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

Citation: *D. J. v. Canada Employment Insurance Commission*, 2018 SST 987

Tribunal File Number: AD-18-545

BETWEEN:

D. J.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 12, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, D. J. (Claimant), worked as a census taker, but left her job before her contract was to have terminated. When she applied for Employment Insurance benefits, the Respondent, the Canada Employment Insurance Commission (Commission), denied her claim on the basis that she had voluntarily left her employment without just cause. The Commission maintained this decision on reconsideration and the Claimant appealed to the General Division of the Social Security Tribunal. Her appeal was dismissed and she now seeks leave to appeal to the Appeal Division.

[3] There is no reasonable chance of success. The Claimant has not pointed to any error of law or factual error in the General Division decision.

ISSUES

[4] Is there an arguable case that the General Division erred in law by finding that the Claimant did not have just cause for leaving her employment because she had reasonable alternatives to leaving?

[5] Is there an arguable case that the General Division's finding that the Claimant had reasonable alternatives to leaving was made in a perverse or capricious manner or without regard for the material before it?

[6] Is there an arguable case that the General Division otherwise 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?

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.[1]

Issue 1: Is there an arguable case that the General Division erred in law by finding that the Claimant did not have just cause for leaving her employment because she had reasonable alternatives to leaving?

[11] The Claimant agreed that she left her employment voluntarily but disputed that she did not have just cause for leaving.

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

[12] Section 30 of the *Employment Insurance Act* (EI Act) states that a claimant is disqualified from receiving benefits if the claimant lost any employment because the claimant voluntarily left any employment without just cause. Paragraph 29(*c*) of the EI Act requires that just cause be determined with regard to whether there are reasonable alternatives, "having regard to all the circumstances." A non-exhaustive list of circumstances to be considered follows in ss. 29(*c*)(i) to (xiv).

[13] The Claimant elaborated on her grounds of appeal in her September 28, 2018, supplementary submission. She claimed that the General Division erred in law regarding some of the listed circumstances, including: s. 29(*c*)(vi) reasonable assurance of another employment in the immediate future; (vii) significant modification of terms and conditions respecting wages or salary, and; (xi) practices of employment that are contrary to law. Presumably, she means that the General Division erred in law by failing to consider these particular circumstances.

[14] The General Division explicitly considered only one of the circumstances listed in s. 29(*c*), finding that the Claimant did not experience a significant change in work duties (s. 29(*c*)(ix)). It did not address the circumstances that the Claimant has identified in this appeal with reference to their s. 29(*c*) description.

[15] Turning first to the Claimant's assertion of a significant modification of terms and conditions respecting wages or salary, the General Division did not name this circumstance but it did consider the underlying factual base on which the Claimant asserted her wages had been modified. The Claimant argued that she was not paid for commuting and that therefore her wages were effectively less. The General Division found that the amount of travel required by the job did not represent a significant change in work duties, even though it exceeded the Claimant's expectations.

[16] If her work duties had not changed significantly, it necessarily follows that she could not have had a significant modification of the terms of her wages or salary justified by a change in work duties. In my view, it was not necessary for the General Division to have explicitly ruled out a significant modification of wages or salary, given that it had found no change in her work duties. There is no arguable case that the General Division erred by failing to consider s. 29(*c*)(vii) of the EI Act.

[17] Likewise, the General Division did not reference the Claimant's reasonable expectation of employment in the future. However, there was no evidence before the General Division that the Claimant left her job with a reasonable expectation of replacing that job with other employment. The Claimant had already held her other employment before she left her current job. While it might be reasonable in certain circumstances to leave employment for the purpose of taking up a different employment, the EI Act is intended to provide compensation to partially offset employment income for "persons whose employment has terminated involuntarily".[2] Subparagraph 29(*c*)(vi) does not justify the payments of benefits to claimants who leave only one of their existing jobs without a reasonable expectation of employment that would replace the job that they left. On the facts of this case, there was no reason for the General Division to address s. 29(*c*)(vi) in its decision, and there is no arguable case that the General Division erred in failing to do so.

[18] The Claimant also suggests that the General Division made an error of law in relation to s. 29(*c*)(xi), practices of employment that are contrary to law. The Claimant alleged employer practices that included "fictitious enumerations and statements that were accepted with no accountability"(AD1-10), but she did not identify any law that was violated by these practices or statements, let alone prove these practices occurred. The General Division is not required to take into account inapplicable circumstances, and there is no arguable case that the General Division erred by failing to consider s. 29(*c*)(xi) or address it in its reasons.

[19] Finally, the Claimant disputes the General Division's conclusion that a reasonable alternative to quitting would have been to secure other employment before quitting. She argues that it would not have been so easy for her to find work because of where she lives and her age. However, the General Division could only reach a conclusion on the availability of reasonable alternatives, by applying the law to the facts. The argument that the identified alternative is not reasonable in the circumstances, is an argument that the General Division made an error of a type referred to as a "mixed error of fact and law." Consequently, I do not have the jurisdiction to intervene, regardless of whether I agree with the Claimant that finding other work before quitting was not a reasonable alternative. In *Quadir v. Canada (Attorney General)*,[3] the Federal Court of

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[2] *Canada (Canada Employment and Immigration commission) v. Gagnon* 2 SCR 29
[3] *Quadir v. Canada (Attorney General)*, 2018 FCA 21

Appeal recently confirmed that the Appeal Division has no jurisdiction to interfere on a question of mixed fact and law.

