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

Citation: *S. M. v. Canada Employment Insurance Commission*, 2018 SST 771

Tribunal File Number: AD-18-438

BETWEEN:

S. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 30, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. M., made a claim for Employment Insurance regular benefits. His claim was initially accepted. The Respondent, the Canada Employment Insurance Commission (Commission), subsequently learned that the Applicant was self-employed and determined that he was unavailable for work and therefore disentitled to Employment Insurance benefits from September 10, 2016 to the end of his claim. Effectively, this resulted in an overpayment. Upon reconsideration, the Commission determined that the disentitlement regarding the Applicant's employment and unavailability for work started on November 13, 2016 instead of September 10, 2016.

[3] The Applicant appealed the Commission's reconsideration decision to the General Division. The General Division decided that the Applicant had failed to prove that he was available for work from November 15, 2016 to February 3, 2017, and that he was therefore subject to a disentitlement to benefits for this time frame. And, because it found that the Applicant's involvement in his self-employment was "not minor in extent," he was regarded as having worked full working weeks starting from February 6, 2017, and that he was therefore subject to a disentitlement from February 6, 2017.

[4] The Applicant seeks leave to appeal the General Division's decision. He claims that the General Division failed to observe a principle of natural justice or based its decision on erroneous findings of fact that it made without regard for the material before it. In particular, he alleges that the General Division failed to consider the fact that he had been unaware that he could be disentitled to Employment Insurance benefits when he was self-employed. I must now decide whether there is an arguable case that the General Division overlooked any of the evidence—that is, does the appeal have a reasonable chance of success?

[5] I am refusing leave to appeal because I find that the appeal does not have a reasonable chance of success.

PRELIMINARY MATTERS

[6] The Applicant claims that requiring him to repay the Employment Insurance benefits will result in financial hardship. He filed a copy of his current credit profile to show his precarious financial position. The General Division did not have copies of these records.

[7] New evidence generally is not permitted on an appeal, except in limited circumstances.[1] The Applicant has not presented any reasons for me to admit these additional records under any of the exceptions to the general rule. As the Federal Court has determined, generally, an appeal to the Appeal Division does not allow for any new evidence. Besides, I find that the credit report is not directly relevant to the disentitlement issue.

ISSUE

[8] Is there an arguable case that the General Division failed to observe a principle of natural justice or based its decision on any erroneous findings of fact when it failed to consider whether the Applicant had been unaware that he would be disentitled to Employment Insurance benefits when he was self-employed?

ANALYSIS

[9] 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

[1] *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31.

(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.

[10] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under ss. 58(1) of the DESDA and that the appeal has a reasonable chance of success. It is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v. Canada (Attorney General)*.[2]

[11] The Applicant submits that the General Division overlooked some of the evidence and that this resulted in an unfair result. He submits that the General Division should have conducted a random sampling of self-employed business owners and survey them on whether they are aware that self-employment could disentitle them to Employment Insurance benefits. He also claims that if the General Division had conducted a survey of the general population, it likely would support the payment of Employment Insurance benefits to self-employed people until earnings are realized.

[12] The Applicant further claims that the Commission has a duty to educate employers and employees about its rules and regulations and that having failed to do so in his case should be grounds for "dismiss[ing] the case against [him]" (namely, forgiving or writing off the overpayment). He further claims that Employment Insurance benefits should always be available to an employee until earnings are resumed.

[13] The Applicant argues that the General Division ignored the fact that, had he been aware that he would be disentitled to Employment Insurance benefits due to his self-employment, he would not have pursued self-employment and would have continued looking for other employment so that he could continue to remain entitled to Employment Insurance benefits.

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[2] *Joseph v. Canada (Attorney General)*, 2017 FC 391.

[14] The Applicant argues that the General Division also ignored the fact that any repayment will impose a financial hardship on him. He is without any funds and has been unable to sell his business.

[15] The Applicant's arguments do not raise a ground of appeal under ss. 58(1) of the DESDA. He contends that there has been a breach of natural justice, but natural justice is concerned with ensuring that applicants have a fair opportunity to present their case, and that the proceedings are fair and free of any bias. It relates to issues of procedural fairness before the General Division, rather than to, for example, how decisions rendered by the General Division affect any of the parties. The Applicant's allegations do not address any issues of procedural fairness or of natural justice as they relate to the General Division. He has not provided any evidence that the General Division has otherwise deprived him of an opportunity to fully and fairly present his case.

[16] The Applicant asserts that the General Division based its decision on erroneous findings of fact that it made without regard for the material before it when, as he claims, it ignored the fact that he was unaware that, as a self-employed individual, he could become disentitled to Employment Insurance benefits and the fact that any repayment will impose financial hardships. Being unfamiliar with the *Employment Insurance Act* and the *Employment Insurance Regulations* does not free a claimant from any of their requirements, but apart from that, the General Division was indeed mindful of the fact that the Applicant was unaware that he could be disentitled to Employment Insurance benefits if he was self-employed and that the Applicant was experiencing serious financial difficulties. The General Division referred to this evidence in its overview and at paragraphs 24 and 25 when it considered whether the Tribunal could waive the overpayment on the Applicant's claim. Accordingly, I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it.

[17] The Applicant suggests that the Commission has a duty to educate employers and employees if the provisions of the *Employment Insurance Act* are to apply, but I know of no basis in law for this proposition, and besides, this does not constitute an error under ss. 58(1) of the DESDA.

[18] The Applicant further suggests that the General Division should have conducted surveys as he claims that most people would agree that self-employed people should be entitled to Employment Insurance benefits until they realize earnings, but the provisions of the *Employment Insurance Act* are not applied by way of popular opinion or public knowledge. This suggestion does not raise an arguable ground under ss. 58(1) of the DESDA.

[19] Finally, I do not see that the General Division might have erred in law on the record or that it overlooked or misconstrued any important evidence.

CONCLUSION

[20] Having determined that the appeal does not have a reasonable chance of success, I find that the application for leave to appeal must be refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	S. M., self-represented