



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *F. S. v. Canada Employment Insurance Commission*, 2016 SSTADEI 385

Tribunal File Number: AD-16-231

BETWEEN:

F. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DECIDED: On the Record

DATE OF DECISION: July 19, 2016

REASONS AND DECISION

INTRODUCTION

[1] On June 20, 2016, the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds of error of law and erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the General Division (GD). The decision of the GD appealed from relates to the refusal of an extension of time for the Appellant to file an appeal before the GD.

[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 Respondent filed submissions which recommend that in the interest of natural justice and procedural fairness, the matter be returned to the GD to be heard on the substantive issue, which is the allocation of earnings pursuant to sections 35 and 36 of the *Employment Insurance Regulations* (Regulations).

[4] In light of the Respondent's submissions, it was unnecessary for the Appellant to make submissions.

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

- a) The lack of complexity of the issues under appeal; and
- b) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] In the circumstances, it is unnecessary to hold an oral hearing at the AD.

ISSUES

[7] Whether the GD based its decision on erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it or erred in law in making its decision.

[8] Whether the AD 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

[9] 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.

[10] 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)(b) and (c) of the DESD Act.

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

[16] Although the GD referred to the *Larkman* case, it does not appear to have considered whether the interests of justice would be served by allowing an extension of time. Rather, the GD seems to have mechanically applied the *Gattallero* factors which, if made out, would be an error of law.

[17] Further, it concerns me that the GD concluded that the appeal had no reasonable chance of success on the basis that the Applicant did not “question any error in law that is unreasonable in light of the information in the file” and that the only missing information to complete the appeal was a copy of the reconsideration decision which the GD had on file. An appeal to the GD might have a reasonable chance of success based on errors other than an error in law. That the missing information was a document which the GD had on file should have been considered in an analysis of whether the interests of justice would be served by allowing an extension of time.

[18] On the grounds that there may be an error of law and erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the GD, I am satisfied that the appeal has a reasonable chance of success.

[12] The GD found that the appeal was incomplete because it was missing a copy of the reconsideration decision. It also found that the Appellant did not demonstrate a continued intention of pursuing his appeal and did not demonstrate that he had an arguable case. The GD did not consider whether the interests of justice would be served by allowing an extension of time.

[13] The GD refused to grant an extension of time based on a mechanical application of the *Gattallero* factors (*Canada (Minister of Human Resources Development) v. Gattallero*, 2005 FC 883). This is an error of law.

[14] In addition, the analysis of the GD on the issue of arguable case was insufficient. It stated only that the Appellant did not “question any error of law ...” and, therefore, there was no arguable case. I note that an error of law may appear on the record without an appellant having identified the error. I also note that reviewable errors may include errors other than an error of law.

[15] On continuing intention to appeal, the GD found that the Appellant submitted his appeal on September 28, 2015. This was an erroneous finding of fact made without regard to the material before it. There are two date stamps on the Appellant’s Notice of Appeal to the GD: one on January 27, 2015 (Service Canada Cornwall, Ont.) and another on February 3, 2015 (Tribunal). The September 28, 2015 date relates to the Appellant’s filing of a copy of the reconsideration decision, the only thing needed to complete his appeal. I also note that when the GD refused an extension of time, on December 11, 2015, it had two copies of the missing document in the file.

[16] Therefore, the GD decision was based on erroneous findings of fact that the GD made in a perverse or capricious manner or without regard for the material before it and an error of law. In addition, the GD failed to observe a principle of natural justice, specifically procedural fairness.

[17] The Respondent submitted that in the interest of natural justice and procedural fairness, the matter should be returned to the GD for determination on the substantive issue. I agree, based on my review of the file.

[18] Subsection 59(1) of the DESD Act sets out the powers of the AD. It states:

The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[19] Considering the submissions of the parties, my review of the GD decision and the appeal file, I allow the appeal. Because this matter has not been heard on the merits and may require the parties to present evidence, a hearing before the GD is appropriate.

CONCLUSION

[20] 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