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

Citation: *R. S. v. Canada Employment Insurance Commission*, 2018 SST 520

Tribunal File Number: AD-17-977

BETWEEN:

R. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 10, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. S. (Claimant), applied for Employment Insurance benefits on October 16, 2015, and the Respondent, the Canada Employment Insurance Commission (Commission), established a benefit period effective October 25, 2015. The Commission determined that the Claimant was entitled to 38 weeks of regular benefits, as well as an additional 25 weeks of benefits under s. 12(2.3) of the *Employment Insurance Act* (Act) as a long-tenured worker. His benefit period was also extended to July 2017. In February 2017, the Claimant had received all 63 weeks of benefits and his claim was terminated.

[3] The Claimant applied for reconsideration because he had expected to receive benefits until the end of his benefit period in July 2017 and because he had not received notice that his claim would be terminated. The Commission maintained its decision and the Claimant next appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal. He now seeks leave to appeal to the Appeal Division.

[4] The appeal has no reasonable chance of success. There is no arguable case that the General Division failed to observe a principle of natural justice, erred in law, or 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.

ISSUES

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice by holding a teleconference, or that it otherwise acted beyond or refused to exercise its jurisdiction?

[6] Is there an arguable case that the General Division erred in law by accepting

a) that the maximum number of hours for calculating weeks of regular benefits is 1820 insurable hours, regardless of the source(s) of those hours, or

b) that benefits may terminate prior to the expiry of the benefit period?

[7] 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 for the material before it?

ANALYSIS

General Principles

[8] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to consider the law. The law includes the statutory provisions of the Act and the *Employment Insurance 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 its conclusions on the issues that it has to decide.

[9] The appeal to the General Division was unsuccessful and the application now comes before the Appeal Division. The Appeal Division can intervene in a General Division decision only if it finds that the General Division has made certain types of errors, which are called "grounds of appeal."

[10] 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 before it.

[11] 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.

[12] 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.

Timing or Manner of General Division Hearing

[13] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision maker and a party's right to be heard and to know the case against them. The Claimant appears to be concerned that he did not have an opportunity to express his concerns or provide input before the General Division decision was made. It is not obvious whether the Claimant is objecting to the fact that the hearing proceeded by teleconference or whether he is concerned that the hearing was premature. In any event, it is apparent that the Claimant feels that he did not have an adequate opportunity to be heard.

[14] I note that the Commission's submissions were disclosed to the Claimant in advance of the hearing and that he was also provided with an opportunity to make his own pre-hearing submissions. He was sent a copy of his file with the September 13 notice of intent, and on October 27, he was sent a notice of hearing for the November 18 hearing, so he had almost two months to prepare for the hearing and to provide additional evidence or argument, if required. So far as the choice of hearing procedure, this is a matter that is entirely within the discretion of the General Division under s. 21 of the *Social Security Tribunal Regulations*. The Claimant called the Tribunal with some questions about the teleconference process on November 10, 2017, but he did not object to the telephone hearing process. Nor has he explained how he was prejudiced by the General Division's choice of teleconference hearing.

[15] The Claimant has not made an arguable case that the General Division failed to observe a principle of natural justice.

General Division's Jurisdiction

[16] Likewise, there is no arguable case that the General Division exceeded its jurisdiction or failed to exercise its jurisdiction. The General Division does not have the jurisdiction to compel the Commission to negotiate the date on which Employment Insurance benefits should conclude, to notify the Claimant that his benefits are drawing to a close, or to otherwise be more transparent. The General Division had jurisdiction only to determine the issue before it, which was whether the Claimant had received all of the weeks of Employment Insurance benefits to which he was entitled.

Maximum Number of Hours to Determine Weeks of Benefits

[17] When the Claimant was still employed, he held two full-time jobs. He accumulated more than 1820 insurable hours from one job as well as a significant number of insurable hours from the other job. The Claimant now suggests that he should have been able to use the insurable hours from his other job to qualify for continued benefits. He submits that his weeks of benefits should not be limited by his having accumulated the maximum number of insurable hours or that he should be able to carry forward the hours he had accumulated in excess of the maximum. He did not argue this before the General Division and, as a result, the General Division did not address this argument directly.

