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

Citation: *I. J. v. Canada Employment Insurance Commission,* 2017 SSTADEI 322

Tribunal File Number: AD-17-23

BETWEEN:

I. J.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 21, 2017

Canada

REASONS AND DECISION

DECISION

[1] The Social Security Tribunal of Canada grants leave to appeal to the Tribunal's Appeal Division (referred to as the “Tribunal”).

INTRODUCTION

[2] On November 29, 2016, the Social Security Tribunal’s General Division (General Division) found that the Commission had correctly applied the provisions of subsection 18(1)(*a*) of the *Employment Insurance Act* (Act), which disentitles a claimant from receiving benefits for any working day on which they cannot prove availability for work, and s.37 of the Act and s.55 of the *Employment Insurance Regulations* (Regulations), which together govern disentitlements for periods where a claimant is outside Canada.

[3] The General Division also confirmed the penalty in the amount of $2,000 imposed under s.38 of the Act.

[4] The Applicant filed an application for leave to appeal to the Tribunal on May 15, 2017.

PRELIMINARY ISSUE

The Applicant submitted a number of documents together with her submission to the Appeal Division. To the extent that any of these documents are new evidence, the Tribunal has not considered this evidence in reaching its decision. As set out in *Marcia v. Canada (Attorney General)*, 2016 FC 1367 (CanLII), “New evidence is not permissible at the Appeal Division as it is limited to the grounds in subsection 58(1) and the appeal does not constitute a hearing *de novo*.”

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (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."

[7] According to subsection 58(1) of the DESD Act, 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.

[8] Subsection 58(2) of the DESD Act states that, "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ANALYSIS

[9] The Applicant does not have to prove the case at the leave to appeal stage: Leave to appeal will be granted if the Tribunal is satisfied that at least one of the above-mentioned grounds of appeal has a reasonable chance of success. The Federal Court in *Osaj v. Canada (Attorney General)*, 2016 FC 115, at paragraph 12, stated that "[…] a 'reasonable chance of success' in this context means having some arguable ground upon which the proposed appeal might succeed."

[10] This means that the Tribunal must, in accordance with subsection 58(1) of the DESD Act, be in a position to determine whether there is a question of law, fact or jurisdiction, the answer to which may lead to the setting aside of the decision under review.

Erroneous finding of fact

[11] The General Division stated that the Applicant did not attend the early 2016 interviews as she "remained in X" and that there was "no evidence" that she attempted to attend the February 22, 2016, interview.

[12] The Applicant argues that the General Division made an important error regarding the facts, in holding that she did not attend scheduled interviews with the Ministry of Environment on February 22, 2016, and with the City of X on January 22, 2016, as she remained in X. The Applicant provided submissions, email correspondence, and testimony to the General Division that she had returned to Canada and that she did attend both the February 22, 2016, and the January 22, 2016, interviews. This would represent at least some evidence that she did not remain in X and that she did make an effort to attend the interviews.

[13] The General Division's understanding that the Applicant remained in X and that she did not attend the scheduled interviews in Canada appears to have formed a part of the justification for finding that the Applicant did not demonstrate a desire to return to the job market during the "period in question." According to the Federal Court of Appeal in *Faucher v. Canada (Employment and Immigration Commission)*, 1997 CanLII 4856 (FCA), A-57-96, this is one of three factors that should be considered in determining whether a claimant has shown that he or she was available for work.

[14] It is therefore arguable that the General Division based its decision that the Applicant was not available for work on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it per s.58(1)(*c*) of the DESD Act.

[15] In relation to the issue of misrepresentation, the Applicant also argues that she had not "knowingly made mistake to get just the benefits" (AD1-49).

