



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *W. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 260

Tribunal File Number: AD-15-125

BETWEEN:

W. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 18, 2016

REASONS AND DECISION

INTRODUCTION

[1] On February 19, 2015, 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 been denied benefits on a claim he filed on September 30, 2013, because the Commission had imposed a disentitlement for being absent from Canada and a disentitlement for failing to prove availability for work. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant attended the GD hearing, which was held by teleconference on February 18, 2015. The Respondent did not attend.

[3] The GD determined that:

- a) The Applicant was outside of Canada for vacation from November 25, 2013 to December 27, 2013;
- b) His reason for being outside Canada does not meet any of the exemptions of section 55 of the *Employment Insurance Regulations* (Regulations);
- c) Therefore, he is subject to disentitlement under subsection 37(b) of the *Employment Insurance Act* (EI Act);
- d) The Applicant was not available for work during this period;
- e) Therefore, a disentitlement was correctly imposed pursuant to subsection 18(a) of the EI Act for not being available for work.

Based on these conclusions, the GD dismissed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on March 11, 2015. The Application did not state the date that

the Applicant received the GD decision. As the Application was filed within 30 days of the date that the GD decision was rendered, it was clearly filed within the 30 day time limit.

ISSUE

[5] Whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] 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.

[7] 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.”

[8] 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.”

[9] 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.

[10] The Applicant's grounds of appeal are "Concern for natural justice / General Division's Decision was without regard to the matter before it". The arguments of Applicant can be summarized as follows:

- a) The Commission has not given attention to any EI benefit entitlement for the period after he returned from vacation and started to look for jobs;
- b) The focus has been only on the period he was away on vacation;
- c) His interest is in receiving EI benefits;
- d) The GD decision makes no direction to the Commission about processing his EI benefits for any period after he was away on vacation;
- e) Service Canada and the GD have not helped or given him advice on how to receive EI benefits; and
- f) The GD ignored his interest in receiving EI benefits and made a decision without regard to the material before it.

[11] The AD requested submissions from the Commission on whether leave should be granted or refused. In particular, the Commission was asked about the Applicant's submissions that: "the General Division did not make a determination on employment insurance benefits for the period after his vacation. He also states that his file was "blocked" when he attempted to discuss his file with Service Canada in the past."

[12] The Commission filed submissions, which are summarized below:

- a) The Applicant filed a claim effective October 6, 2013;
- b) Upon separation from his employment, the Applicant received vacation pay which was deducted from his benefits from the week of October 6, 2013 to the week of October 20, 2013; this was explained in a letter dated October 8, 2013, for which the Applicant did not seek reconsideration;

- c) The Applicant was also notified that his pension was considered earnings for EI purposes and would also be deducted from his benefits from October 20, 2013 to the end of his claim;
- d) The reason no benefits are payable to the Applicant since the beginning of his claim is not because of the decision under appeal; the reason is that he was in receipt of a pension from his employer;
- e) The Applicant did not complete any reports since October 2013 and his claim went dormant, which explains why the Commission could not give him any information on his claim;
- f) The Applicant filed a new application for benefits in December 2014; since he had not accumulated any hours of insurable employment from December 1, 2013 to November 29, 2014, he could not receive benefits; he has not requested reconsideration of this decision;
- g) The only issue before the GD related to disentitlement during the period November 24 to December 28, 2013, and there is no reviewable error in the GD decision; and
- h) There is also no evidence to show that the GD breached any principle of natural justice.

[13] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of disentitlement due to absence from Canada and non-availability, at pages 3 to 5, 7 and 8.

[14] The GD noted that the Applicant attended the GD hearing and testified. The GD decision, at pages 5 and 6, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[15] The GD noted that the Applicant argued similar points before the GD (as he stated in the Application), i.e. he has not received any EI benefits since his unemployment, on pages 6 and 8 of the GD decision.

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

[17] 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.

[18] 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.

[19] On the grounds that GD decision was made "without regard for the material before it", the appeal does not have a reasonable chance of success.

[20] As for the Applicant's submissions that the GD Member did not give appropriate consideration to his circumstances and made a decision based only on the period when he was out of the country, the Applicant appears to be suggesting that the GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[21] The appeal before the GD related to a request for reconsideration of a Commission decision dated November 4, 2014. The subject of that decision was EI benefits from November 25, 2013 to December 27, 2013 ("time period in question"), when the Applicant was outside of Canada. The Commission advised, by letter dated December 4, 2014, that its initial decision was maintained and provided written reasons.

[22] The Respondent's submissions note that its decisions on the Applicant's claim for EI benefits as it relates to periods outside of the time period in question were communicated to the Applicant separately and that the Applicant did not request reconsideration on those decisions. (According to the Respondent, the other decisions related to: (1) the week of October 6, 2013 to the week of October 20, 2013; (2) from October 20, 2013 to the end of the Applicant's 2013 claim; and (3) a new application for benefits in December 2014.) The Applicant's only request for reconsideration related to disentitlement during the time period in question.

[23] The jurisdiction of the GD was, therefore, limited to the Applicant's availability and disentitlement during the time period in question. The GD did not refuse to exercise its jurisdiction in limiting its decision to the period when the Applicant was out of the country. The Applicant's entitlement to EI benefits outside of this period was not before the GD.

[24] While the Applicant argues that the GD "makes no direction to the Commission about processing his EI benefits for any period after he was away on vacation", it is clear that the Applicant's entitlement to EI benefits outside of this period was not before the GD.

[25] If the Applicant is seeking to have any of the other decisions of the Commission reviewed, he must do so through the reconsideration process with the Commission. He cannot ask the AD to rule on a decision of the Commission that did not go through the reconsideration process and GD appeal process first.

[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