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

Citation: *L. M. v. Canada Employment Insurance Commission*, 2018 SST 431

Tribunal File Number: AD-17-874

BETWEEN:

L. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 19, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] When the Applicant (Claimant), left her job at the end of May 2015, she went to Service Canada to give them a copy of her Record of Employment (ROE). At Service Canada, she was informed that she would not be eligible for Employment Insurance benefits until her severance ran out. After her severance finally ran out, she applied for benefits. This was in January 2017. The Respondent (Commission), denied her application on the basis that she had zero insurable hours of employment in the preceding 52 weeks. The Claimant requested a reconsideration and the Commission maintained its decision. The Commission also refused to antedate her claim on the basis that she did not have good cause for the delay. The Claimant appealed to the General Division of the Social Security Tribunal, but her appeal was dismissed. The Claimant is now seeking leave to appeal to the Appeal Division.

[3] The appeal does not have a reasonable chance of success. The Claimant did not identify any error of fact or of law. Her principal concern is with the manner in which the General Division applied settled law to undisputed facts, and this is a question of mixed fact and law. Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) does not give me the jurisdiction to consider mixed errors of fact and law.

ISSUE

[4] Is there an arguable case that the General Division erred when it found that the claim could not be antedated because she did not have good cause for the delay in applying for benefits?

ANALYSIS

General principles

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

[6] The appeal to the General Division was unsuccessful, and the application now comes before the Appeal Division. The Appeal Division is permitted to interfere with a decision of the General Division only if the General Division has made certain types of errors, which are called "grounds of appeal."

[7] Subsection 58(1) of the DESD Act 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 before it.

[8] Unless the General Division has erred in one of these ways, the appeal cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion or the result.

[9] At this stage, I must find that there is a reasonable chance of success for one or more grounds of appeal in order to grant leave and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1]

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

Basis for finding of "good cause for delay"

[10] The Claimant does not dispute that she had no insurable hours in the 52 weeks preceding when she made her initial claim in January 2018. Her concern is with the Commission's refusal to antedate her claim. According to s. 10(4) of the Act, a claimant may antedate his initial claim application if the claimant can show that the claimant would have been qualified to receive benefits on the earlier date and also show that there was good cause for the delay throughout the period from the earlier date to when the initial claim was actually made.

[11] In her appeal to the General Division, the Claimant argued that she had good cause for the delay because she had never collected employment insurance benefits and didn't know that she had only four weeks to apply. She argued that it was reasonable in the circumstances to wait until her severance ran out before applying.

[12] The Claimant filed written submissions to the General Division in which she stated that she was told at Service Canada that she was not eligible for benefits until her severance ran out (GD2-3). However, she stated in her oral testimony that, once Service Canada had her ROE, she "thought that's all I had to do". When the General Division referred the Claimant to the statement that she made to the Commission that she had not enquired at Service Canada about her responsibilities or filing procedures (GD3-25), she agreed that she did not, and she said that she thought the main thing was that they had the ROE. She testified as follows: "In my mind, I thought because I had a severance I wouldn't get employment anyway until my severance ran out." On further questioning as to why she thought she would not get Employment Insurance benefits if she received a severance, the Claimant said only, "because I thought your severance was to hold you over until I got a new job".(sic).

[13] The Claimant has not identified any evidence that was ignored or misunderstood by the General Division. In fact, it appears from the decision that the General Division Member's understanding of the facts is consistent with the Claimant's testimony in all significant particulars. The Claimant simply disagrees with the General Division's conclusion that she did not act reasonably and therefore that she did not have good cause for her delay. It is not my

function to reassess the evidence or reweigh the factors that were considered by the General Division to reach a different conclusion.[2]

[14] There is therefore no arguable case that the General Division's finding that the Claimant did not have good cause was made in a perverse or capricious cause or without regard to the material before it.

Reasonableness of the Claimant's actions

[15] The question of whether the measures taken by the Claimant were reasonable in the circumstances is a mixed question of fact and law. In considering this very issue, the Federal Court of Appeal has recently held that the Appeal Division has no jurisdiction to intervene on a question of mixed fact and law.[3]

[16] I am bound to follow the decision of the Federal Court of Appeal. A mixed error of fact and law is not one of the grounds of appeal listed in s. 58(1) of the DESD Act. The Appeal Division has no jurisdiction to consider mixed errors of fact and law and there is therefore no reasonable chance of success on appeal.

CONCLUSION

[17] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	L. M., self-represented

[2] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[3] *Quadir v. Canada (Attorney General of Canada)*, 2018 FCA 21.