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

Citation: *S. L. v. Canada Employment Insurance Commission,* 2017 SSTADEI 115

Tribunal File Number: AD-16-779

BETWEEN:

S. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Mark Borer

HEARD ON: January 13, 2017

DATE OF DECISION: March 23, 2017

Canada

DECISION

[1] The appeal is dismissed.

INTRODUCTION

[2] Previously, a General Division member dismissed the Appellant's appeal.

[3] In due course, the Appellant filed an application for leave to appeal with the Appeal Division and leave to appeal was granted.

[4] A teleconference hearing was held. The Appellant and the Commission each appeared and made submissions.

[5] During the hearing, the parties asked that an adjournment be granted so that additional written submissions could be made regarding the Appellant's request for a confidentiality order. The adjournment was granted, and both parties made further written submissions.

THE LAW

[6] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal are that:

> (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.

ANALYSIS

[7] This appeal concerns an overpayment caused by certain alleged earnings that had not been initially allocated by the Commission. As noted above, the Appellant also requested that a confidentiality order be made to protect the personal information contained in this file.

[8] On the substantive issue, the Appellant repeats many of the arguments she made to the General Division member. She does not identify any particular error made by the member, nor is she able to point to any evidence that suggests that his decision was flawed.

[9] The Commission, for their part, supports the General Division member's decision.

[10] In that decision, the member reviewed the evidence before him as well as the law and the submissions of the parties. He then found that the Appellant did indeed have earnings that needed to be allocated (as had been previously determined by the Commission), and dismissed the Appellant's appeal.

[11] I have carefully considered the Appellant's submissions, but am unable to agree with her that her appeal should be allowed.

[12] In my view, as evidenced by the decision and record, the General Division member conducted a proper hearing, weighed the evidence, made findings of fact that were open to him based upon the evidence, established the correct law, properly applied that law to the facts, and came to a conclusion that was intelligible and understandable.

[13] As I have found no reviewable error in the General Division member's decision, this appeal must fail. But there remains a second issue to address.

[14] As noted above, the Appellant requested that I prevent the publication of any personal information or identifiers related to her. The issue was discussed at length at the hearing before me, and the Appellant and the Commission were given the opportunity to provide further written submissions after the hearing which they each took advantage of.

[15] To my knowledge, this is the first time a member of the Appeal Division has been requested to issue a confidentiality order. Before considering making such an order I must first determine if I have the jurisdiction to do so.

[16] Sections 62 and 64 of the DESDA read as follows:

> 62 All or part of a Tribunal hearing may be held in private if the Tribunal is of the opinion that the circumstances of the case so require.
>
> …
>
> 64(1) The Tribunal may decide any question of law or fact that is necessary for the disposition of any application made under this Act.

[17] I find that the above sections, combined with the general authority of every tribunal to control its own processes, support the finding that I do indeed have the jurisdiction to issue confidentiality orders.

[18] In my view, Parliament's intention in drafting s. 62 was to give the Social Security Tribunal (Tribunal) the ability to keep selected sensitive hearings private. This necessarily implies that they would otherwise be public. It also must include the ability to restrict public access to the evidence and written record in such cases, because if it did not then the privacy protections established in s. 62 could be easily circumvented. As the DESDA uses the word "may," I also find that this decision is a discretionary one.

[19] I also note that the Appellant and the Commission each agree that I have the jurisdiction to issue such an order.

[20] Having established that I have the jurisdiction to make a confidentiality order, I must determine what criteria should be considered in making that decision and in determining the scope of any such order.

[21] In *Lukacs v. Canadian Transportation Agency et al*., 2015 FCA 140, the Federal Court of Appeal addressed the release of information related to a case before the Canadian Transportation Agency (Agency). This case is directly on point and I am bound by it.

[22] In its decision, the Court quoted with approval (at paragraph 37 of its decision) the Ontario Court of Appeal, and found that the open court principle applied to the Agency when it acts in its capacity as an independent quasi-judicial adjudicative tribunal.

