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

Citation: *A. M. v. Canada Employment Insurance Commission*, 2018 SST 750

Tribunal File Number: AD-18-442

BETWEEN:

A. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: July 19, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Applicant, A. M. (Claimant), was disentitled from receiving Employment Insurance benefits in the period from December 10, 2016, to January 13, 2017, because he had been outside Canada and unavailable for work. The Commission also assessed a penalty against the Claimant and issued a Notice of Violation because it found that the Claimant had made false statements. The Commission maintained this decision on reconsideration, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed his appeal. As a result, the Claimant is now seeking leave to appeal to the Appeal Division.

[3] There is no reasonable chance of success on appeal. The Claimant did not point to any potential breach of natural justice and it is not apparent that any evidence was ignored or misunderstood. The Claimant has not made out an arguable case that the General Division erred.

ISSUE(S)

[4] Is there an arguable case that the General Division failed to observe a principle of natural justice?

[5] Is there an arguable case that the General Division based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

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]

Is there an arguable case that the General Division failed to observe a principle of natural justice?

[10] The Claimant has asserted that the General Division failed to observe a principle of natural justice. This is one of the grounds of appeal described in s. 58(1) of the DESD Act.

[11] "Natural justice" refers to fairness of process and includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against them. The Claimant did not explain in what way the General Division failed to observe a principle of natural justice, and there is no error related to natural justice that is apparent from a review of the record.

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

[12] I find that the Claimant has not made out an arguable case that the General Division failed to observe a principle of natural justice under s. 58(1)(*a*) of the DESD Act.

Is there an arguable case that the General Division based its decision on a finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[13] The Claimant did not specifically assert that the General Division based its decision on an erroneous finding of fact. However, the submission that he attached to his application for leave to appeal[2] concerns the manner in which the General Division evaluated the evidence. This is most properly considered under the "erroneous finding of fact" ground of appeal.

[14] Section 37 of the *Employment Insurance Act* states that a claimant is not entitled to receive benefits for any period during which the claimant is not in Canada. One of the issues before the General Division was whether the Claimant should be disentitled because he was outside Canada in the period between December 10, 2016, and January 13, 2017.

[15] The Claimant's submission was addressed to the evidence on this issue only. He indicated that he told the General Division member that he was not outside Canada and that the Canada Border Security Agency (CBSA) Traveller Declaration Card (Declaration) was not completed in his handwriting. He also indicated that he had informed the member that he had been caring for his disabled and sick mother and therefore could not have been out of Canada, and that he had denied being outside Canada in response to a letter from CBSA and in a phone call from a CBSA officer.

[16] The General Division summarized the evidence before it, and it is apparent that it both heard and understood the Claimant's evidence. However, the General Division did not accept that the Claimant's assertion that his mother required care necessarily meant that the Claimant could not have been outside Canada. It also did not accept that the Claimant's utility bills or the pay slips that he provided proved that he had not been outside Canada in the period from December 10, 2016, to January 13, 2017.

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[2] AD1-4

[17] However, the General Division did accept the undisputed evidence from the Commission that the Claimant did not attend scheduled job assessments in the period that he was alleged to be outside Canada. It further accepted the Claimant's testimony that he did not return the Commission's January 12, 2017, call for two weeks and that he had not been checking his home phone messages.

[18] The General Division questioned the Claimant's credibility because of the inconsistency between the Claimant's statements that he had attended a January 9, 2017, job assessment session[3] that he made in support of his reconsideration application and his later assertion that he had not attended the job assessment session because he had not received an invitation. The General Division noted that the Commission's records confirm that he had been scheduled for a session on December 15, 2016, but did not attend.[4]

[19] It appears that the General Division weighed all of this evidence, including the Claimant's testimony and evidence, and that it concluded that such evidence as the Claimant submitted to support his physical presence in Canada during the period from December 10, 2016, to January 13, 2017, was insufficient to disprove the evidence of the Declaration.

[20] The Declaration supplied to the Commission by CBSA is a form that must be completed by a traveller before entering Canada. The General Division noted that the Declaration in evidence was completed on January 13, 2017, in the Claimant's name; contained the Claimant's personal information; and indicated that the traveller had left Canada on December 10, 2016. The Claimant asserted that the Declaration was not completed in his handwriting. It is apparent that the General Division understood this argument because it stated that the Claimant's explanation for the Declaration was that someone had forged the Declaration and impersonated him.[5] The General Division accepted the Declaration as a reliable evidence of his absence, noting that a traveller re-entering Canada would have to present a valid passport containing photo ID together with the Declaration, and that the Claimant could not offer a reasonable explanation as to how he

[3] GD3-47, GD3-50
[4] GD3-49
[5] General Division decision, paras. 17, 35

could have been impersonated by an unknown person who looked like him and had access to his personal data.[6]

[21] The weighing of evidence is the General Division's prerogative. The Appeal Division is not authorized to intervene unless it can find that the General Division has ignored or misunderstood the evidence or that its findings were perverse or capricious.[7] The Claimant has not made out an arguable case that the General Division erred in such a manner.

[22] I appreciate that the Claimant may disagree with the manner in which the General Division weighed or analyzed the evidence and with its conclusion, but Claimant cannot establish a ground of appeal under s.58(1) of the DESD Act by simply disagreeing with the findings[8] or asserting that his own evidence should be given more weight.[9]

[23] There is no arguable case that the General Division erred under s. 58(1)(*c*) of the DESD Act in finding that the Claimant had been outside Canada from December 10, 2016, to January 13, 2017.

[24] The Claimant did not identify any concern particular to the other issues before the General Division, namely; the issue of availability for work under s. 18(1)(*a*), or the issue of the penalty or notice of violation relating to a misrepresentation. Nonetheless, in accordance with the direction of such decisions as *Karadeolian,*[10] I have reviewed the record to determine whether any evidence was ignored or overlooked. This review was comprehensive of the evidence related to all of the issues that were before the General Division.

[25] However, it is still not apparent to me that any evidence before the General Division was overlooked or misunderstood, and I do not find an arguable case that any finding of fact was made in a perverse or capricious manner or without regard for the material before the General Division under s. 58(1)(*c*) of the DESD Act.

[26] There is no reasonable chance of success on appeal

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[6] General Division decision, para. 14
[7] *Garvey v. Canada (Attorney General),* 2018 FCA 118
[8] *Griffin v. Canada (Attorney General),* 2016 FC 874
[9] *Tracey v. Canada (Attorney General),* 2015 FC 1300
[10] *Karadeolian v. Canada (Attorney General),* 2016 FC 615

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	A. M., self-represented