant in the GD decision;

h) The GD decision was based on a number of errors of fact and did not question the inconsistencies in the Respondent's evidence and submissions; and

i) The reasons in the GD decision were insufficient.

[14] The Notice of Appeal to the GD included this note handwritten by the Appellant: "Language Help: My English is not strong. I hope I can talk to the person who can speak Mandarin." A letter received by the GD in July 2015 included the Appellant's statement:

"Writing this letter has been very stressful, as my English is not good, I have to spend a lot time doing this. I hope this is clear enough. If you need more information, I hope to discuss further in person, preferably with a translator in Mandarin."

[15] The Notice of Appeal to the GD was late, and, in July 2015, the GD granted an extension of time within which to bring the appeal. There is no mention of language issues in the written decision granting an extension.

[16] The GD decision on the merits of November 2015 stated the issues as:

a) Issue 1: an allocation of earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

b) Issue 2: the denial of employment insurance sickness benefits pursuant to paragraph 12(3)(c) of the Act.

[17] The GD decision concluded:

> [24] The Tribunal scheduled a video conference Hearing. During the hearing the Appellant stated that he was not injured to the point of not being able to work. The Tribunal advised the Appellant that this statement was contradictory to the medical note provided to the Respondent on April 3, 2013. He requested additional time to review the medical note with his doctor to secure the correct information.
>
> [25] The Appellant provided the Tribunal with a new medical note dated November 24, 2015 stating that the Appellant was involved in motor vehicle accident on January 7, 2009 and that during the above period he continued to work at his full time job. (GD8)
>
> …
>
> [39] The Tribunal finds that the spontaneous answers provided to the Respondent (GD3-22, 23) more credible than the subsequent statements provided by the Appellant when the possibility of reduced benefits were realized.
>
> [40] The Appellant provide 2 medical notes to the Respondent and 1 medical note to the Tribunal and they were contradictory. The medical note dated January 24, 2013 states that the Appellant was injured and not able to work for 6 months, the second note dated September 19, 2012 states that the Appellant was injured and was advised to take 1 week off work. The third note provided post Hearing states that Appellant was injured in a car accident but continued to work at his full time job. The Tribunal finds on the balance of probabilities that this third medical note constitutes an after the fact opinion given, with intent to bolster the Appellant's efforts to obtain Employment Insurance benefits. It contains no directive or details.

> [41] The Tribunal also finds that the Appellant left both of his jobs shortly after he was injured in a car accident and that his initial statements to the Respondent that when he returned to work with his regular employer; he found he was unable to perform the job duties as he had in the past due to his injuries are more credible. The Tribunal finds that the Appellant left his employment due to illness and was unable to work. The Tribunal finds that the Respondent correctly converted his regular benefits to sickness benefits and that the Appellant was paid the maximum benefits pursuant to the Act.

[18] In paragraphs [24], [40] and [41] of the GD decision, the GD Member noted contradictions in the Appellant's evidence. In paragraphs [39] and [41] of the decision, the Member made determinations about the Appellant's credibility.

[19] The Appellant's ability to understand and be understood in English is important to findings of contradiction and credibility. However, the GD decision does not mention or acknowledge any requests for an interpreter prior to the hearing or the language concerns that the Appellant had raised.

[20] While the Appellant did not use the words "I am requesting an interpreter at the hearing", he did twice ask, in writing, to speak to someone in person who is Mandarin-speaking. He clearly asked for help with language in his Notice of Appeal and written submissions to the GD.

[21] The Application states that the Appellant notified the GD again of his need for a Mandarin translator/interpreter prior to the start of the hearing on November 17, 2015 and that, at the start of the hearing, he repeated to the GD Member that his language abilities in English were poor. In addition, because of his self-described "difficulty in understanding oral or written English", he made "next to no submissions" at the GD hearing.

[22] Although a recording of the GD hearing was requested by the AD, in order to confirm what had been said at the GD hearing, no recording was available.

[23] The Respondent was not present at the hearing, although it did file written representations for the GD's consideration. The GD decision was made based on information from the docket including the Respondent's representations, and the videoconference hearing which the Appellant alone attended.

[24] The absence of a recording of the GD hearing and there being no one else in attendance but the Member, there is no way for the Appellant to prove that he repeated his need for language interpretation or his difficulties in English at the GD hearing. He also cannot establish that the GD Member said that his "English is fine" or words to that effect.

[25] In the circumstances, it can be argued that the absence of an audio recording of the GD hearing effectively denies the Appellant his right of appeal to the AD. If the record does not allow the Tribunal to properly dispose of an application (or effectively denies the Appellant's right of appeal), this violates the rules of natural justice: *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 795 and *Canada (AG) v. Scott*, 2008 FCA 145.

[26] The Respondent agrees with the Appellant that there was a breach of natural justice, in that the Appellant was denied his right to be heard. Further, the Respondent recommends that this matter be returned to the GD to be heard as a *case de novo*.

[27] Given the fundamental nature of the right to be heard, the circumstances of this case and the Respondent's agreement, I am satisfied that the appeal has a reasonable chance of success.

[28] Considering the grounds for appeal raised by the Appellant, my review of the GD decision and the file, and the absence of a recording of the GD hearing in these specific circumstances, I grant the application for leave to appeal.

[29] In addition, given all of the above and the Respondent's consent and request, I allow the appeal. Because this matter will require the parties to present evidence and the assistance of an interpreter, a hearing before the GD is appropriate.

CONCLUSION

[30] The application for leave to appeal is granted.

[31] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration by a different Member.

Shu-Tai Cheng
Member, Appeal Division