[18] However, there is no arguable case that the General Division erred by not carrying over excess insurable hours to qualify the Claimant for continued benefits. Subsection 12(2) of the Act states that the number of weeks for which benefits may be paid in a benefit period (not including the additional 25 weeks to which the Claimant was entitled as a long-tenured worker) shall be determined in accordance with Schedule I. Schedule I does not provide for increased weeks of benefits for additional insurable hours, once a claimant has attained 1820 hours of insurable employment in the qualifying period. This is true regardless of whether the insurable hours are accumulated from multiple employments.

[19] A benefit period is established in relation to those insurable hours that have been earned within its qualifying period, and s. 8(1)(*a*) of the Act states that the qualifying period is the

shorter of the 52-week period immediately before the beginning of a benefit period under s. 10(1), and the period beginning on the first day of the immediately preceding benefit period.

[20] Therefore, even if a separate benefit period could be established in relation to his second employment in such a manner that it would commence after he had exhausted benefits within his first benefit period, the qualifying period for a second benefit period would have to be the period that commenced on the first day of his first benefit period, i.e. a period in which he would have been on Employment Insurance benefits and not accumulating any insurable hours. In this way, s. 8 operates to prevent overlap of qualifying periods and excludes any excess hours (accumulated in the qualifying period prior to his first benefit period) from the qualifying period for any subsequent claim.

Benefit Entitlement vs. Benefit Period

[21] The Claimant also argued that the General Division erred in law by accepting that his benefits may terminate when his benefit period had not.

[22] The General Division stated that benefits may be paid for each week of unemployment falling within the benefit period under s. 12(1) of the Act. However, the General Division also noted that, under s. 12(2), the maximum number of weeks (of regular benefits) in the benefit period is determined in accordance with Schedule I by reference to the regional rate of unemployment and the number of insurable hours in a claimant's qualifying period (subject, in the Claimant's case, to the additional 25 weeks he was allotted under s. 12(2.3)).

[23] The Act clearly contemplates a distinction between the period in which benefits may be paid (the benefit period) and the actual number of weeks of benefits to which a claimant is entitled. The weeks for which benefits are actually paid are situated within the period of weeks in which the benefits *may* be paid (the benefit period), but benefits are not necessarily paid in every week of the benefit period. In this case, the benefit period was extended by 37 weeks to July 2017, in accordance with s. 10(13.3). At paragraph 41, the General Division cited s. 10(8) of the Act to the effect that "a benefit period ends when no further benefits are payable to the appellant in their benefit period, or when the benefit period would otherwise end, whichever occurs first." This is an accurate paraphrase of s. 10(8), and the General Division was simply

applying the legislation as it is written. The July 2017 date is the date that the "benefit period would otherwise end" under s. 10(8). However, the Claimant had used all 63 weeks of his benefit entitlement by February 11, 2017, so at that point, "no further benefits [were] payable." Because the Claimant's benefit entitlement lapsed first, his benefit period lapsed at the same time, in accordance with s. 10(8).

[24] I appreciate that the Claimant disagrees with the General Division's interpretation of the law. However, the Act is clear that the Claimant cannot receive more benefits within his benefit period than those to which he is entitled, and I can find no arguable case that the General Division erred in its understanding or application of the law. As noted by the Federal Court of Appeal in *Knee*, "adjudicators are permitted neither to rewrite legislation nor to interpret it in a manner that is contrary to its plain meaning."[1]

Erroneous Finding of Fact

[25] While the Claimant submits that the General Division made one or more erroneous findings of fact and states that "[t]he Tribunal fail(ed) to carefully review the evidence," the Claimant has failed to identify any material error. There is some question as to whether the benefit period was to lapse on July 15, 2017, or July 25, 2017, but given the finding that the Claimant's entitlement to benefits ended in February 2017, this was not material to the decision.

[26] I have followed the lead of the Federal Court in cases such as *Karadeolian*,[2] in which it was stated that "the Tribunal must be wary of mechanistically applying the language of section 58 of the [DESDA] when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party…."

[27] Accordingly, I have reviewed the record for some other error. However, I was unable to discover any significant evidence that was overlooked or misunderstood, or any other obvious error. 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.

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[1] *Canada (Attorney General) v. Knee*, 2011 FCA 301
[2] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	R. S., self-represented