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

Citation: *R. C. v. Canada Employment Insurance Commission*, 2018 SST 490

Tribunal File Number: AD-18-71

BETWEEN:

R. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 3, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission), refused the Applicant's (Claimant) application for benefits on the basis that he voluntarily left his employment without just cause. The Claimant requested a reconsideration of this decision, arguing that he did not quit but that he had been terminated without cause. The Commission maintained its original decision, and the Claimant appealed to the General Division of the Social Security Tribunal.

[3] The General Division dismissed the Claimant's appeal on December 28, 2017, confirming that he had left his employment without just cause. The Claimant now seeks leave to appeal that decision.

[4] The Claimant's appeal does not have a reasonable chance of success. 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 to the material before it.

ISSUES

[5] Is there an arguable case that the General Division based its decision on an erroneous finding of fact that the Claimant voluntarily left his employment, and that this finding was made in a perverse or capricious manner or without regard for the material before it?

[6] Did the General Division refuse to exercise its discretion by failing to investigate additional circumstances not in evidence?

PRELIMINARY ISSUES

Is the application for leave to appeal late?

[7] The leave to appeal decision is late. The General Division decision was issued on December 28, 2017. There is no evidence on when the decision was actually communicated to the Claimant, but the Appeal Division acknowledged that it received the Claimant's application on January 25, 2018, so the *initial* application could not have been late.

[8] However, the initial application was not complete. The Appeal Division sent a letter to the Claimant on January 26, 2018, informing him that the application for leave lacked certain information and inviting him to remedy the deficiencies by February 26, 2018. The Claimant contacted the Appeal Division on February 2, 2018, to clarify what was required to complete his application. The Appeal Division directed a second letter to the Claimant, dated February 20, 2018, to reiterate that the application was still incomplete.

[9] The Claimant obtained further clarification by telephone on March 1, 2018, and forwarded the final requirements. On March 2, 2018, the Appeal Division acknowledged the Claimant's completed application.

[10] Paragraph 57(1)(*a*) of the *Department of Employment and Social Development Act* (DESD Act) stipulates that an application for leave to appeal must be made in the prescribed form and manner and within 30 days of the date it is communicated to the appellant. Section 40 of the *Social Security Tribunal Regulations* prescribes the form and the content required of a complete application. An incomplete application is not yet an application within the meaning of s. 57(1)(*a*) of the DESD Act.

[11] The Appeal Division has a practice of deeming incomplete applications to be filed on time if the incomplete application is received within 30 days of the date the decision is communicated and the missing information is provided by the deadline provided by the Tribunal. In this case, the Tribunal imposed a deadline of February 26, 2018 for receipt of the missing information. That information was not received until March 2, 2018. The application is therefore late.

Should the Claimant be granted an extension of time to seek leave?

[12] I will grant an extension of time and permit the late application to proceed.

[13] Subsection 57(2) of the DESD Act permits me to allow further time for the application of leave to be made. The decision to allow further time is a highly discretionary decision[1] but, in exercising my discretion to grant an extension of time, I must still have regard to the four factors identified by the Federal Court in *Gattellaro*.[2] They are as follows:

- A continuing intention to pursue the appeal;
- A reasonable explanation for the delay;
- The existence of prejudice to the other party if the extension is allowed, and;
- The matter discloses an arguable case.

[14] The weight given to each of the above factors may differ in each case, and in some cases, different factors will be relevant. The overriding consideration is that the interests of justice be served.[3]

[15] In this case, the Claimant's initial incomplete application was filed on time, and he was only four days late in completing his application. He maintained contact with the Tribunal for the purpose of clarifying and satisfying the leave application requirements. I find that he had both a continuing intention to pursue the appeal and a reasonable explanation for the delay. Furthermore, I find that a delay of only four days could not have prejudiced the Commission in its ability to respond to the application.

[16] While I do not find that the matter discloses an arguable case, as will be evident from my reasons below, three of the *Gattellaro* factors are supportive of granting an extension of time. Given the minimal delay, I cannot accept that the interests of justice would be served by denying the extension of time.

[17] I will consider the Claimant's application for leave.

---

[1] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498
[2] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883
[3] *Canada (Attorney General) v. Larkman*, 2012 FCA 204

ANALYSIS

General principles

[18] 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 *Employment Insurance Regulations* (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 apply the law to the facts to reach conclusions on the issues that it has to decide.

[19] 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."

[20] 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.

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

[22] At this stage, I must find that there is a reasonable chance of success on 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.[4]

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

The finding that the Claimant voluntary left his employment

[23] Section 30 of the Act stipulates that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left employment without just cause. The Claimant had argued at the General Division that he did not leave his job voluntarily but that he was fired. Had the General Division found that he had been fired, it would have then had to further consider whether he had been fired for misconduct. Having instead found that the Claimant voluntarily left his employment, the General Division considered whether the Claimant had any reasonable alternative to leaving, having regard to all the circumstances.

[24] The Claimant submitted that the General Division erred in finding that he had voluntarily left his employment. According to the Claimant, the foreman's statement that he should "not bother coming back" cannot be interpreted as quitting, no matter what the circumstances.

[25] The General Division recognized that both the Claimant and the employer accepted that the Claimant's foreman had told him to "not bother coming back" (paragraphs 8 and 11 of the decision). The Claimant appears to view the fact that the foreman made such a statement as conclusive proof that he was terminated and did not quit. He feels that this is true "no matter what the circumstances."

