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

Citation: *J. N. v. Canada Employment Insurance Commission,* 2016 SSTADEI 231

Tribunal File Number: AD-16-371

BETWEEN:

J. N.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 25, 2016

REASONS AND DECISION

INTRODUCTION

[1] On January 27, 2016, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision of the Canada Employment Insurance Commission (Commission). The Applicant had requested a claim conversion from sickness benefits to regular benefits and that the claim be antedated. The Commission denied the antedate request. The Appellant requested reconsideration. In July 2015, the Commission maintained its initial decision. The Applicant appealed to the GD of the Tribunal.

[2] The GD hearing proceeded by videoconference on January 26, 2016. The Applicant attended the hearing. The Respondent did not attend.

[3] The GD determined that:

a) The issue before the Tribunal was whether or not the Applicant had good cause for the delay throughout the entire period of delay;

b) The existence of good cause for delay is a question of mixed law and fact. The meaning of good cause is a question of law; whether the facts in a given case fall inside the definition is a question of fact. The onus for demonstrating good cause lies with the appellant;

c) The Applicant failed to demonstrate that he acted as a reasonable person in the same situation would have done; and

d) The Applicant failed to prove that he had good cause for his delay in filing his claim during the entire period of the delay.

[4] Therefore, the Applicant's appeal before the GD was dismissed.

[5] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 29, 2016. The Application stated that he received the GD decision on January 29, 2016. However, that is the date of the letter advising him of the GD

decision. The GD decision would have been received by the Applicant within the days following January 29, 2016 (i.e. January 30, 2016 or later). Therefore, the Application was filed within the 30-day limit.

ISSUES

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

LAW AND ANALYSIS

[7] Pursuant to section 57 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 appealed from was 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] The Applicant's reasons and grounds for appeal can be summarized as follows:

a) The GD took half a day after the hearing was conducted to render a decision, and that was not sufficient time;

b) The GD Member seemed tired, over worked and confused, and he did not consider the Applicant's circumstances but made the decision solely on his personal view;

c) The GD did not consider that the Applicant was not provided with information that his leave of absence would not be switched to regular benefits; and

d) He offered to provide further information to make the matter clearer, but the GD Member "didn't want to be bothered".

[12] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of antedate.

[13] The GD stated that the "existence of good cause for delay is a question of mixed law and fact. The meaning of good cause is a question of law; whether the facts in a given case fall inside the definition is a question of fact. The onus for demonstrating good cause lies with the appellant. " This was a correct statement of the applicable legal test.

[14] The GD decision, at pages 4 to 6, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[15] The Applicant's submissions in support of the Application mostly re-argue the facts and arguments that he asserted before the GD.

[16] The GD is the trier of fact and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[17] 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.

[18] As for the Applicant's submissions that the GD Member did not give appropriate consideration to his circumstances, rendered a decision too quickly and made a decision based only on his personal view, the Applicant appears to be suggesting that the GD failed to observe a principle of natural justice in that his hearing was unfair.

[19] The Applicant requested a copy of a recording of the videoconference and a transcript of the hearing. The Tribunal provided a copy of the audio recording of the hearing to him and advised that it does not prepare or obtain transcripts of hearings and that only the audio portions of hearings are recorded.

[20] In terms of the evidence that the Applicant offered to the GD during the hearing, it was an offer to contact his family doctor and to ask for a note about his condition in the period January 2014 to April 2015. The GD Member stated that it would not be necessary to do this and that he accepted the Applicant's evidence that he suffered from anxiety and was taking medication that confused him.

[21] The GD Member stated that "within 10 days" he would write a decision and it would be sent to the parties. The Applicant suggests that because the GD rendered a decision the day after the hearing, the GD Member did not consider his personal circumstances. The GD decision includes the evidence and submissions about the Applicant's circumstances and situation.

[22] 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 at paras 21-22.

[23] I have reviewed the appeal file in detail, and it is clear that the GD had the documentary file (which included the Applicant's application and other documents related to the review conducted by the Commission). The GD also summarized, in its written decision, the Appellant's testimony about the history of the proceedings and the challenges which resulted. The GD did not require the Applicant to produce a medical note relating to his condition in the relevant period and accepted his evidence about it.

[24] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere

suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard.

[25] I have considered the allegations in the Application and the record of the appeal, including the audio recording of the GD hearing, and I conclude that the material in them does not demonstrate conduct by the GD that derogates from the standard.

[26] If leave to appeal is granted, then 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 anew. 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.

[27] 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.

[28] In order to have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[29] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division