



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. K. v. Canada Employment Insurance Commission*, 2018 SST 847

Tribunal File Number: AD-18-482

BETWEEN:

K. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: August 28, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, K. K. (Claimant), applied for and obtained Employment Insurance maternity benefits based on the hours of insurable employment that she claimed she had accumulated with a particular employer. The Respondent, the Canada Employment Insurance Commission (Commission), investigated and subsequently determined that the Claimant had not worked for the employer. It sought recovery of all the benefits that had been paid and imposed the maximum penalty for the Claimant's false statements. The Commission maintained this decision on reconsideration.

[3] The Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal. The General Division held that the Claimant had not been employed and that she made false statements in relation to her employment. It dismissed this part of the appeal. In relation to the penalty, the General Division found that the Commission had not considered the Claimant's financial hardship as a mitigating factor and reduced the penalty from \$5000.00 to \$4500.00. The Claimant now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. The Claimant did not identify how the General Division decision was procedurally unfair or point to any evidence that was ignored or misunderstood.

ISSUES

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

[6] Is there an arguable case that the General Division's finding that the Claimant had not worked for the business that she claimed as her employer was made in a perverse or capricious manner or without regard for the material before it?

ANALYSIS

General Principles

[7] 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.

[8] 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.

[9] 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.

[10] 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.

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

[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 him or her. The Claimant has not raised a concern with the adequacy of notice of the hearing, with pre-hearing disclosure of documents, with the manner in which the hearing was

conducted or her understanding of the process, or with any other action or procedure that could have affected her right to be heard or to answer the case. She suggested that the General Division member was biased or had prejudged the matter, either.

[12] There is no 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's finding that the Claimant had not worked for the business that she claimed as her employer was made in a perverse or capricious manner or without regard for the material before it?

[13] The General Division did not accept as credible the Claimant's evidence that she had worked for her employer and her accumulated hours of insurable employment. This was based on several findings:

- The General Division found that the Claimant had little knowledge of the physical details of her supposed workplace, of the other employees and their roles, and of the employer's clients or suppliers. The information she provided about the employer's business was both incomplete and inconsistent.
- The General Division also found that the Claimant and the employer provided inconsistent information related to the nature of her job duties and the employer's work expectations. The General Division further relied on the employer's statement that he did not care what she did and that "he paid her for sport" (paragraph 21 of the decision).
- The General Division did not accept that the Claimant would have arranged for 15 of 19 medical appointments to have taken place on workdays, including her first day of work, but it did not place a lot of weight on this factor.
- The General Division found that the Claimant's cell phone records rarely placed her near her workplace on days that she claimed to be working.
- Finally, the General Division found that the Claimant's paycheque dates were irregular and did not correlate with paystub dates and that the Claimant demonstrated a pattern of

depositing paycheques and then withdrawing the money immediately. From this it inferred that the Claimant returned the money to the employer. The General Division did not accept that the money was withdrawn to be sent overseas to her family because there were no receipts or other corroborating documents.

[14] In her application for leave to appeal, the Claimant took issue with a number of the findings above but did not identify evidence that was ignored or misunderstood in reaching those findings.

[15] Reading the decision, it is plain that the General Division understood the Claimant's evidence, including her explanation that she may have given inconsistent information because she had not recovered from having given birth. However, the General Division was not satisfied that the Claimant's medical issues were responsible for the Claimant's confusion or inconsistency.

[16] The Claimant sought to justify her lack of knowledge of other employees, but the General Division decision does not fault her for her inability to name each and every employee: instead, it expressed a broad concern that the Claimant did not know the names of the people with whom she would have necessarily had dealings and that she could not estimate the number of employees or the scope of the business's operation.

[17] The General Division apparently understood the Claimant's assertion that she normally used the term "basement" to describe a main floor in a house with an upper story, but it did not accept this because of the manner in which the Claimant's description of her workplace shifted in other respects as well.

[18] The General Division also understood, but did not accept, the Claimant's position that her employer "paid her for sport" to be kind and to help her while she was pregnant.

[19] The General Division acknowledged the Claimant's explanation for the multiple scheduled appointments during working hours and accepted the possibility that the Claimant might have been able to work around her appointments. The General Division did not consider the fact that the Claimant scheduled so many appointments during what would have been working hours as a significant element of its decision.

[20] The Claimant suggested that the General Division was mistaken about the evidence that located her phone, claiming that it was not her phone but her husband's. Again, according to the evidence on the file, she admitted that it was her phone (GD3-170) and later did not deny it (GD3-326). While she may not have always had it with her, she did state that she took it with her to work (GD3-327). Despite her testimony at the hearing that she only took the phone to work once or twice, which the General Division acknowledged, there was evidence on which the General Division might conclude that she generally carried the phone with her and that cell phone tower records confirmed that the phone, and therefore the Claimant, did not spend much time near the employer's workplace.

[21] The Claimant objected that the General Division assumed that she had withdrawn the amounts paid to her by her employer to give it back to the employer on the basis that she could not produce a receipt for the overseas transfer of the money. The Claimant said the Commission had not investigated the money exchange. In fact, the General Division accepted that the Commission had investigated the money exchange company that the Claimant claimed to have used. The General Division relied on the exchange company's confirmation that they do not accept cash and that they do issue receipts (GD3-176).

[22] From my review of the General Division's decision and the appeal record, I am satisfied that there was some evidentiary basis for the General Division's findings and that the General Division did not ignore or misunderstand the evidence as argued by the Claimant, or in any other respect. It is not my role to reweigh or re-evaluate the evidence that was before the General Division, or to interfere in the General Division's assessment of credibility. I appreciate that the Claimant disagrees with the manner in which the General Division weighed and analyzed the evidence and with its conclusion, but this does not lead to the conclusion that findings of fact were perverse, capricious, or made without regard for the evidence.¹

[23] The General Division rejected the Claimant's evidence because it was either inconsistent or implausible. There is no arguable case that the General Division ignored or misunderstood evidence, or that it erred in accordance with s. 58(1)(c) of the DESD Act by finding facts in a perverse or capricious manner or without regard to the evidence before it.

¹ *Grosvenor v. Canada (Attorney General)*, 2018 FC 36

[24] I find that there is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	Gurdeep Kaloti, for the Applicant
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