[26] However, it is not an error for the General Division to consider evidence of the circumstances surrounding the Claimant's departure from his employment, including the context of the foreman's statement. The undisputed facts include the following:

- that the foreman's statement was in response to the Claimant's declaration that he intended to take some time off (paragraphs 11 and 14). According to the Claimant's request for reconsideration, he told the foreman that he would not be at work for "the next couple of days and all [of the] next week."
- that a letter from the assistant shop foreman, submitted by the Claimant in support of his reconsideration application, stated that "[The Claimant] was told that if he left he might as well not return." The employer agreed that the foreman told him not to bother coming back "if he left" (paragraph 16).

- That the foreman was upset or annoyed at the time he told the Claimant not to bother coming back (the employer described the foreman as being "short" with the Claimant and the Claimant described him as "yelling"), but that he then asked the Claimant into his office to discuss the matter further. The Claimant refused to do so and left (paragraphs 14 and 16).

[27] The General Division is the trier of fact, and it was open to the General Division to find that the Claimant had voluntarily left, even on the undisputed evidence. I appreciate that the Claimant disagrees with the manner in which the General Division weighed and analyzed the evidence and with its conclusion, but simply disagreeing with the findings does not establish a ground of appeal under s. 58(1) of the DESD Act.[5] Nor does a request to reweigh the evidence establish a ground of appeal with a reasonable chance of success.[6] The Claimant has not convinced me that there is an arguable case that the General Division erred in the manner that is required by s. 58(1)(*c*) of the DESD Act.

Stress as the reason for leaving

[28] The Claimant also argued that the General Division erred in mistakenly characterizing his application for benefits at paragraph 6 of the decision as having stated that he quit his employment because he was getting stressed. The Claimant had indicated that he "quit" on the application form and he stated that he was "getting very stressed" and that he "had to take a small break for stress relief" in response to question 8 of the questionnaire, which asked, "explain fully how [the foreman] w[as] involved in causing you to quit your job?" However, it would appear that stress was offered as the reason that the Claimant told his foreman he was taking time off and not a reason why he quit. I agree with the Claimant that the General Division's summary of this particular piece of evidence is inaccurate.

[29] However, the General Division revisits this question at paragraph 37, where it notes that the Claimant completed the questionnaire stating that he quit because of his foreman, which is accurate in relation to his response to questions 6, 7, and 8 of the questionnaire. The General

[5] *Griffin v. Canada (Attorney General)*, 2016 FC 874
[6] *Tracey v. Canada (Attorney General)*, 2015 FC 1300

Division also found more particularly at paragraph 37 that the Claimant had voluntarily left after refusing to accept that the foreman would not authorize time off.

[30] Such a finding was open to the General Division based on the facts, and the balance of the General Division's evidence summary and its analysis suggests that the General Division fully appreciated both the manner in which the Claimant characterized his departure and the evidence related to that departure.

[31] The finding that the Claimant voluntarily left his employment or "quit" does not appear to have been influenced by the misstatement of the Claimant's response to question 8. Therefore, I do not accept that it supports an arguable case that the General Division's finding was perverse or capricious or made without regard to the material before it.

Significance of the evidence of text messages

[32] The Claimant did not dispute that the employer attempted to text him as per paragraphs 10 and 16, but he states that he could not have received the texts. Putting aside for the moment the question of whether evidence that he could not have received the texts was even before the General Division, I am not convinced of the relevancy.

[33] The General Division relied on the foreman's email but not on any text message evidence, and it relied on the email evidence only to support a finding that the foreman was expecting the Claimant to return to work after his time off. There is no indication that the employer's or foreman's texts factored into the decision at all.

[34] The Claimant has not made out an arguable case that the General Division based its decision on any finding related to the Claimant's receipt, or non-receipt, of texts from the employer or foreman.

Further consideration of just cause

[35] I have found that there is no arguable case that the General Division erred in finding that he had voluntarily left his employment. Section 29 of the Act explains that a claimant will have just cause for voluntarily leaving an employment if the claimant had no reasonable alternatives to leaving having regard to all the circumstances. However, the Claimant's arguments were entirely focused on the distinction between voluntary leaving and being terminated. He did not suggest that the General Division erred by failing to have regard to all the circumstances or in its identification of reasonable alternatives.

[36] I have followed the lead of the Federal Court in cases such as Karadeolian[7] in which it was stated that "[…] the Tribunal must be wary of mechanistically applying the language of section 58 of the Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party […]."

[37] Accordingly, I have reviewed the record for some other error and had particular regard to whether any evidence was overlooked or misunderstood in respect of those circumstances in evidence that would be relevant to determining whether the Claimant had reasonable alternatives to leaving. However, I was unable to discover any significant evidence was overlooked or misunderstood or any other obvious error.

[38] There is no 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.

Incomplete investigation

[39] The Claimant further argued that the General Division did not enquire into why the Claimant's foreman was later relieved of his duties and that it did not fully investigate the circumstances surrounding the end of his employment. This might be understood as an argument that the General Division failed to exercise its discretion as required under s. 58(1)(*a*) of the DESD Act.

---

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

[40] The Federal Court has confirmed that a tribunal has no obligation to seek evidence from an applicant.[8] Similarly, the General Division has no duty to seek out additional evidence from any other source. As stated by the Supreme Court of Canada, "failure to do what is not required should not be construed as a denial of the right to be heard or a refusal of jurisdiction."[9] Since the General Division is not required to investigate, it is not a refusal of jurisdiction to fail to investigate.

[41] I find that there is no reasonable chance of success on appeal.

CONCLUSION

[42] The application is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	R. C., self-represented

[8] *Grosvenor v. Canada (Attorney General)*, 2018 FC 36
[9] *Labour Relations Board v. Traders' Service Ltd.*, [1958] SCR 672 (SCC), at p. 677