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

Citation: *N. K. v. Canada Employment Insurance Commission*, 2018 SST 1105

Tribunal File Number: AD-18-701

BETWEEN:

N. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: November 8, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission), wrote to the Applicant, N. K. (Claimant), on May 29, 2017, to inform her that she was not entitled to benefits because she had lost her employment as a result of her misconduct. The Claimant disagreed that she had lost her employment for misconduct but she did not file a request for reconsideration until November 30, 2017. The Commission refused to consider her late request for reconsideration because it did not accept that the Claimant had a reasonable explanation for requesting a longer filing period or that she had demonstrated a continuing intention to seek a reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, but her appeal was dismissed. She now seeks leave to appeal to the Appeal Division.

[4] The Claimant's appeal does not have a reasonable chance of success. She has not made out an arguable case that the General Division failed to observe a principle of natural justice or made a jurisdictional error, that the General Division erred in law, or that it based its decision on an erroneous finding of fact.

ISSUES

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

[6] Is there an arguable case that the General Division erred in law?

[7] Is there an arguable case that 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?

ANALYSIS

General Principles

[8] The Appeal Division's task is more restricted than that of the General Division. The General Division is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the substantive issues raised by the appeal.

[9] However, the Appeal Division may intervene in a decision of the General Division only if 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).

[10] The only grounds of appeal are described 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.

[11] 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.

[12] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

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

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice or made a jurisdictional error?

[13] Natural justice refers to fairness of process and includes procedural protections such 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 the notice of the General Division hearing, with the pre-hearing disclosure of documents, with the manner in which the General Division 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. Nor has she suggested that the General Division member was biased or that he had prejudged the matter.

[14] I understand that the Claimant does not feel it is fair that the initial decision at the Commission that she was dismissed for misconduct was based on information from the wrong employer. However, this has nothing to do with whether or not the process at the General Division was conducted in accordance with natural justice.

[15] Likewise, the Claimant has not identified how the General Division either refused to exercise its jurisdiction or exceeded its jurisdiction. There is no arguable case that the General Division failed to observe a principle of natural justice or made an error of jurisdiction under s.58(1)(a) of the DESD Act.

Issue 2: Is there an arguable case that the General Division erred in law?

[16] In the Claimant's submissions, she argues that the General Division erred in law.

[17] The issue before the General Division was the Commission's decision to refuse to consider the Claimant's reconsideration request. To determine whether the Claimant's reconsideration request was late, the General Division applied s. 112(1) of the *Employment Insurance Act* (EI Act), which requires that a claimant make a reconsideration request within 30 days of the day the decision was communicated. This was appropriate.

[18] The General Division stated that it took judicial notice of the fact that mail is usually received within 10 days in assessing the date of communication. While the General Division apparently did not rely on s. 19(1) of the *Social Security Regulations*, a provision that deems a

decision to have been communicated 10 days after the date on which it is mailed to the party, the result is effectively the same.

[19] Furthermore, the Claimant stated in her reconsideration application that she received the decision in the summer of 2017. This does not conflict with the finding that she received the decision on June 8, 2017, 10 days after May 29, 2017, and therefore, the General Division did not err in law in presuming the decision to have been communicated on June 8, 2017.

[20] The General Division correctly acknowledged that the Commission has discretion to allow a late reconsideration request—as permitted by s. 112(1)(b) of the EI Act—and rightly defined the judicial exercise of discretion with reference to applicable case law: to show that discretion has been exercised in a non-judicial manner, it must be shown that the decision-maker acted in bad faith, acted for an improper purpose or motive, took into account an irrelevant factor, ignored a relevant factor, or acted in a discriminatory manner.[2]

[21] Finally, the General Division appropriately referred to s. 1(1) of the *Reconsideration Request Regulations*, which stipulates that the Commission may allow a longer period under s.112(1)(b) of the EI Act if it is satisfied that there was a reasonable explanation for the delay in making the request and that the claimant demonstrated a continuing intention to request the reconsideration. The General Division applied these criteria to assess the relevancy of the factors that were or should have been considered by the Commission.

