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

Citation: *R. K. v. Canada Employment Insurance Commission*, 2018 SST 544

Tribunal File Number: AD-18-225

BETWEEN:

R. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 16, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] After the Applicant, R. K. (Claimant), was laid off from her employment in October 2016, she commenced a program of studies in early January 2017. Her studies were subsidized through Second Career, a program of the Ontario Ministry of Advanced Education and Social Development (MAESD). She declined a late-January recall to work on the basis that she was already involved and attending her program, and she would be liable to repay the cost of her Second Career subsidy if she quit.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), eventually determined that the Claimant voluntarily left her employment without cause when she refused to return to work. The Commission did not accept that she had been authorized by the Commission or by its designate to attend the school program. The Claimant sought reconsideration but was denied and her appeal to the General Division was dismissed. She now seeks leave to appeal.

[4] The application does not have a reasonable chance of success. The General Division did not have jurisdiction to consider either the alleged negligence of the Ontario MAESD or of its purported agent Second Chance Employment Counselling (Second Chance). Similarly, the General Division had no jurisdiction over the Commission's delay in adjudicating the disqualification and seeking recovery of the overpayment or over the Claimant's argument that the Commission was negligent. There is no arguable case that the General Division erred in law by failing to take negligence or delay into account or that the Claimant had just cause for leaving her employment to attend school without authorization.

ISSUES

[5] Is there an arguable case that the General Division erred in law by failing to consider the Commission's negligence or the negligence of its designates, of other governments, or of the agents of other governments?

[6] Is there an arguable case that the General Division erred in law by requiring the Claimant to have obtained authorization from a designated authority before leaving (or refusing to return to) her employment?

ANALYSIS

General principles

[7] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[8] By way of contrast, the Appeal Division cannot intervene in a General Division decision unless it can find that the General Division has made one of the types of errors described by the grounds of appeal in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and set out below:

> (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.

[9] 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 or result.

[10] 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.[1]

Negligence of other governments and their agents

[11] The Claimant argued to the General Division and maintains that she relied on advice from Second Chance, the employment counselling firm that was administering the application process of the Second Career subsidy program for the Ontario MAESD (formerly the Ministry of Training, Colleges and Universities). The Claimant noted that she attended an orientation session and completed the paperwork to complete the process through the MAESD and claimed that MAESD was also negligent in not having her request an authorization to decline work from the Commission.

[12] Whether Second Chance or MAESD (for which Second Chance is said to be an agent) may be found to be negligent, these matters are both irrelevant to the decision that was before the General Division and outside its jurisdiction. The General Division's jurisdiction is to hear appeals from reconsideration decisions and determine appeals based on the provisions of the *Employment Insurance Act* (Act) and the *Employment Insurance Regulations.* There is no arguable case that the General Division erred in law in failing to appreciate or accept the negligence of an Ontario provincial ministry or its agents or contractors.

Negligence of the Commission

[13] The Claimant has also suggested that the Commission was negligent in taking so long to adjudicate the Claimant's disqualification or to seek recovery of the overpayment.

[14] According to s. 52(1) of the Act, the Commission may reconsider a claim within 36 months. A claimant's liability to repay an amount paid by the Commission for any period for which the claimant is disqualified[2] is a debt due to the Crown,[3] and the only applicable statutory limitation to the Commission's recovery of overpayment is the 72 month limitation prescribed in

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[1] *Canada (Minister of Human Resources) v. Hogervorst,* 2007 FCA 41*; Ingram v. Canada (Attorney General),* 2017 FC 259
[2] *Employment Insurance Act, s.43(*a)
[3] *Ibid., s.47(1)*

s. 47(3). The Commission adjudicated the reconsideration well within 36 months and acted to recover the overpayment well within the 72 months. While it would be preferable if all decisions of the Commission were made more expeditiously, there is no statutory deadline for adjudication or recovery of overpayments that is relevant in the circumstances of this case.

[15] The Claimant has failed to demonstrate that the Commission's processing and adjudication processes were outside the scope of its authority under the Act, and it follows that there is no arguable case that the General Division erred in law in failing to find the Claimant's actions to be contrary to law.

Voluntary leaving without just cause

[16] Paragraph 29(*c*) of the Act states that a claimant has just cause for voluntarily leaving when the claimant has no reasonable alternative to leaving, having regard to all the circumstances. Under s. 30, a claimant is disqualified from receiving benefits if he or she has voluntarily left employment without just cause. The Claimant does not dispute that she voluntarily left her employment when she refused the recall from her employer, but she is of the view that she had just cause for doing so, based on her belief that her program had been approved.

[17] The General Division employed the correct legal test and applied it appropriately. It is settled law that leaving one's employment to attend school is not "just cause."[4] This is true, even where the Claimant's investment in training is at stake.[5] Many of the case law authorities also acknowledge an exception where a Claimant is authorized by the Commission to leave employment to go to school.[6] However, a referral to a program is not the same as an authorization to leave employment (or to refuse a recall, in this case). It is possible that the Claimant's "referral" by MAESD constitutes a referral by a designated authority under s. 25 of the Act, in which case s. 25 would operate to deem the Claimant to be capable and available notwithstanding s. 18 of the Act which would allow her to claim benefits while attending school. The Claimant believed she had been referred by Second Chance or MAESD to her program. She

[4] *Canada (Attorney General) v. Caron*, 2007 FCA 204
[5] *Canada (Attorney General) v. Connell*, 2003 FCA 144
[6] *Canada (Attorney General) v. Lessard*, 2002 FCA 469

also understood that her acceptance into the Second Career program included an authorization by the Commission for her to refuse a recall to work. It did not.

[18] I acknowledge that the Claimant believed she was following the advice of the provincial MAESD program and the Second Chance employment agency and that she felt she was entitled to rely on that advice. Unfortunately for her, she did not confirm that advice with the Commission. There was no evidence to suggest that the Commission authorized the Claimant to leave her employment to take the program in the first place or authorized her to refuse a recall to continue the program.

[19] I recognize that the Claimant may have suffered financial hardship as a result of her disqualification and of the Commission's efforts to recover the overpayment, but I am unable to discover any arguable case that the General Division erred in law.

[20] Following the direction of the Federal Court in such cases as *Karadeolian,*[7] I have searched the record for other evidence that may have been overlooked or misunderstood, but I have been unable to discover an arguable case in relation to such an error.

[21] The Claimant has not made out any of the grounds described in s. 58(1) of the DESD Act and there is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	R. K., self-represented

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