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

Citation: *R. R. v. Canada Employment Insurance Commission*, 2018 SST 667

Tribunal File Number: AD-18-341

BETWEEN:

R. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: June 11, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. R. (Claimant), had a term employment contract that ended on November 30, 2015, and she decided to pursue the possibility of buying into the business of her former employer as a partner. By the time it occurred to her to apply for Employment Insurance benefits, she believed she was already too late.

[3] In November 2016, the Claimant discovered that she could have applied for benefits earlier and she learned about the possibility of seeking an antedate. She applied for benefits on November 22, 2016, seeking an antedate to November 30, 2015. The Commission originally denied her request because it did not consider her hours with her employer to be insurable. When the Claimant obtained a Canada Revenue Agency ruling that her hours had been insurable, the Commission again denied her request on the basis that she did not have a reasonable explanation for her delay in applying. The Claimant asked for a reconsideration, but the Commission maintained its decision. The General Division of the Social Security Tribunal dismissed her appeal of the reconsideration decision. She now seeks leave to appeal the General Division decision to the Appeal Division.

[4] The Claimant has no reasonable chance of success. She has not made out an arguable case that the General Division ignored or misunderstood any of the evidence or that its findings of fact were otherwise perverse or capricious.

ISSUE

[5] Is there an arguable case that the General Division ignored or misunderstood evidence relating to the Claimant's attempts to clarify her rights and obligations under the *Employment Insurance Act?*

ANALYSIS

General Principles

[6] 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.

[7] 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 before it.

[8] 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.

[9] 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]

---

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

Is there an arguable case that the General Division ignored or misunderstood evidence relating to the Claimant's attempts to clarify her rights and obligations?

[10] The Claimant testified that she had not thought to apply for Employment Insurance benefits because she had been committed to the idea of working at her own business until February 2016. According to her testimony at the General Division hearing, she determined that she would not be buying an interest in the business and began to look for work at that time. The Claimant also stated she has a diagnosed condition of Borderline Personality Disorder and that this condition interferes with her judgement and makes it difficult for her to let go of an idea. She told the General Division that this was the reason that her delay continued even beyond February 2016.

[11] The General Division found that the Claimant did not have good cause for the entire period of the delay. Its finding relied on case law that requires claimants to demonstrate that they did "what a reasonable and prudent person would have done in the circumstances to satisfy as to their rights and obligations under the [*Employment Insurance Act*]."[2] The General Division found that she did not make efforts to clarify her rights and obligations for about a year and thus did not do what a reasonable and prudent person would do. It considered whether the Claimant's Borderline Personality Disorder qualified as exceptional circumstances,[3] but found that she had not proven that this disorder impacted her ability to enquire about her rights and obligations. Instead, the General Division found that her failure to apply in a timely manner was a result of her misunderstanding that the deadline had passed.

[12] In her application for leave to appeal, the Claimant asserts that the General Division made an error of fact. More particularly, she states that the General Division did not mention that she had "looked online prior to starting [her] formal job search in February 2016" and that she also called Employment Insurance around that time. She stated that an agent confirmed that she was past the four-week application timeframe but did not tell her that she could seek an antedate. She also states that if she had known about the option to antedate sooner, she would have made the application sooner.

---

[2] *Kamgar v. Canada (Attorney General*), 2013 FCA 157
[3] *Canada (AG) v. Caron,* A-395-85

[13] If by "looked online" the Claimant means that she conducted some form of informal job search prior to her formal job search—i.e. at the same time she was focused on becoming a business owner—the Claimant testified that she started looking for work around February 1, 2016. She did not provide any evidence of an earlier online job search. In any event, the Claimant did not explain how an online job search would be relevant to the question of why she did not apply for Employment Insurance benefits earlier. Therefore, I will assume that the Claimant's intention was to assert that the General Division did not consider that she had looked online for Employment Insurance-related information before starting her job search in February 2016.

[14] However, I can find no documentary or testimonial reference to her attempts to obtain information from the Commission to clarify her rights or obligations before November 2016. To the contrary, the General Division member specifically asked the Claimant whether, around February 1, 2016, when she realized that her business idea was not working out, she had contacted the Commission or a Service Canada centre, phoned, or searched for information online. Without qualification, the Claimant answered "No."[4]

[15] The Claimant did not point to any evidence that she sought information on her possible entitlement to benefits until November 2016. There is therefore no arguable case that the General Division ignored or misunderstood the evidence regarding the Claimant's efforts to clarify her rights and obligations.

[16] The Claimant also argued that she would have applied for benefits earlier if she had known to apply earlier. The General Division decision recognized this: it accepted that the Claimant did not apply in a timely manner because she thought the deadline had passed.[5] The General Division also acknowledged the Claimant's evidence that she was not told she could apply until November 2016, when she was in a Service Canada office on other business and thought to ask.[6]

[17] While I appreciate that the Claimant may not agree with the General Division that she has a responsibility to determine her rights and obligations, this is not an "erroneous finding of fact."

---

[4] Audio recording of General Division hearing at 00:16:35
[5] General Division decision, para. 19
[6] *Ibid.*, para. 12

The Claimant's responsibility is dictated by the courts above, and there can be no arguable case that the General Division erred by applying applicable case law.

[18] 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.

[19] 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 to the material before it under s. 58(1)(*c*) of the DESD Act. There is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	R. R., self-represented

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