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

Citation: *M. K. v. Canada Employment Insurance Commission*, 2018 SST 403

Tribunal File Number: AD-17-947
AD-17-959
AD-17-960

BETWEEN:

M. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 11, 2018

Canada

DECISION AND REASONS

DECISION

[1] The applications for leave to appeal are refused.

OVERVIEW

[2] The Applicant (Claimant) was working three part-time jobs and had two additional casual positions until he resigned from his part-time jobs at X and from his part-time job at X. Before that, he had received 15 weeks of special benefits beginning in August 2015. In December 2015, he submitted a request to the Respondent (Commission) seeking approval to attend school, but he did not receive that approval before he resigned from X and from X to commence a course of studies.

[3] The Claimant received three decision letters from the Commission dated December 20, 2016. In the first decision, his application for benefits was rejected effective December 20, 2015, on the basis that he had left his employment with X without just cause. In the second decision, the Claimant's application for benefits was rejected effective November 15, 2015, on the basis that he had left his employment with X without just cause. In the third decision letter, the Claimant's earnings were adjusted and allocated, and the Commission informed the Claimant that it was aware that the Claimant was on a training course, and that this was contrary to what the Claimant had told the Commission.

[4] The Claimant asked that these decisions be reconsidered. In response, the Commission maintained the first and second decisions regarding the Claimant's voluntarily leaving his employment at X and X, but made additional adjustments to the earnings allocation of the third decision. The reconsideration of the third decision also clarified that the Claimant was not considered available for work as a result of his training program, but it acknowledged the Commission's delay in processing his application and found him to be disentitled from receiving benefits in the period from March 21, 2016, through to April 8, 2016.

[5] The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeals with respect to the first decision (concerning the

voluntary leaving from X without just cause) and the third decision (concerning the allocation of earnings and availability for work), but it varied the effective date of the disqualification for voluntarily leaving X without just cause. The Claimant is now seeking leave to appeal all three of the decisions.

[6] All three applications for leave to appeal are refused, since there is no reasonable chance of success on appeal. The Claimant has failed to make an arguable case that 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 or that it erred in law.

PRELIMINARY ISSUE

[7] The General Division joined the appeals of the three Commission decisions on its own initiative under s. 13 of the *Employment Insurance Regulations* (Regulations) on the basis that there was a common question of law or fact arising from the appeals and that no injustice was likely to be caused to any party. Therefore, the three appeals were heard together, resulting in a single decision.

[8] The Claimant submitted to the Appeal Division a separate application for leave for each of the three appeals joined by the General Division. No party has expressed a concern with the manner in which the General Division proceeded or a desire to have the appeals heard separately, and I am not aware of any injustice to any party in joining the matters at the Appeal Division. The three leave applications are identical, and I consider that they concern a common question of law or fact.

[9] Therefore, I will also join the three appeals—AD-17-947, AD-17-959, and AD-17-960—on my own initiative.

ISSUES

[10] Is there an arguable case that the General Division based its decision on an erroneous finding that the Claimant's reason for separation was to attend school, and was this finding made in a perverse or capricious manner or without regard for the material before it?

[11] Is there an arguable case that the General Division based its decision on an erroneous finding that the Claimant was separated from all employment?

[12] Is there an arguable case that the General Division erred in fact or in law by determining that the Claimant was not capable of work, available for work, and unable to obtain suitable employment, during any working day of his benefit period?

ANALYSIS

General Principles

[13] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to apply the law. The law includes the statutory provisions of the *Employment Insurance Act* (Act) and the Regulations that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must reach conclusions on the issues that it has to decide, based on an application of the law to the facts.

[14] Two of the appeals to the General Division were unsuccessful, and a third decision was varied, but an application for leave now comes before the Appeal Division in relation to all three appeals. The Appeal Division is permitted to interfere with a General Division decision only if the General Division has made certain types of errors, which are called “grounds of appeal.”

[15] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out 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.

[16] Unless the General Division erred in one of these ways in its decision on a particular appeal, an appeal of the General Division decision cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion and the result.

[17] I must find in respect of a particular appeal that there is a reasonable chance of success of appeal, on one or more grounds of appeal, in order that I might grant leave and allow that appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1]

Reason for separation from smployment

[18] A claimant is disqualified from benefits under s. 30(1) of the Act if the claimant is found to have voluntarily left their employment without just cause. The Claimant argues that the General Division's decision that he voluntarily left his employment was based on an erroneous finding that he left to go to school, and that the General Division had not considered his reasons for separation from employment accurately". In describing his reasons, he says that he left because he was "offered an ultimatum," and he also says that he "did not have enough time on [his] schedule for [*sic*] accommodate all 5 employers."

[19] The Claimant also objects to his leaving being characterized as "quitting." I note that he himself has described his leaving as quitting in materials that he has filed with the General Division (GD8-5, for example) and in his February 27, 2018, letter to the Appeal Division. In any event, it is undisputed that he resigned from his positions at X and X. The Claimant submits that his resignation was not voluntary because he had been faced with what he calls an ultimatum. He described this in his testimony as "to resign or be terminated."

[20] The Claimant was presented with this choice only because he had requested that X and X make scheduling adjustments to accommodate his schedule, and neither employer would agree to his requests. However, this is irrelevant to the question of whether he "voluntarily left" his employment within the meaning of the Act. As noted by the General Division, the basic question is whether he had a choice to stay or leave. The question is not whether he had a choice to stay *on his terms* or leave.

