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

Citation: *J. F. v. Canada Employment Insurance Commission*, 2018 SST 516

Tribunal File Numbers: AD-18-64; AD-18-65

BETWEEN:

J. F.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 9, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application is refused.

OVERVIEW

[2] The Applicant (Claimant) had been diagnosed with depression and was receiving special Employment Insurance benefits. When he was cleared to work again, he converted his benefits to regular benefits and later accepted a job as a commission salesperson for a vehicle dealership. He was to be paid a $3,000 training allowance and a specified commission per sale. Because he did not know whether the job would work out, he continued to collect Employment Insurance benefits. After a short time, the Claimant quit his job at the dealership, claiming that he had not made a single sale and that he had no income whatsoever.

[3] When the Respondent, the Canada Employment Insurance Commission (Commission), discovered that the Claimant had been working, it assessed an overpayment for the benefits that he received from the middle of June to the end of July 2015 and it imposed a penalty. The Commission also determined that the Claimant was disqualified from benefits because he left his job without just cause. The Commission maintained its decision that the Claimant had voluntarily left his employment in one reconsideration decision dated April 13, 2017, and maintained its penalty decision in a separate reconsideration decision, also dated April 13, 2017. The Claimant appealed both reconsideration decisions to the General Division of the Social Security Tribunal. In a decision dated December 17, 2017, in which the two appeals were joined, the General Division varied and reduced the amount of the penalty but it also dismissed the appeal regarding his disqualification for having left his employment without just cause. The Claimant seeks leave to appeal to the Appeal Division.

[4] The appeal has no reasonable chance of success, so I must refuse the application. The General Division decision did not fail to observe a principle of natural justice, err in jurisdiction, err in law, or make an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

PRELIMINARY ISSUE

Joined Appeals

[5] The General Division joined the appeals of the two Commission reconsideration decisions on its own initiative under s. 13 of the *Social Security Tribunal Regulations* on the basis that there was a common question of law or fact arising from the appeals. As a result, the two appeals were heard together, resulting in a single decision. In considering whether to grant leave to appeal from the General Division decision, I am also necessarily considering whether there is an arguable case that the General Division erred in relation to both Commission decisions.

New Evidence

[6] The Claimant has attached additional evidence regarding the allocation of his earnings, his bank account, and the advertised terms of employment. However, the Appeal Division can consider only the evidence that was before the General Division.[1]

ISSUES

[7] Is there an arguable case that the General Division failed to observe a principle of natural justice by holding a videoconference hearing?

[8] Is there 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 evidence before it in one or more of the following ways:

- ignoring the Claimant's investment of his own time and resources in obtaining a licence to sell vehicles;
- proceeding with an inaccurate understanding of the Claimant's pay periods; or
- failing to consider or appreciate the Claimant's diagnosed depression.

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[1] *Mette v. Canada (Attorney General),* 2016 FCA 276

ANALYSIS

General Principles

[9] 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 apply the law. The law would include the statutory provisions of the *Employment Insurance Act* (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 as well. Finally, the General Division must reach conclusions on the issues before it, based on an application of the law to the facts.

[10] The applications for leave related to both appeals now come before the Appeal Division. 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."

[11] Subsection 58 (1) of the *Department of Employment and Social Development Act* (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;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

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

[13] At this stage, I must find that a particular appeal has a reasonable chance of success on one or more grounds of appeal in order to grant leave and allow that appeal to go forward. A reasonable chance of success has been equated to an arguable case.[2]

Is there an arguable case that the General Division failed to observe a principle of natural justice by holding a videoconference hearing?

[14] One of the grounds of appeal selected by the Claimant on his application for leave is that the General Division failed to observe a principle of natural justice or exceeded or refused to exercise its discretion. Natural justice refers to the fairness of the process. It includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against them.

[15] Expanding on his grounds of appeal, the Claimant referenced “prejudice” in connection with “section 3(a)”, and he stated that this was a factor in the decision. I presume that the Claimant’s reference to section 3(a) is a reference to paragraph 3 of the General Division decision. This paragraph supplies the rationale for proceeding by way of videoconference. Paragraph 3(a) identifies the possibility that credibility may be a prevailing issue as one reason that the videoconference process was selected. Therefore, I understand the Claimant to be asserting that he was prejudiced by the selected hearing process.

[16] The selection of the method of proceeding is a matter which is within the discretion of the General Division member, and there is no evidence that it is more difficult to assess credibility by videoconference than through an in-person hearing. Furthermore, the Claimant accepted the hearing process at the time of the hearing without objection. Finally, the General Division decision does not find against the Claimant’s credibility or base its decision on any finding of credibility.

[17] The General Division did not fail to observe a principle of natural justice by selecting videoconference as the method of proceeding. I can find nothing else in the Claimant’s application that touches on a principle of natural justice (or jurisdictional concern).

