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

Citation: *S. K. v. Canada Employment Insurance Commission*, 2018 SST 817

Tribunal File Number: AD-18-493

BETWEEN:

S. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 17, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. K. (Claimant), had been receiving Employment Insurance benefits while working part-time. He left this employment on December 18, 2015, without notifying the Respondent, the Canada Employment Insurance Commission (Commission). The Commission subsequently determined that he voluntarily left this employment without just cause, within the meaning of the *Employment Insurance Act*, and that voluntarily leaving his job was not his only reasonable alternative. The Commission determined that the Claimant should not have received any benefits "starting December 13, 2015" and that he had undeclared earnings from the employment in question. The fact that he had received benefits after December 13, 2015 and the adjustment to his earnings resulted in an overpayment.[1]

[3] On reconsideration, the Commission maintained its decision that the Claimant had voluntarily left his employment without just cause.[2] The Claimant now seeks leave to appeal the General Division's decision on the ground that it based its decision on an erroneous finding of fact that it made without regard for the material before it.

[4] The General Division rendered its decision on May 15, 2018. The Claimant filed an application requesting leave to appeal the General Division's decision on August 7, 2018, beyond the 30-day filing deadline. He explained that he was delayed in filing an application because he was in the process of moving and because he sought legal advice.

[5] I must now decide whether the application requesting leave to appeal is late and, if so, whether I should grant an extension of time. If I should grant an extension, I must also determine whether the appeal has a reasonable chance of success. For the reasons that follow, I am granting an extension of time but refusing leave to appeal because I am not satisfied that the appeal has a reasonable chance of success.

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[1] Letter dated June 26, 2017, at GD3A-37 to 40 (redacted portions) and GD3B-67 to 70.
[2] Letter dated August 22, 2017, at GD3A-49 to 50 (redacted portions) and GD3B-81 to 82.

ISSUES

[6] The issues before me are as follows:

(a) Did the Claimant file an application requesting leave to appeal on time? If not, should I grant him an extension of time to file this application?

(b) If I grant an extension of time, does the appeal have a reasonable chance of success? Is there an arguable case that the General Division based its decision on any erroneous findings of fact without regard for the material before it?

(c) Is there an arguable case that the General Division erred in law at paragraph 47 when it wrote that the burden of proof shifted to the Claimant to prove that the statements were not made knowingly and to provide a reasonable explanation for the incorrect information?

(d) Is there an arguable case that the General Division erred in law by failing to consider the purpose of the Employment Insurance Act in the Claimant's particular circumstances?

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 at least one of the Claimant's grounds of appeal relates to a ground of appeal under subsection 58(1) of the DESDA and that there is a reasonable chance that the appeal would succeed on this ground. [3]

(a) Was the Claimant late in filing an application requesting leave to appeal? If so, should I grant him an extension of time to file this application?

[9] Yes. I find that the Claimant was late in filing an application requesting leave to appeal. However, I am prepared to grant an extension of time because I am of the view that it would serve the interests of justice in this case to consider whether the Claimant has an arguable case. Furthermore, the delay involved is not excessive, the Commission is unlikely to face any prejudice if I grant an extension, and the Claimant's explanation for being late is reasonable. I will consider the issue of whether there is an arguable case in my assessment of the application requesting leave to appeal.

(b) Is there an arguable case that the General Division based its decision on any erroneous findings of fact without regard to the material before it?

[10] The Claimant submits that the General Division based its decision on several erroneous findings of fact without regard to the material before it. In particular, he alleges that the General Division erred as follows:

- at paragraph 24, when it wrote that "he knew the [work] schedule would change." He denies that he was aware that his work schedule would change. He also claims that this is contradicted by the General Division's own findings at paragraph 27, where it wrote: "He can't recall if he had a contract but believes it was an informal agreement and the schedule could change."

- at paragraph 48, when it described his position as a "security guard" when, in fact, he worked as a valet.

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

Paragraphs 24 and 27

[11] At paragraphs 24 and 27, the General Division considered the issue of whether the Claimant had any reasonable alternatives available to voluntarily leaving his employment. The General Division wrote:

> [24] The Tribunal considered the [Claimant's] argument that he didn't realize it was a permanent part-time position and that he felt the employer did not give him adequate notice of his schedule. However the Tribunal finds the employer did notify the [Claimant] and all staff in early December, and the [Claimant] conceded that he accepted a position that he knew the schedule would change.
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> [. . .]
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> [27] The [Claimant] stated when he was hired he was given a number of options for shifts to choose from and he selected Thursdays and Fridays during the day. He can't recall if he had a contract but believes it was an informal agreement and the schedules could change.

