



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. D. v. Canada Employment Insurance Commission*, 2017 SSTADEI 339

Tribunal File Number: AD-17-245

BETWEEN:

J. D.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Stephen Bergen

DATE OF DECISION: September 18, 2017

REASONS AND DECISION

INTRODUCTION

[1] On November 20, 2016, the General Division of the Social Security Tribunal of Canada (the “General Division”) considered an appeal of the Canada Employment Insurance Commission’s (the “Commission” or “Respondent”) September 14, 2016, reconsideration decision. The reconsideration decision had overturned the notice of violation but had confirmed the Respondent’s June 27, 2016, decision to impose a penalty after determining the Appellant knowingly failed to declare earnings during a period in which he was in receipt of Employment Insurance sickness benefits.

[2] The General Division upheld the Commission’s reconsideration decision.

[3] The Appellant sought leave to appeal the General Division decision on March 20, 2017, and, the Appeal Division granted leave to appeal in its decision dated March 30, 2017.

[4] This appeal proceeded on the record for the following reasons:

- a) The Tribunal Member has determined that no further hearing is required.
- b) The *Social Security Tribunal Regulations* require that the appeal proceed as informally and as quickly as circumstances, fairness, and natural justice permit.
- c) There is sufficient information on file to make a decision.

ISSUE

[5] The Appellant raised a number of issues in the leave to appeal application. One of the issues he identified was that the General Division had failed to observe a principle of natural justice: In the course of the teleconference hearing at the General Division, the Appellant lost the connection to the hearing on his cell phone. The General Division proceeded with the appeal in the absence of the Appellant and made a decision based on the evidence already on file. In essence, the Appellant is claiming that he was denied the right to be heard.

THE LAW

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

- (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] The Appellant claims to have called back 5–10 minutes after he lost contact with the General Division teleconference, he later, only to be advised that the administrator was not on the line. He also states that he left a message but that it was not returned. He does not say with whom he left a message, or whether he spoke to an actual person or left a voice-mail message.

[8] There is no telephone log record of any appeals inquiry received following the disconnection. The next telephone log entry is dated January 20, 2017. In that call, the Appellant requests an update of the decision status.

[9] There is no record that the Appellant raised a concern that he had been disconnected from the teleconference hearing.

[10] The General Division did not consider that the Appellant might have lost the connection. The decision indicates that the Appellant “hung up,” and the General Division proceeded to complete the hearing on the basis of the materials filed.

[11] The General Division decision reads as follows:

“The Appellant joined the teleconference call and after a short rant about the Government, became angry when discussing GE 16-2602, an issue of voluntary leaving, in particular CUB 38804.

He stated, “I know where this is going, send me your decision and I will appeal it to the next level.[”] He refused to discuss the issue of misrepresentation, the issue in this file, and disconnected the call.”

[12] Beyond the above commentary, the General Division did not disclose on what basis it believed the Appellant to have hung up, as opposed to having “lost” the call or having been disconnected.

[13] The Tribunal notes that the Commission did not participate and that there is no recording of the hearing.

[14] Concerning the Appellant’s intention, there is little in the General Division decision to distinguish its interpretation from its observations. For example, the Tribunal cannot discern whether the Appellant explicitly stated that he refused to discuss an issue or whether the General Division inferred this from his conduct. Without a recording, the Tribunal cannot determine whether the General Division was reasonable in inferring, from its assessment of the Appellant’s emotional state and from his comments, that the Appellant had intended to disconnect from the call.

[15] In its submissions, the Respondent noted that the Appellant had hung up on a Commission employee on a previous occasion, presumably suggesting that, if the Appellant had hung up on the Commission in the past, he was more likely to have also hung up on the teleconference hearing.

[16] The record of the telephone call to which the Respondent alludes also does not disclose the basis on which the Commission believes the Appellant to have hung up.

[17] The fact that the connection was lost at the teleconference hearing on this occasion and that the connection had been lost on one prior occasion with the Commission does not establish a pattern such that this Tribunal can infer that the Appellant willfully withdrew from the teleconference hearing on November 20, 2016, or that he otherwise waived his right to a hearing.

[18] The Appellant is the only party in a position to know what actually occurred on the Appellant's end of the call, and whether the Appellant intentionally withdrew from the hearing or lost the connection unintentionally. The Appellant has clearly asserted that his cell reception was lost and that he attempted to reconnect.

[19] Although the General Division inferred that the Appellant had hung up from the Appellant's conduct, the decision is not sufficiently detailed for the Tribunal to be satisfied that the inference was well-founded.

[20] The Tribunal is mindful that there is no evidence to corroborate the Appellant's assertion that he attempted to reconnect to the hearing, or that he spoke to anyone or left a message with anyone at the Social Security Tribunal shortly after that the hearing. If a record of such an attempt existed, it would certainly support the Appellant's assertion that he did not intend to disconnect from the hearing. However, the absence of such evidence is not determinative.

[21] In light of the Appellant's direct and uncontradicted evidence that his "cell reception was lost" the Tribunal accepts that the Appellant did not intend to disconnect from the hearing.

[22] The General Division stated that it had no alternative but to make a decision based on the information in the file. The Tribunal respectfully disagrees. The General Division may have formed an impression that the Appellant had not wished to participate, but the natural justice right to be heard is of such fundamental importance that the General Division ought to have at least made some effort to confirm that its impression was accurate. An effort could have been made to reconnect with the Appellant, or the hearing could have been adjourned to schedule a continuance. There is no evidence that such an effort was made.

[23] While no particular form of hearing is necessarily required to satisfy the natural justice requirement that the Appellant be given an opportunity to be heard, the Appellant had been given to understand that he would have a teleconference hearing, and a teleconference hearing had commenced. The Appellant may well have had relevant evidence or additional argument that he had not yet forwarded and that he was prepared to deliver orally. When the General Division completed the appeal with reference only to the Appellant's brief appearance and the information on file, this opportunity was lost.

[24] The Tribunal finds that the General Division denied the Appellant the opportunity to be heard by completing the appeal and issuing a decision without first confirming that the Appellant had indeed intentionally withdrawn from the teleconference process.

[25] Having found that the General Division infringed on the Appellant's natural justice right to be heard, there is no need to consider whether additional justification exists for allowing this appeal.

CONCLUSION

[26] The appeal is allowed. The matter is remitted to the General Division for a new hearing and decision.

Stephen Bergen
Member, Appeal Division