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

Citation: *Z. C. v. Canada Employment Insurance Commission*, 2018 SST 699

Tribunal File Number: AD-18-319

BETWEEN:

Z. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: June 26, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, Z. C., applied for regular Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim for Employment Insurance benefits from September 5, 2017, because it found that he was taking a training course on his own initiative and therefore had not proven that he was available for work. The Applicant sought a reconsideration, arguing that although he attended college upwards of three days per week, taking a heavy equipment operator course, he was otherwise available and actively seeking employment. He claimed that if he had been able to find work, he would have quit school. The Commission maintained its decision on reconsideration.

[3] The Applicant appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division allowed the appeal in part. It found that the Applicant had failed to prove that he was capable of and available for work; that he was unable to obtain suitable employment on any working days since September 5, 2017; and that he had not rebutted the presumption that he was unavailable for work. The General Division also found that until February 7, 2018, the Applicant failed to make reasonable and customary efforts to obtain suitable employment; failed to adequately express his desire to return to the labour market through efforts to find suitable employment; unduly limited his chances of returning to the labour market; and was unavailable for work.

[4] The Applicant is now seeking leave to appeal the General Division's decision, alleging that the General Division erred by presuming that, in spite of his testimony, he would not have quit school to work. He also submits that the General Division erred by describing his job search as "insincere" without considering that there were no suitable employment opportunities available in his region. He also submits that the General Division erred in suggesting that because some of the job applications he made after January 1, 2018, were not limited to

employment as a heavy equipment operator, these other positions were suitable for him and that he should have applied for them before January 2018.

[5] For the reasons that follow, I am not satisfied that there is an arguable case on any of these arguments or, in other words, that the appeal has a reasonable chance of success.

ISSUES

[6] The following issues are before me:

(a) 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 in finding or presuming that the Applicant was unavailable for work?

(b) Is there an arguable case that the General Division 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, by describing his job search as “insincere?”

(c) 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 in finding that there was other suitable employment for the Applicant?

ANALYSIS

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

(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] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under s. 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey v. Canada (Attorney General).*[1]

Issue 1: Is there an arguable case that the General Division 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 in finding or presuming that the Applicant was unavailable for work?

[9] The Applicant cites paragraph 13 of the General Division decision, arguing that the General Division erred in presuming that he was unavailable for work because he was attending school. He claims that it erred because it failed to consider his testimony that he would have quit school if he had been able to find work, as well as the fact that he had worked on a full-time basis since 2012.

[10] Paragraph 13 of the General Division's decision represents the Commission's arguments. The General Division addressed the general presumption that the Applicant was unavailable for work at paragraphs 23 to 29. However, the General Division also examined whether the presumption could be rebutted. As part of this examination, the General Division reviewed the Applicant's course schedule and whether it limited his availability. The General Division also examined the Applicant's efforts to find suitable employment.

[11] The General Division also noted the Applicant's testimony that he was prepared to quit the course if he was offered employment. In this regard, the General Division referred to *Canada (Attorney General) v. Wang*,[2] where the Federal Court of Appeal held that the presumption of non-availability of work could be rebutted. There, the respondent had testified that her first

[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[2] *Canada (Attorney General) v. Wang*, 2008 FCA 112.

intention was to find and accept suitable full-time employment. She had provided evidence of her efforts to find such suitable employment. The Umpire found her to be credible, and the presumption had thereby been rebutted.

[12] The Applicant testified that he was prepared to quit his course if he was offered employment. The General Division did not immediately address this aspect of his testimony under its heading "Has the Appellant rebutted the presumption he is unavailable for work?" but it analyzed this point at paragraphs 37 and 43 to 49 by assessing his efforts to seek employment.

[13] The General Division noted that the Applicant had made nine applications for employment from September 2017 to December 2017, versus another 35 applications sometime after January 1, 2018. The General Division drew the following conclusions from this evidence:

i. at paragraph 45, that Applicant had a "limited desire to return to the labour market [that] continued until his classes ended on February 7, 2018;"

ii. at paragraph 46, that he "did not adequately express his desire to return to the labour market through efforts to find suitable employment until February 7, 2018;"

iii. at paragraph 48, that nine applications between September 2017 and December 2017 "is an adequate expression of desire to return to the labour market;" and

iv. at paragraph 49, that the applications made after January 1, 2018, adequately express his desire to return to the labour market through efforts to find suitable employment starting once his classes ended on February 7, 2018.