[20] There is no arguable case that the General Division erred in law under s. 58(1)(*b*) of the DESD Act.

Issue 2: Is there an arguable case that the General Division's finding that the Claimant had reasonable alternatives to leaving was made in a perverse or capricious manner or without regard for the material before it?

[21] In her submission to the Appeal Division, the Claimant identifies, and attempts to explain or elaborate, a number of events or circumstances related to her employment. Some of the information incorporated to her submissions is new evidence that was not before the General Division; I may not consider this new evidence.[4] At other points, she is simply disagreeing with the conclusion that the General Division reached on the evidence.

[22] On the final page of her submission, the Claimant referred to three of the circumstances from the list found at s. 29(*c*) of the EI Act, and she associated some brief notes with each circumstance. To the extent that she may be suggesting that the General Division overlooked her evidence, I will review those circumstances again.

[23] The fact that the Claimant also had income from temporary placements through a placement agency or that she made some income through a small business and through CPP or other pension benefits is not relevant to the circumstance in s. 29(*c*)(vi), as I noted above. Because of this, there is no reasonable argument that the General Division erred in failing to consider this evidence.

[24] In terms of the circumstance described in s. 29(*c*)(vii), the Claimant gave evidence that her job took her longer and involved greater expense than she had anticipated. However, she did not argue that the employer altered the terms under which she was paid. The General Division found that there was no evidence that the Claimant experienced significant changes in work duties or that her work hours were greater than she was told to expect. Although this was stated in the context of "significant changes in work duties," there is no arguable case that the General

[4] *Mette v. Canada (Attorney General)*, 2016 FCA 276

Division failed to consider this evidence in relation to a significant modification in the terms or conditions of wages or salary. Once the General Division had concluded that the Claimant's work duties and work hours had not changed, it was no longer possible to find that the Claimant's wages were effectively decreased by increased hours as the Claimant had argued, and it was not necessary for the General Division to revisit the evidence or its findings to rule out significant modifications to the conditions or terms of wages or salary. The Claimant did not otherwise point to any evidence that the General Division ignored or misunderstood concerning changes to her salary.

[25] There is no arguable case that the General Division erred by ignoring or misunderstanding evidence that the employer had practices contrary to law. The Claimant did not provide evidence of any breach of law or even identify what laws she believed had been breached.

[26] The Claimant has not raised an arguable case that the General Division ignored or misunderstood evidence relevant to these particular three s. 29(*c*) circumstances—or any other evidence—and has not identified in what manner it considers the finding that the Claimant had reasonable alternatives to leaving to be otherwise perverse or capricious.

Issue 3: Is there an arguable case that the General Division otherwise 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?

[27] The Claimant has raised two objections related to the quality of the evidence that was available to the General Division.

[28] First, the Claimant argued that the Commission obtained and supplied to the General Division an incorrect job description. In the course of its investigation, the Commission obtained a job description related to a position with an employer other than the Claimant's employer (GD3-27). This was included in the reconsideration file forwarded to the General Division.

[29] I accept that the job description provided by the Commission did not describe the Claimant's particular position. However, the Claimant did not express concern about the inapplicable job description at her hearing before the General Division and the General Division member did not refer to the job description in the hearing.

[30] It is clear from the decision that the General Division was aware of the identity of the Claimant's actual employer, which is different from the employer whose name appears across the top of the written job description. Furthermore, the General Division had asked the Claimant to describe what she was told about the job before she started and how her work was different than she expected, to which the Claimant responded with a brief description of what she had been told before she started. She also stated that the basics were the same as what she had been told, but that it was different in execution.

[31] There is no indication that the General Division preferred the erroneous job description in any way to the Claimant's description in her testimony, or that it even considered it. In fact, there was no need for the General Division to verify the Claimant's testimony with reference to the written job description or to compare the written job description to her actual job duties, because the Claimant did not argue or provide evidence to support any significant change in her work duties. There is therefore no arguable case that the General Division **based its decision** on the erroneous job description or on any finding of fact dependent on the accuracy of the job description.

[32] Second, the Claimant argued that the General Division had made its decision without considering her supervisor's notes or other information in the files of her employer. However, the General Division is not mandated to investigate claims but rather to adjudicate appeals of claims on the basis of evidence brought by the parties. There is no arguable case that the General Division erred by failing to consider evidence that was not before it.

[33] In other court decisions, the Appeal Division has been directed to look beyond the specific errors argued by claimants. In *Karadeolian v. Canada (Attorney General)*,[5] the Federal Court noted that "[…] the Tribunal must be wary of mechanistically applying the language of section 58 of the Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like [the appellant in that case]."

[34] As a result, I have searched the record for other instances in which an arguable case might be made that significant evidence was ignored or overlooked. I have not found any such instance. The Claimant has not made out an arguable case that the General Division made an

[5] *Karadeolian v. Canada (Attorney General)* 2016 FC 615

erroneous finding of fact in a perverse or capricious manner or without regard to the material before it under s. 58(1)(c) of the DESD Act.

[35] There is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	D. J., self-represented