[12] I do not find that anything significant turns on whether the Claimant believed that his work schedule "could" change as opposed to whether it "would" change. He testified that when he was hired, he believed "that, to me, was more an informal agreement with the scheduler, and scheduling manager, and it was also my understanding was that [the schedule] was something fluid. It could change."[4] Having been aware from the outset that the schedule **could** change, the Claimant should not have been surprised when the schedule did ultimately change. In any event, the General Division indicated that the issue of whether he believed his schedule could change, rather than would change, was immaterial to the primary issue of whether he had no reasonable alternative but to leave his employment. After all, the General Division found that, while the changed schedule might have served as a reasonable excuse to leave his employment from his perspective, it did not prove that he had no reasonable alternatives.

[4] Claimant's oral testimony at approximately 10:00 of audio recording of General Division hearing.

Paragraph 48

[13] The Record of Employment[5] describes the Claimant's occupation as a valet. Clearly, the General Division erred by describing the Claimant as a security guard. However, I find that the General Division did not base its decision on this error. The Claimant's occupation or job title had no bearing on the outcome, on the issue of whether the Claimant made any false or misleading statements, or on any of the other issues that the General Division addressed. The General Division would have come to the same determination, irrespective of whether the Claimant was a security guard, valet, or working in any other position.

(c) Is there an arguable case that the General Division erred in law at paragraph 47 when it wrote that the burden of proof shifted to the Claimant to prove that false statements had not been knowingly made and to provide a reasonable explanation for the incorrect information?

[14] At paragraph 47, the General Division wrote: "The burden of proof now shifts to the [Claimant] to prove the statements were not made knowingly and provide a reasonable explanation for the incorrect information."

[15] The Claimant maintains that he did not knowingly make any false statements and that he provided a reasonable explanation for the incorrect information.

[16] The Claimant notes that he attended a mandatory information session where an information officer described the type of employment he was unable to refuse while he received Employment Insurance benefits. He recalls that the information officer defined "regular employment" as a position where the remuneration was at least 70% of his former income. He calculates that his part-time employment represented approximately 16% of his former income. As a result, he argues that his part-time employment should not qualify as "regular employment" and that it was therefore reasonable that he responded on an e-report that he had not stopped working for any employer, when in fact he had.

[5] Record of Employment dated December 30, 2015 at GD3A-23 / GD3B-45.

[17] The General Division considered this evidence. The Claimant is not suggesting that the General Division overlooked or misconstrued any part of this evidence. Essentially, the Claimant is calling for a reassessment, but s. 58(1) provides for only limited grounds of appeal. It does not allow for a reassessment.

[18] If anything, the Claimant argues that the General Division erred in its assessment of the facts and in its conclusion that he had to report that he had stopped working. However, as the Federal Court of Appeal held in *Garvey v. Canada (Attorney General),*[6] the Appeal Division has no jurisdiction to interfere in factual findings or findings of mixed fact and law unless those findings were made in a perverse or capricious manner or without regard to the evidence. The Appeal Division may also intervene where an error of mixed fact and law discloses an "extricable legal issue." However, neither of those scenarios exist here and, accordingly, I have no jurisdiction to intervene in this matter. I am not satisfied that there is an arguable case under this ground.

(d) Is there an arguable case that the General Division erred in law by failing to consider the purpose of the *Employment Insurance Act* in the Claimant's particular circumstances?

[19] At paragraph 29, the General Division wrote that the purpose of the *Employment Insurance Act* is to "compensate persons whose employment has terminated involuntarily and who are without work." It cited *Canada (Canada Employment and Immigration Commission) v. Gagnon*[7] in this regard.

[20] The Claimant argues that the position in question "at no time compensated [him] for the employment with which [he] was terminated involuntarily." He maintains that this part-time employment had "very little bearing on the compensation afforded to him as prescribed in the [*Employment Insurance*] *Act*."

[21] The *Employment Insurance Act* was never designed to provide full compensation for loss of employment, irrespective of whether a claimant is fully unemployed or collecting some

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[6] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.
[7] *Canada (Canada Employment and Immigration Commission) v. Gagnon,* [1988] 2 SCR 29.

earnings from part-time employment. While the Claimant's earnings from his part-time employment as a valet may have been minimal, s. 19(2) of the *Employment Insurance Act* nevertheless requires that earnings be deducted from benefits, as set out in the legislation.

[22] More importantly, the Claimant has not identified any alleged error by the General Division in this paragraph, nor do I readily see any legal errors. The General Division accurately quoted the Supreme Court of Canada. I am not satisfied that there is an arguable case that the General Division committed any errors at paragraph 29.

[23] Finally, I have also reviewed the underlying record and do not see that the General Division erred in law or either overlooked or misconstrued important evidence or arguments.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	S. K., self-represented