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

Citation: *A. C. v. Canada Employment Insurance Commission*, 2016 SSTADEI 239

Tribunal File Number: AD-15-1087

BETWEEN:

A. C.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division– Appeal Decision

DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: April 28, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On February 5, 2016, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds that a breach of natural justice may have occurred.

[2] The Tribunal requested the parties' submissions on the mode of hearing, whether one is appropriate and, also, on the merits of the appeal.

[3] The Appellant filed detailed submissions on the merits.

[4] The Respondent filed submissions which recommend that the Appellant be given the opportunity to present her case to the General Division (GD) for a new determination.

[5] This appeal proceeded on the basis of the record for the following reasons:

a) The lack of complexity of the issue(s) under appeal;

b) The AD Member has determined that no further hearing is required; and

c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

ISSUE

[6] Whether the GD made an error of law, mixed error of law and fact or breached a principle of natural justice in arriving at its decision.

[7] If yes, the AD of the Tribunal must decide whether it should dismiss the appeal, give the decision that the GD should have given, refer the case to the GD for reconsideration or confirm, rescind or vary the decision of the GD.

LAW AND ANALYSIS

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[9] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraphs 58(1)(a) of the DESD Act.

[10] In particular, the decision granting leave to appeal stated:

> [36] In this case, an audio recording is not available. The Applicant argues that the recording is a "crucial piece of evidence" for her appeal and that the absence of the recording would impair her appeal. In particular, the Applicant argues that the GD Member, during the teleconference hearing, "agreed that she was entitled to EI benefits".
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> [37] The decision of the GD was rendered in writing on August 25, 2015. Whatever the GD Member may or may not have said during the hearing, the GD decision dismissed the Applicant's appeal and the reasons for this were stated in that decision.
>
> [38] The recording is not "a piece of evidence". While the testimony during the GD hearing does form part of the evidence, that testimony appears to be summarized at paragraph [14] of the GD decision. The decision also summarizes the documentary evidence in the record.
>
> [39] The issue is limited to whether the absence of an audio recording of the GD hearing effectively denies the Applicant her right of appeal to the AD.

> [40] The Applicant states that she wanted the audio recording "to see where and how the Tribunal made that decision". She also states that the absence of the recording denies her the ability to appeal the GD decision. The Respondent argues that the appeal record is adequate for the AD to properly dispose of this Application.
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> [41] The AD must refuse leave to appeal, if it is satisfied that the appeal has no reasonable chance of success. This does not mean that I must be satisfied that the appeal will succeed in order to grant leave to appeal.
>
> [42] On the limited issue of the alleged breach of natural justice, specifically whether the absence of an audio recording of the GD hearing effectively denies the Applicant her right of appeal to the AD, the matter warrants further review, as I am not satisfied that the appeal has no reasonable chance of success.

[11] The Respondent agrees that there may be a breach of natural justice. It no longer takes the position that the appeal record is adequate for the AD to properly dispose of this appeal. Therefore, the Respondent recommends that the matter be returned to the GD for a new determination.

[12] Because an audio recording is not available, the Appellant argues that the Tribunal is unable to say that an error was not made by the GD. I would note that it is the Appellant who must establish that the GD made a reviewable error. It is not for the Tribunal to convince the Appellant that no error was made. In this regard, the Appellant's arguments are not accepted by the AD.

[13] In addition, the Appellant makes a distinction between a failure to record and the non-availability of a recording, arguing that the Supreme Court of Canada's decisions are distinguishable because they dealt with failure to record not an audio recording which was made but is not available. I find that the Supreme Court of Canada's decision in *S.C.F.P., Local 301 v. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 795 and other similar cases (holding that in the absence of a legal obligation to record, courts must determine whether the file record allows it to properly dispose of the application; if so, the unavailability of the recorded hearing will not violate the rules of natural justice) are applicable to situations of failure to record and to situations of non-availability of a recording.

[14] The Federal Court of Appeal has also ruled on situations where an audio recording could not be provided for various reasons.

[15] The non-availability of an audio recording from the GD hearing, in and of itself, is not a ground for setting aside a GD decision: *Canada (AG) v. Scott*, 2008 FCA 145 and *Patry v. Canada (AG)*, 2007 FCA 301. If the unavailability or absence of the audio recording effectively denies a party their right of appeal before the AD, then the GD decision may be set aside.

[16] In the circumstances, the Respondent has conceded that the non-availability of the audio recording of the GD hearing in this matter may have effectively denied the Appellant her ability to appeal to the AD.

[17] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter will require the parties to present evidence, a hearing before the GD is the appropriate form of hearing.

CONCLUSION

[18] 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