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

Citation: *Canada Employment Insurance Commission v. M. P.*, 2016 SSTADEI 224

Tribunal File Number: AD-16-363

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

M. P.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 21, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on February 8, 2016. The GD allowed the Respondent's appeal where the Commission had determined that the Respondent (or claimant) was not available for work pursuant to paragraph 18(a) the *Employment Insurance Act* (EI Act).

[2] The Respondent requested a reconsideration of the Commission's decision. The Commission maintained its original decision on the basis that the Respondent had not proven that he was available for work as of October 22, 2014 but any benefits payable to him prior to that date were to be issued to him.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 26, 2016. The Application was filed within the 30 day time limit.

[4] The grounds of appeal stated in the Application are that the GD erred in fact and law as follows:

a) The Respondent was unwilling to leave his part-time employment for full-time employment and was not seeking employment;

b) The Commission determined that by restricting his availability for work to his part-time employer, the Respondent set personal conditions that limited his chances of returning to the labour market full-time;

c) The GD incorrectly allowed the appeal on the basis of the Respondent having proved his availability for work, in particular by placing more weight to his statements at the hearing than to the initial, spontaneous statements and by failing to justify why the recent statements are more credible than those made previously to the Commission;

d) The Respondent provided no evidence of any efforts to find other employment, full time or part time; and

e) The GD ignored case law which has held that in order to obtain EI benefits, a claimant has to actively seek suitable employment even if he finds it more reasonable not to do so and to be satisfied with part-time employment.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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".

[7] 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".

[8] 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;
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> (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.

[9] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[10] The Tribunal notes that the Respondent was present at the GD hearing and a Tribunal-supplied translator also attended. The Respondent testified at the hearing before the GD with the assistance of the translator. The Applicant did not to attend.

[11] The GD found, at page 6 of its decision, that:

> [19] The Appellant's submissions and evidence were that he was given a training opportunity to learn to be a school bus driver. He was hired in October, 2014 and was still working. He was not looking for full-time work because he was working and he was looking for a second part time job. He was not willing to leave his part-time job.
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> [20] The submissions of the Commission were that the Appellant is restricting his availability for work to his part-time employer. He has declared many times that he is unwilling to leave his part-time employment for full-time work and that he is not seeking full-time employment.
>
> [21] The Member considered the submissions and evidence. Those of the Commission were concise and consistent with the law. Those of the Appellant were that he was working and were also consistent. The Member prefers the evidence and submissions, based on the balance of probabilities, of the Appellant.
>
> [22] The Member finds that the Appellant showed the desire to return to the labour market as soon as a suitable, second, part-time job was offered. He expressed that desire through efforts to find a suitable, second, part-time job and he did not set personal conditions that might unduly limit the chances of returning to the labour market.
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> [23] The Member finds that the Appellant demonstrated a desire to work. He was working.
>
> [24] The Member finds that the Appellant was available for work during the period in question and unable to obtain additional, suitable, employment. He was attempting to find additional employment to supplement those hours he was already working. He had proven he was capable of and available for work.
>
> [25] The Member finds that the Commission incorrectly imposed a disentitlement pursuant to subsection 18(a) of the Act for failing to prove his availability for work during the period in question. The Appellant is to receive benefits from October 22, 2014 until the end of his entitlement.

[12] The GD concluded that the Respondent was entitled to benefits from October 22, 2014 until the end of his entitlement.

[13] While the GD stated the legislative provisions relevant to the issues on appeal and cited the *Faucher* decision (A-56-96/A-57-96 on appeal from CUB 30987 and CUB 380988), the Applicant argues that the GD erred in fact and law by misapplying the legal test for availability and preferring the claimant's oral testimony at the hearing over contradictory statements which the claimant had made previously to the Commission.

[14] The GD's explanation was that it preferred the evidence and submissions of the claimant over those of the Commission. It is certainly within the purview of the GD to prefer some evidence over other evidence; the GD is the trier of fact and its role includes the weighing of evidence and making findings based on its review of that evidence. However, findings of fact must take into consideration the material before the GD and not be made in a perverse or capricious manner.

[15] In *Oberde Bellefleur OP Clinique dentaire v. Canada (Attorney General)*, 2008 FCA 13, the Federal Court of Appeal cautioned that if a Board of Referees decides that contradictory evidence should be dismissed or assigned little or no weight at all, it must explain the reasons for the decision, failing which there is a risk that its decision will be marred by an error of law or be qualified as capricious.

[16] Whether the GD sufficiently explained the reasons for its conclusion in paragraph [21] of its decision warrants review.

[17] In terms of the Applicant's argument that there was no evidence of any efforts on the part of the Respondent to find other employment, full time or part time, there appears to have been evidence at the hearing related to his efforts. The GD refers to evidence that was given at the hearing by the Respondent (for example paragraphs [15] and [22]).

[18] The Applicant was invited to but did not attend the hearing before the GD. Its written submissions and the record on appeal were before the GD. By its absence, the Applicant lost the ability to cross-examine the Respondent.

[19] The Applicant's submissions on the alleged factual errors are affected by its choice not to attend the hearing. Presenting a convincing argument that an erroneous factual finding was "made in a perverse or capricious manner or without regard for the material before it" is

difficult when the Applicant chose not to be present when all elements of the evidence were before the GD, including the testimony and submissions at the hearing. The Applicant alleges that the Respondent provided “no evidence”, but it was not present at the hearing when evidence over and above what was in the Applicant’s file was presented. It does not appear that the Applicant consulted the recording of the hearing to confirm all the facts brought to the knowledge of the GD since the Applicant’s submissions do not point to specific portions of the Respondent’s testimony.

[20] It is not my role, as a Member of the Appeal Division of the Tribunal on an application for leave to appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD’s findings of fact with my own. It is my role to determine whether the appeal has a reasonable chance of success on the basis of the Applicant’s specified grounds and reasons for appeal: erroneous finding(s) of fact based on the evidence that was before the GD which finding of fact, pursuant to paragraph 58(1)(c) of the DESD Act, was made in a perverse or capricious manner or without regard for the material before it.

[21] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal, namely paragraph 58(1)(b) and (c) of the DESD Act, as specified in paragraphs [14] to [17] above.

[22] On the ground that there may be an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[23] The Application is granted.

[24] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[25] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division