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

Citation: *R. C. v. Canada Employment Insurance Commission,* 2016 SSTADEI 286

Tribunal File Number: AD-16-514

BETWEEN:

R. C.

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 31, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On March 11, 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, in August 2015, had requested reconsideration of a decision of the Commission of October 2008. This delayed request for reconsideration was denied by the Commission. The Applicant appealed to the GD of the Tribunal.

[2] The Representative of the Applicant attended the GD hearing, which was held by teleconference on March 7, 2016. The Respondent did not attend.

[3] The GD determined that:

a) The issue on appeal is the Applicant's request to extend the 30 day period for reconsideration of the Commission's October 2008 decision;

b) The Commission's decision to refuse an extension is a discretionary one and can only be reversed by the Tribunal if the Commission exercised its discretion in a non-judicial manner;

c) There was no reason to intervene with the Commission's decision considering the following factors: explanation for the delay, continuing intention to request reconsideration, reasonable chance of success, and prejudice to other parties; and

d) The Commission acted in good faith and considered all the relevant factors and did not consider irrelevant factors when it denied the Applicant's request to extend the period for reconsideration.

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 April 5, 2016. It was 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 described in a three page attachment to the Application. The Applicant's arguments can be summarized as follows:

a) He was incarcerated during the relevant period. This is the reason for his delay in requesting reconsideration;

b) He did not have internet access, help from any friends or family, or the ability to collect information while incarcerated;

c) Responding to mail takes longer than the allocated 30 day response period;

d) He did not say that "paperwork was too time consuming" as stated in the GD decision; rather he said he was unable to get the paperwork done within the allotted time;

e) He informed the Commission that he was incarcerated and provided proof of his period of incarceration;

f) He disagrees with the GD's conclusions that he did not have a reasonable explanation for his delay and did not demonstrate a continuing intention to request reconsideration;

g) He has special circumstances: he is in jail, does not have access to the internet, and did not have any family or friends willing to help him; and

h) He feels there is bias against him because he is in prison.

[11] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of a late request for reconsideration, at pages 3, 4, 6 and 7.

[12] The GD noted that the Applicant's Representative attended the GD hearing on his behalf. The GD decision, at pages 4 to 5, summarized the evidence in the file, the arguments made at the hearing and the Applicant's submissions.

[13] The Applicant argued similar points before the GD (as he stated in the Application before the AD), i.e. he had special circumstances to explain his delay.

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

[15] 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.

[16] It is not my role, as a Member of the AD 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.

[17] The Applicant also argues that the GD decision was based on an error in paragraphs [12] and [15] b) in that the GD summarized one of his submissions and part of the evidence as:

> All of the paperwork has to be sent by mail, which is extremely time consuming for him.

[18] This is not an error in a finding of fact. The GD summarized part of the evidence and submissions as "paperwork has to be sent by mail, which is extremely time consuming", where the Applicant's explanation in his words was that he "was unable to get the paperwork done within the allotted time". The GD referred to other evidence in the file and the submissions of the Applicant's Representative at the hearing. This finding of fact was not made in in a perverse or capricious manner or without regard for the material.

[19] I also note that not every erroneous finding of fact will fall within the terms of paragraph 58(1)(c) of the DESD Act. An erroneous finding of fact upon which the GD does not base its decision would not be caught, nor would one that is not made in a perverse or capricious manner or without regard for the material before the Tribunal.

[20] 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.

[21] In terms of the Applicant's submission that "there is bias against him", he states that he feels this way because he is in prison.

[22] 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. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[23] Even taking the Applicant's arguments as proved, they are insufficient to show that the GD did not give the Applicant a sufficient opportunity to be heard or that the GD was prejudiced or biased.

[24] 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.

[25] 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

[26] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division