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

Erroneous finding of fact: The Claimant's licence to sell vehicles

[18] The Claimant has also suggested 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.

[19] The Claimant contends that the General Division failed to consider his evidence that he had to invest both time and his own funds to obtain his licence to sell cars. The General Division did not expressly reference the Claimant's personal investment, but neither is it required to do so. It may be presumed to have considered all the evidence before it, unless the probative value of the evidence that is not discussed is such that it should have been.[3] In this case, the Claimant has not explained how his personal investment in time and money to become a salesman is probative of the issues on appeal, i.e. whether he had just cause for leaving and whether he knowingly made a false statement about his earnings.

[20] The Claimant has not made out an arguable case that the General Division's failure to expressly discuss his payment for his licence resulted in an erroneous finding of fact on which the decision was based.

Erroneous Finding Of Fact: Mistaken Pay Periods

[21] The General Division stated that the employer paid the Claimant a training wage during his employment and that the Claimant acknowledged that he did not have a pay period without earnings (paragraph 57). The Claimant argues that the General Division's understanding of the payment periods was not accurate and that he was not paid anything until June 30, 2015. This is important to the Claimant because his principal justification for leaving was that he was paid "zero dollars" (apart from the training pay that he acknowledged). In answer to the General Division member's question of whether he had any period with no earnings, he said "I think so" and he testified that he thought he was paid his training pay in "one shot" and only after he left. This would mean that he did not receive any earnings while he was still working for the employer.

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[3] *Lee Villeneuve v. Canada (Attorney General)*, 2013 FC 498

[22] The General Division member questioned the Claimant as to whether he would have received a paycheque at minimum wage from which he might have understood that he was being paid minimum wage, or whether he ever received a blank paycheque. The Claimant responded that he did not, although it is unclear whether he was denying having received a cheque at minimum wage or denying any nil pay period. However, he continued on to say that he thought his employer told him that he would be paid the training pay that he was owed after he left.

[23] The General Division recorded that the Claimant told the Commission that the employer paid him $3,000 in training pay on one paycheque, but the Claimant was not sure how the employer broke down his earnings on a weekly basis (paragraph 11). According to paragraph 12, this was confirmed by the employer.

[24] The Claimant also testified: "No, there was not a time where I would [inaudible] two weeks, and then didn't receive anything." It would appear that it was this last statement that the General Division had in view when it noted, at paragraph 26, that the Claimant stated that he had never had a pay period with no earnings because they were paying him for the training period. At paragraph 57, the General Division accepted that the Claimant had been entitled to the minimum wage if he failed to earn any commissions, which was based—in part—on its understanding that the Claimant had "acknowledged that he did not have a pay period without earnings."

[25] While the Claimant now unequivocally asserts that he was not paid until June 30, his testimony before the General Division was less certain. In fact, the Claimant was very forthright about his difficulty remembering how he was paid and when. In my view, the General Division's finding that the Claimant did not have pay periods without earnings took the Claimant's testimony into account and attempted to interpret that testimony.

[26] I also note that the General Division accepted that the Claimant genuinely feared he would have no income if he did not make sales. It determined that the Claimant could have spoken to his employer about his wages (and presumably confirmed his minimum guaranteed pay), rather than leaving without discussing his concerns about having no income whatsoever. Such a finding is not dependant on the General Division's understanding that he did or did not receive any pay prior to June 30, 2015.

[27] Therefore, I do not accept that the decision was based on the finding that the Claimant did not have a pay period without earnings, or that this finding was made without perversely or capriciously or without regard for the material before the General Division.

Erroneous finding of fact: Diagnosed depression

[28] The Claimant argued that the General Division either ignored his diagnosed depression or failed to take this condition seriously and that his depression was a major factor in his decision to leave his employment. I note that the General Division accepted the Claimant's testimony that he had been hospitalized for depression and that he remained in contact with his doctor throughout "this period" (prior to quitting). It gave significant weight to his mental health and hospitalization with respect to his penalty. However, the General Division also accepted that the Claimant did not quit on the advice of his doctor (paragraph 65), based again on the Claimant's testimony (paragraph 63).

[29] The Claimant's assertion that the General Division did not take his condition seriously is a challenge to the weight that the General Division attached to the evidence of his condition as one of the circumstances bearing on whether he had reasonable alternatives to quitting. I appreciate that the Claimant disagrees with the manner in which the General Division weighed and analyzed the evidence and with its conclusion, but this does not establish a ground of appeal with a reasonable chance of success.[4]

[30] The Claimant has not convinced me that there is 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.

General Review

[31] I have followed the lead of the Federal Court in cases such as Karadeolian,[5] in which it was stated: "[…] 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 grouns for appeal advanced by a self-represented party…"

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[4] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[5] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

[32] 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 that was overlooked or misunderstood.

[33] 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.

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

CONCLUSION

[35] The application is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	J. F., self-represented