[23] The Tribunal is not an administrative body. It does not administer the *Employment Insurance Act* (Act) or any other legislation; in the case of the Act, that is the role of the Commission. Instead, in employment insurance matters the Tribunal is an independent quasi-judicial adjudicative tribunal responsible for hearing appeals in accordance with the procedures and powers set out in the DESDA, the Act, and the related statutes and regulations. I therefore have no hesitation in finding that the open court principle applies to the Tribunal just as it does to all other such bodies.

[24] The Court explained what is meant by the open court principle (at paragraph 27) by quoting Chief Justice McLachlin of the Supreme Court of Canada:

> The open court principle can be reduced to two fundamental propositions. First, court proceedings, including the evidence and documents tendered, are open to the public. Second, juries give their verdicts and judges deliver their judgments in public or in published form.

[25] Continuing, the Court found that there are limits to the application of the principle in some circumstances, noting (at paragraph 32) that

> In *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, 132 D.L.R. (3d) 385, Dickson J., as he then was, stated at page 189:
>
> > Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[26] The Court (at paragraph 35) then cited a number of cases, including *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, and held that "the test is whether the salutary effects of the requested limitation of the open court principle will outweigh the deleterious effects of that limitation."

[27] Finally, in concluding, the Court stated that:

> [72] However, as has been noted earlier in these reasons, there are circumstances in which unfettered access to the record before the court runs counter to competing societal interests. In those circumstances, the affected party may apply to the court for relief, either under the procedural rules of that court or on the basis of the *Dagenais/Mentuck* test in respect of *Charter*-based applications. In appropriate circumstances, the court will circumscribe the scope and application of the open court principle. When it does so, the court will have determined that, in the circumstances, safeguarding the integrity of the administration of justice and protecting the often vulnerable party who seeks that protection, outweigh the benefits of open access that the open court principle would otherwise provide. Thus, the open court principle mandates that the record of the court will be available for public access and scrutiny, except to the extent that the Court otherwise determines.
>
> [73] In my view, there is no principled reason to employ a more limited interpretation of the term record simply because that term relates to a quasi-judicial adjudicative tribunal, such as the Agency, rather than a court. The record of the proceedings before the Agency performs essentially the same function as the record of a court.

[28] In the matter before me, the Appellant argues that she has a right to not have her personal information revealed to the public. In addition to these general concerns, she is also worried about identity theft. She submits that these factors outweigh any general interest the public may have in viewing the record.

[29] I agree with the Appellant that privacy is a valid concern. If our positions were reversed, I would argue similarly that my own privacy interests should be protected and would ask that a third party not be able to access my file.

[30] It is a trite legal principle, however, that it is not enough that justice be done. Justice must also be seen to be done, so that the public can have confidence in the Canadian administrative law system. This is why the Tribunal issues written decisions, and why the Tribunal has made great efforts to publish decisions as quickly as possible in both official languages.

[31] I note that on the facts of this case the Appellant has not identified any specific reason why her file is more confidential or more sensitive than any other employment insurance file that the Tribunal might adjudicate. If I were to accept the Appellant's arguments and issue a confidentiality order in this file, it would logically follow that a similar order should be issued in every employment insurance file. In practice, that would nullify the open court principle and veil in shadow the activities and proceedings of the Tribunal which should properly be clothed in light.

[32] I am highly sympathetic to the Appellant's arguments. However, I find that on the facts of this case the positive effects of a confidentiality order on the Appellant are outweighed by the negative effect of limiting the open court principle. I also find that the ends of justice would not be subverted by disclosure, and that there is no evidence upon which I could conclude that any of the material in question might be used for an improper purpose unless a confidentiality order was issued.

[33] For these reasons, I decline to exercise my discretion to issue a confidentiality order.

[34] In closing, I would make a final observation. Prior to the issuance of *Lukacs*, the Tribunal made a number of choices involving the difficult balancing act between privacy and transparency. It may well be that the time has come to revise and/or codify some of those choices, given the clear position of the Court on the importance and application of the open court principle to independent quasi-judicial adjudicative tribunals.

CONCLUSION

[35] For the above reasons, the appeal is dismissed.

Mark Borer

Member, Appeal Division