[16] The General Division apparently found that the Applicant knew her claim was fraudulent at paragraph 30. However, the evidence on which it relied in making this finding is not apparent. Such a finding would be unnecessary to its determination that she knowingly

made a false statement. However, if there was no basis for such a finding, this would call into question the General Division's further decision, in which it confirmed that the Commission exercised its discretion judicially in respect of the amount of the penalty—meaning that it considered appropriate mitigating and aggravating circumstances. The General Division did not disclose on what basis it found the Commission 's discretion to have been exercised judicially, but the Applicant might reasonably suppose that the General Division's finding of fraud was considered as an aggravating circumstance, and that it was taken into account when the General Division confirmed the level of penalty imposed.

[17] It is therefore possible that the decision that the Commission's discretion had been exercised judicially is based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, per s.58(1)(*c*) of the DESD Act.

Failed to observe a principle of natural justice

[18] It is not clear from the General Division's reasons that it apprehended that the two job interviews in Canada were scheduled to take place at a time several months beyond the period in question, i.e. beyond the disentitlement period, which ended on April 30, 2015. Nor did the General Division articulate why it considered her attendance or non-attendance at these interviews to be relevant to her desire to work in the period prior to April 30, 2015.

[19] In relation to the General Division finding that the Applicant failed to demonstrate a desire to return to the job market during the "period in question," the Tribunal considers that the General Division's reasons could be found so unclear as to constitute a denial of natural justice under s.58(1)(*a*) of the DESD Act.

Error of law

[20] Although the Applicant did not identify any specific error of law, the Tribunal has reviewed the application and the record and is of the view that the General Division may have misapplied the test for the imposition of a penalty under s.38(1)(*a*) of the Act, or that it misapplied the test.

[21] The Federal Court of Appeal in *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206 (CanLII) defined the test as follows: "In order to be subject to a penalty under section 38(1)(a) it is not enough for the representation to be false or misleading; it must be made by the Applicant with the knowledge that it is false or misleading." Quoting Canada *(Attorney General) v. Purcell*, 1995 CanLII 3558 (FCA), [1996] 1 FCR 644 (FCA), the Court continued, "The Board must decide on a balance of probabilities that the particular claimant subjectively knew that a false or misleading statement had been made. In other words, the standard is not what the so-called reasonable unemployment insurance claimant would know."

[22] The General Division found that the Applicant knew that her responses in the negative to the question "Were you outside Canada during the period of this report" were false when she made them: "The Appellant stated to the General Division that she did understand if she said YES she would not get benefits and if she answered NO she would get benefits […]"

[23] However, the General Division also stated, at paragraph 30, that "[…] the Appellant has not provided any evidence of any further mitigating factors that would allow it to conclude that she did not knowingly make false and misleading statements." According to *Mootoo*, the determination of whether a claimant knowingly made a false and misleading statement under s.38(1) relates to the subjective state of mind, although it is said that it may "take into account common sense and objective factors."

[24] Objective factors may be considered in relation to s38(1) of the Act. "Mitigating factors" are referenced in the jurisprudence in relation to whether the *amount* of the penalty has been properly determined under s38(2) of the Act. The General Division's choice of words suggests that it may have confused the test or taken into account irrelevant or improper considerations.

[25] Furthermore, the General Division noted in paragraph 31 that, "[…] [the Appellant] had 'knowingly' completed her reports to collect benefits <u>knowing her claim was fraudulent</u> and dismisses the Appellant's appeal on this issue" (emphasis added). From this statement, it appears that the General Division may have understood the test to require that she not only knew her statement was false but that she intended to commit fraud. Proof of fraud is not

necessary in order for a penalty to be imposed. A misapplication of the legal test would be an error of law under s.58(1)(*b*) of the DESD Act.

CONCLUSION

[26] Upon review of the appeal file, the General Division's decision, and the Applicant's arguments in support of her application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success under the grounds set out in s58(1) of the DESD Act. The General Division may have based its decision on findings of fact that it made in a perverse or capricious manner or without regard for the material before it (s.58(1)(*c*)); its reasons may be found to be inadequate (s.58(1)(*a*)); and the General Division may have made an error of law (s.58(1)(*b*)).

[27] Leave to appeal is granted.

[28] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division