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[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259

[21] However, the Claimant's circumstances and justification remain relevant to whether he had "just cause" for leaving. Paragraph 29(*c*) of the Act states that a claimant has just cause for voluntarily leaving an employment or taking leave from an employment if the claimant had no reasonable alternative to leaving or taking leave, having regard to all the circumstances (and including a list of enumerated circumstances).

[22] The General Division determined that the Claimant did not have just cause for leaving, based on its finding that he had quit his jobs at X and X to attend school (paragraph 101). The Claimant contends that the General Division's finding that he left his employment to attend school is inaccurate. In order to satisfy s. 58(1)(*c*) of the DESDA, a finding of fact would have to be not just inaccurate, or erroneous, but would have to have been made perversely or capriciously or without regard for the facts.

[23] The Claimant appears to take the position that the General Division ignored or misunderstood his testimony that he left because the employer gave him no choice. The General Division found that he had the reasonable alternatives of remaining employed, or of remaining employed until such time as he was sponsored or approved to attend training. It did not accept that the Claimant had no choice but to leave.

[24] The General Division's conclusion that the Claimant could have remained employed does not imply that it believed he could have remained employed on his proposed terms. Rather, it is implicit that the Claimant could have remained employed *if he adhered to the existing terms of his employment*, and this appears to be supported by the evidence. The Claimant testified that X and, similarly, X, rejected his "offer" (request for accommodations) and confirmed their requirement that he be available for work. Thus, the "ultimatum" the Claimant says he was given apparently presupposed the Claimant's unwillingness to be available as required.

[25] While still asserting that he had to leave because of an ultimatum, the Claimant's letter of February 27, 2018, makes the further claim that the ultimatum was because he was "already employed by too many other employers and did not have enough time on [his] schedule for [*sic*] accommodate all 5 employers" (namely, X, X, the X, and casual work with the X [security at X], and with X).

[26] In order to assess whether any of the Claimant's evidence may have been overlooked or misunderstood, I reviewed the audio recording of the hearing. The Claimant testified as to his difficulty coordinating his various jobs and shifts as a justification for leaving the most inflexible of those jobs. However, I did not discover any evidence that supported a link between his employers' "ultimatums" and the Claimant's asserted conflict with the schedules of other employers. He testified to having some difficulty managing these various jobs, but he also testified that he had previously been able to manage conflicts between his jobs with X, X, and the X, and that he had taken on additional opportunities for casual security work in December 2015, shortly before he left the X and X jobs and commenced his studies. This testimony was given in the context of which of his jobs he could maintain *and* go to school at the same time.

[27] The Claimant also testified that his employers knew he would be starting school in January 2016, and that they rejected his request to work around his anticipated schedule in December 2015, immediately before he resigned. The General Division referred to December 2015 email exchanges between the Claimant and the two employers, and to the Claimant's request to X for a leave of absence to attend school.

[28] I agree with the Claimant that the General Division based its decision that he had voluntarily left his employment, at least in part, on a finding that he had left his employment to attend school. The question is whether this finding was made in a perverse or capricious manner or without regard for the material before it. However, the finding that the Claimant left his employment with X and X to attend school has a readily apparent factual foundation, which may be observed in the Claimant's statements to the Commission (paragraph 98 of the decision), in the emails he sent to X and X(paragraph 99), and in his own testimony as referenced above. The Claimant disagrees with the manner in which the General Division interpreted his evidence, but he has not identified any evidence that was ignored or overlooked. Therefore, there is no arguable case that the General Division based its decision on any erroneous finding of fact.

Complete or Partial Separation

[29] The only ground of appeal that the Claimant selected in completing his application for leave is the one found in s. 58(1)(*c*) of the DESDA, i.e. that 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. In response to my request that the Claimant clarify his ground of appeal, he provided a letter dated February 27, 2018. In this letter, the Claimant submitted that his "separation from employment was not a complete seperation [*sic*]" because he continued to work for the X, X, and X Security after he quit X and X.

[30] However, the General Division did not find, nor was it required to find, that the Claimant "quit all of [his] employment and then claimed Employment Insurance for being unemployed." The decision relied on the fact that the Claimant had left his employment at X and X. Subsection 30(1) disqualifies a claimant who voluntarily leaves *any* employment without just cause. Paragraph 29(*a*) defines "employment" for the purpose of s. 30 as "any employment of the claimant within their qualifying period or their benefit period."

[31] I find no arguable case in this regard.

Availability for work and allocation of earnings

[32] The third appeal before the General Division concerned a reallocation of earnings and a determination that the Claimant was unavailable for work when he was attending school and therefore disentitled to benefits.

[33] Because the Claimant's leave applications pertained to three separate appeals but were otherwise identical, the Claimant was asked to identify what he considered to be errors in respect of each appeal individually, and to explain why he considered them to be errors. The selected ground of appeal for all three appeals was an erroneous finding of fact; however, even in his February 27, 2018, response to the request for clarification, the Claimant did not identify the finding that he considered to be erroneous for this third appeal. Correspondingly, he failed to describe why any finding was made in a perverse or capricious manner or without regard for the material before the General Division.

[34] I have reviewed the audio recording of the hearing, together with the submissions and evidence that were both before the General Division, in accordance with the leading of the Federal Court in decisions such as *Karadeolian*.[2] I can find no instance of evidence of

[2] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

significance that was overlooked or misapprehended in respect of the Claimant's availability for work or any of the other issues that were before the General Division.

[35] The Claimant has failed to make an arguable case in respect of any of the grounds of appeal. There is no reasonable chance of success on appeal.

CONCLUSION

[36] All three applications for leave to appeal are refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	M. K., self-represented