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

Citation: *O. B. v. Canada Employment Insurance Commission*, 2018 SST 574

Tribunal File Number: AD-18-178

BETWEEN:

O. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Konrad von Finckenstein

Date of Decision: 25.05.2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant made a claim for Employment Insurance (EI) benefits on June 9, 2017. On July 14, 2017, the Canada Employment Insurance Commission (Commission) informed the Applicant that they were unable to pay her benefits as she did not have enough hours of insurable employment in her qualifying period of June 6, 2016, to June 2, 2017. This decision was confirmed on reconsideration on August 15, 2017. On appeal before the General Division, the Applicant conceded that the Commission correctly calculated her qualifying period, the applicable unemployment rate of 7%, and the 548 hours of insurable employment accumulated in the qualifying period. However she requested that her application be antedated to April 12, 2017, when she quit her employment, with the associated recalculation of her hours of insurable employment. The General Division dismissed her appeal.

ISSUE

[3] Does the Applicant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?

ANALYSIS

[4] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) specifies the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or based its decision on an erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

[5] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove her case; she must instead establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, the Applicant must show that there is arguably some reviewable error upon which the appeal might succeed.

[6] Therefore, before leave can be granted, the Tribunal must be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

[7] In short, the Tribunal must be in a position to determine, in accordance with s. 58(1) of the DESDA, whether there is an issue of natural justice, jurisdiction, law, or fact that may lead to the setting aside of the General Division decision under review.

Does the Applicant's raise some reviewable error of the General Division upon which the appeal might arguably succeed?

[8] The scheme of the *Employment Insurance Act* is quite clear. A person who becomes unemployed can make a claim for benefits. Upon making a claim, a qualifying period—usually the 52 weeks before the claim was made—is established. The earnings during that qualifying period and the regional rate of unemployment (adjusted by a formula based on the rate of unemployment in the area in which the claimant lives) will determine whether the claimant qualifies for benefits during the benefit period, normally the 52 weeks following the date the initial claim was made. It is thus essential that a claimant make their claim as soon as they become unemployed; otherwise, any period of delay will become part of the qualifying period but show no hours of employment, thus lowering the total amount of hours acquired during the qualifying period. This can result in a claimant not having sufficient hours in their qualifying period to qualify for benefits.

[9] This is precisely what happened in this case. The Applicant became unemployed on April 12, 2017, but did not file a claim until June 9, 2017, with the result that her hours during the qualifying period fell below the minimum required. She asked that her initial claim be

antedated to April 12, relying on s. 10(4) of the *Employment Insurance Act*, which states the following:

> **(4)** An initial claim for benefits made after the day when the claimant was first qualified to make the claim shall be regarded as having been made on an earlier day if the claimant shows that the claimant qualified to receive benefits on the earlier day and that there was good cause for the delay throughout the period beginning on the earlier day and ending on the day when the initial claim was made.

[10] The Applicant argued before the General Division that she qualifies for an antedate for the following reasons:

a) She was moving;

b) She was looking for another job; and

c) She was living in a hotel, using her savings while looking for another job.

It is her contention that all these factors made her forget to apply for benefits.

[11] The General Division rejected her claim, holding the following:

> The [Applicant] was aware of the existence of EI, having applied in the past in 2013 and 2015. Rather than applying she chose to singularly seek work. A valiant pursuit on her part but this reasoning does not constitute good cause for the delay.
>
> The FCA has re-affirmed that ignorance of the law, even if coupled with good faith, is not sufficient to establish good cause. The correct legal test for good cause is whether the [Applicant] acted as a reasonable person in her situation would have done to satisfy herself as to her rights and obligations under the Act, (*Canada (Attorney General) v. Kaler*, 2011 FCA 266).

[12] On appeal, the Applicant repeated the same arguments and did not point to any specific fact or finding. She merely asserted, “I feel that my case has a reasonable chance for success because all the facts were not taken into consideration while on the teleconference call.”

[13] It is well-settled law that a claimant has an obligation to take "reasonably prompt steps" to determine entitlement to benefits and to ensure his/her rights and obligations under the *Employment Insurance Act*.[1] The General Division found that a reasonable person familiar with the process, as this applicant is, would not have put off filing a claim for over two months merely because she was looking for other jobs or was moving.

[14] I can find nothing wrong in the finding or the decision of the General Division that could arguably be construed as constituting a decision based "on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before" the General Division within the meaning of s. 58 of DESDA. Quite the contrary, the decision is logical and well laid out. The General Division considered and dealt with each of the Applicant's contentions. None of the evidence presented was misconstrued or overlooked.

[15] Thus there is no arguable case that the General Division based its decision on an erroneous finding of fact by not taking into account the claimant's circumstances and the important facts of her case. Accordingly this application cannot succeed.

CONCLUSION

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

Konrad von Finckenstein
Member, Appeal Division

REPRESENTATIVE:	O. B., self-represented

[1] *Canada (Attorney General) v. Carry*, 2005 FCA 367.