[22] There is no arguable case that the General Division made an error of law under s. 55(1)(b) of the DESD Act.

Issue 3: Is there an arguable case that 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?

[23] The Claimant has not identified any evidence that was ignored or misunderstood by the General Division relevant to its finding that the Commission exercised its discretion judicially.

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[2] *Canada (Attorney General) v Purcell*, 1 FC 644.

[24] Following the lead of the courts in cases such as *Karadeolian v Canada (Attorney General)*,[3] I have reviewed the record to determine whether the General Division ignored or misunderstood any of the evidence surrounding the Commission's exercise of discretion. This involved a search for evidence that would suggest that there are other relevant factors that the Commission ought to have considered or anything that could support a finding that the factors taken into consideration by the Commission were irrelevant. I have also searched for any evidence of bad faith or improper purpose, or discrimination in the Commission's exercise of discretion.

[25] The General Division observed that the Commission considered the Claimant's explanation that she had found work and did not need benefits and that she believed she did not need to pursue her reconsideration because she had an "open file" and could always reopen her claim at a later date. The General Division also noted that the Commission considered that the Claimant was aware of the misconduct decision in the summer of 2017 and told the Commission she would be filing a reconsideration on August 24, 2017, but she did not do so until November 30, 2017, despite several telephone enquiries to the Commission and renewal applications.

[26] However, the General Division did not incorporate all of the evidence into its analysis. I note that the Commission also documented that it left the Claimant a voicemail message on July 4, 2017, in which it confirmed that the Claimant had been disqualified and that it had sent her a letter to the same effect.[4] In the same claim log entry, the Commission indicates that an agent spoke with the Claimant again on August 11, 2017, and reminded her of the May 29, 2017, letter advising her that she was disqualified and that she had a right to reconsideration. The Commission also referenced a November 2, 2017, letter that told the Claimant that her claim was reactivated, but which again informed her that she did not have enough hours to qualify because of the earlier dismissal, and advised her of her right to reconsideration.

[27] While the General Division did not refer to this additional evidence, a tribunal need not refer in its reasons to each and every piece of evidence before it; it is presumed to have considered all the evidence.[5] Furthermore, this additional evidence is supportive of the Commission's

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[3] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.
[4] GD3-64.
[5] *Simpson v Canada (Attorney General*), 2012 FCA 82.

decision to deny the extension of time, and, therefore, it could not have affected the General Division's finding that the Commission exercised its discretion judicially.

[28] While the Claimant has alleged bad faith and/or an improper purpose on the part of the Commission, I have found no evidence that the Commission discriminated against the Claimant or did not act properly and in good faith when it determined that it could not allow the extension of time for the reconsideration. The Commission's initial mistake in obtaining information from the wrong employer is not relevant to its decision to deny the extension of time and it was not a factor. If the Commission was in error in initially finding misconduct on the basis of information from the wrong employer, the Claimant's remedy was to seek reconsideration. The entire purpose of the reconsideration process is to provide the Claimant with the means to remedy mistakes in the Commission's decisions. It is not bad faith for the Commission to insist that the Claimant comply with the filing requirements of s. 112(1)(a) of the EI Act or to otherwise provide a reasonable explanation and establish a continuing intention to appeal in accordance with s. 112(1)(b) and s. 1(1) of the *Reconsideration Request Regulations*.

[29] There was simply nothing before the General Division on which it could find that the Commission acted in a discriminatory fashion or in bad faith, or with an improper purpose or motive. I did not find any instance where the General Division may have ignored or misunderstood evidence to result in an erroneous finding that the Commission had acted judicially.

[30] Therefore, there is no arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it under s. 58(1)(c) of the DESD Act.

[31] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	N. K., self-represented