[14] Given the preceding and following paragraphs in the General Division's decision, it is apparent that the General Division made a typographical error at paragraph 48, where it describes the nine applications between September 2017 and December 2017 as "an adequate expression of desire to return to the labour market," when clearly it intended to write that the nine applications was an inadequate expression of desire to return to the labour market.

[15] Given the General Division's consideration of the Applicant's testimony, its overall analysis of the evidence, and its understanding of the nature of the applications made after

January 2018, the General Division was entitled to draw conclusions regarding the Applicant's availability for work and whether the Applicant's efforts to obtain suitable employment were reasonable and customary and reflected his desire to return to the labour market as soon as suitable employment was offered.

[16] Given the nature of the evidence regarding the Applicant's job search efforts, the General Division concluded that the job search efforts did not fully support the Applicant's evidence that he was prepared to quit his course if he was offered employment. In other words, the General Division found that a more extensive job search would have been appropriate, if the Applicant truly was motivated to obtain employment. This articulation of the law is consistent with the prevailing jurisprudence.

[17] Essentially, the Applicant is requesting that I draw a different conclusion from the evidence than the General Division did. As the Federal Court of Appeal has now consistently determined, a disagreement with the application of settled principles to the facts of a case does not afford me the basis for intervention.[3]

[18] I am not satisfied that there is an arguable case that the General Division either 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 it in finding or presuming that the Applicant was unavailable for work, simply because he testified that he would have quit his course if he had been offered employment.

Issue 2: Is there an arguable case that the General Division 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, by describing the Applicant's job search as "insincere?"

[19] No. I find that there is no arguable case that the General Division 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 by describing the Applicant's job search as "insincere."

---

[3] *Garvey v. Canada (Attorney General)*, 2018 FCA 118; *Quadir v. Canada (Attorney General)*, 2018 FCA 21.

[20] The Applicant cites paragraph 15 of the General Division decision, arguing that the General Division erred by finding that his job search efforts were "insincere." He argues that the General Division erred because it failed to consider the limited suitable employment opportunities available to him in his region.

[21] The Applicant suggests that had the General Division been mindful of the limited employment opportunities in his region, it may have determined that his job search efforts before January 2018 reflected "reasonable and customary efforts to obtain suitable employment," as well as his desire to return to the labour market as soon as suitable employment was offered. The Applicant states that he was able to be more aggressive in his job search after February 2018 because once he had completed his course, more opportunities became available to him. He denies any suggestion by the General Division that he could have expanded his job search efforts between September 2017 and December 2017.

[22] Paragraph 15 represents the Respondent's submissions. The General Division did not describe the Applicant's job search efforts as "insincere."

[23] However, the General Division did contrast the Applicant's job search efforts between September 2017 and December 2017 with his efforts after January 2018. It noted that the applications after January 2018 were not limited to employment as a heavy equipment operator. In other words, the General Division determined that the Applicant could have made these additional applications, which were not limited to heavy equipment operator positions, before January 2018.

[24] The Applicant suggests that the General Division erred in assuming that some of these additional job applications, those for positions not limited to work as a heavy equipment operator, were made before February 2018. However, the job list[4] did not indicate when the Applicant applied to these jobs. Furthermore, as the General Division noted at paragraph 45, the Applicant had not provided the dates on which he made these applications. The General Division noted that the Applicant had testified that they were made in both January and February 2018. The General Division was therefore entitled to find from this testimony that the Applicant had made these applications in January 2018.

[4] List of jobs to which the Applicant applied sometime after January 2018.

[25] I am not satisfied that there is an arguable case that the General Division 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 in describing the Applicant's job search as "insincere" or in finding that he could have expanded his job search between September 2017 and December 2017.

Issue 3: 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 in finding there was other suitable employment for the Applicant?

[26] The Applicant argues that the General Division erred in finding that because he had applied for more jobs sometime after January 2018, he was necessarily suited for other employment that he could have applied for between September 2017 and January 2018. The Applicant submits that because he was then qualified for work as a heavy equipment operator, he could be more aggressive in his job search after February 2018.

[27] As I have noted above, there was little supporting evidence before the General Division that the Applicant only became qualified for all or most of the jobs (to which he applied after January 2018) as he neared completion of his course. As the General Division noted, these additional job applications were not limited to work as a heavy equipment operator. Without additional supporting information or any details as to the nature of the employment to which he applied, it was open to the General Division to conclude that the Applicant might have been qualified for these other positions. While the General Division certainly could have decided differently on the facts before it, that alone does not warrant my intervention.

[28] Accordingly, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	Z. C., self-represented