



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. P. v. Canada Employment Insurance Commission*, 2016 SSTADEI 206

Tribunal File Number: AD-15-1589

BETWEEN:

S. P.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal and Appeal Decision

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 13, 2016

REASONS AND DECISION

INTRODUCTION

[1] On November 12, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing in this matter. The claimant (Appellant) had filed a claim for employment insurance (EI) benefits in 2011 and was paid benefits. Due to his employer's payment practices, the Canada Employment Insurance Commission (Commission) re-calculated the earnings which he had received and this had an impact on the overpayment which he incurred. The Appellant disputed the overpayment debt of \$679. The GD dismissed his appeal.

[2] The Appellant was present at the GD hearing held by teleconference. The GD rendered its decision on November 12, 2015, and it was communicated to the Appellant by letter of the same date.

[3] The Appellant received the GD decision on November 18, 2015 and filed an incomplete application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal, on December 17, 2015.

[4] On December 24, 2015, Tribunal requested information from the Appellant in order to complete the Application. The Appellant replied that when he sent the Application, he also sent attachments which the Tribunal appeared not to have received; and that the missing information was in those attachments. He attempted to send the missing information on January 21 and January 25, 2016, by email. The Tribunal received the information on January 25, 2016.

[5] On February 4, 2016, the Appellant responded to the Tribunal's treatment of his Application as a late Application. He explained that the Application was filed by email on January 16, 2016 (at 11:59pm) and that the attachments were sent on January 17, 2016. He was not aware that the Tribunal did not receive the attachments until he received the Tribunal's letter of December 24, 2015 and spoke with Tribunal telephone agents in January 2016. It appears that the Tribunal's server discarded the attachments. He attempted to send the attachments again on January 21, 2016 and received an error message a few days later. He sent the documents again on January 25, 2016, as attachments to two separate emails. He submits

that the Application was submitted on time, as it was filed on December 16, 2015, and the problems with the attachments related to the Tribunal's server rejecting his subsequent emails.

[6] On March 15, 2016, the Tribunal requested submissions from the Respondent on whether leave should be granted or refused and on the "documentation which the Applicant argues was provided in support of adjusting his earnings for the other weeks referred to in paragraph [32] of the General Division decision and which the Applicant argues were overlooked or not considered by the Commission and/or the General Division".

[7] The Respondent filed written submissions, on April 7, 2016, stating that the Appellant has grounds for appeal under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), namely procedural fairness and natural justice, and asking that leave to appeal be granted and the matter be referred back to the GD of the Tribunal.

ISSUE

[8] 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

[9] 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.

[10] 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".

[11] 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".

[12] 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.

[13] 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.

[14] 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.

[15] The Application refers paragraphs 58(1)(a) and (c) of the DESD Act. In particular, the Appellant submits that:

- a) The GD failed to observe a principle of natural justice in that the GD decision at paragraph [32] stated that the Appellant did not provide evidence to support adjustments to earnings for “the other weeks”; however, the Appellant had provided documentation;
- b) The Appellant attached about thirty pages of documentation, which he stated were previously provided to the Tribunal; and
- c) The GD based its decision on an erroneous finding of fact without regard for the material before it by not taking into account the evidence he provided in support of his appeal.

[16] The Respondent was not present at the GD hearing, although it did file written representations for the GD's consideration.

[17] The GD decision noted, at paragraph [32], that the Commission had adjusted the Appellant's earnings for three weeks, based on documentation which he had submitted. However, it found that the Commission was unable to adjust earnings for other weeks, "because there has been no documentation provided by the Appellant for the other weeks to support his claims".

[18] The Appellant submits that there should have been documents in the GD file about the other weeks. He submitted a number of documents "again" with the Application, but only the Application was received by the Tribunal. There appear to have been problems with the Tribunal's receipt of the documents by email, resulting in the Tribunal's request for missing information. These documents were added to the Tribunal file on January 26, 2016.

[19] The Appellant submits that the documents attached to the Application were submitted to the GD previously but the GD decision either overlooked them or did not have them on file.

[20] The Respondent submits that the documentation which the Appellant attached to the Application were not in the Commission's file. Therefore, they were not considered by the Commission. However, that evidence should be considered by the GD of the Tribunal. Therefore, in the interest of procedural fairness and natural justice, it recommends that the AD grant the Application, allow the appeal, and return the matter to the GD for reconsideration.

[21] 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.

[22] Considering the grounds for appeal raised by the Appellant and my review of the GD decision and the file, I grant the application for leave to appeal.

[23] 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, a hearing before the GD is appropriate.

CONCLUSION

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

[25] 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