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

Citation: *G. G. v. Canada Employment Insurance Commission*, 2018 SST 1122

Tribunal File Number: AD-18-542

BETWEEN:

G. G.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 31, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, G. G. (Claimant), applied for Employment Insurance regular benefits in November 2016. She began receiving regular benefits but later sought to convert them to sickness benefits. She produced medical certificates from her family physician. In one of the certificates, the family physician wrote that the Claimant was unable to work in August 2016, when he first saw her. The Respondent, the Canada Employment Insurance Commission (Commission), paid the 15-week maximum of sickness benefits on her claim. It advised her that she had exhausted all of her entitlement to sickness benefits.[1]

[3] However, the Commission later determined that the Claimant had completed reports between August 2016 and January 2017 stating that she had been "ready willing, and capable of full time work"[2] throughout that time. As a result, the Commission found that the Claimant had failed to notify the Commission that she was incapable of working due to illness while she was receiving regular benefits and that she had therefore knowingly made several false representations.[3] It advised her that she had been overpaid and would be required to repay the overpayment ($6,205) and pay a penalty ($1,241). The Claimant denied that she had ever erred or made any false representations. She provided several medical records that confirmed she has rheumatoid arthritis. She also provided a copy of her application for a Canada Pension Plan disability pension in which she advised that she could no longer work as of August 2016 because of her medical condition.[4] The Commission maintained its decision that the Claimant was entitled to receive 15 weeks of sickness benefits but that she had been overpaid because she had received regular benefits during weeks when she was sick and unavailable to work and therefore not entitled to receive regular benefits. Given the Claimant's mitigating circumstances, the

---

[1] Commission's letter dated April 20, 2017, at GD3-22, GD3-87, and GD3-125.
[2] Investigation Information Sheet, at GD3-18.
[3] Commission's letter dated April 21, 2017, at GD3-23 to GD3-24, GD3-90 to GD3-92, and GD3-120 to GD3-122.
[4] Questionnaire for Disability Benefits – Canada Pension Plan, filed May 4, 2017, with Service Canada, at GD3-64 to GD3-69.

Commission reduced the monetary penalty to a warning letter and overturned its decision on the violation.[5]

[4] The Claimant appealed the Commission's reconsideration decision to the General Division on the basis that she had not made any errors. The General Division dismissed the appeal because it found that the Claimant had not proven that she was available for work. The General Division decided that the Claimant was required to repay the overpayment and that the Commission had properly imposed a warning. The Claimant now seeks leave to appeal the General Division's decision on the ground that the General Division failed to observe a principle of natural justice. She maintains that she has been truthful from the start. I must decide whether there is an arguable case under s. 58(1) of the *Department of Employment and Social Development Act* (DESDA).

[5] I am refusing the application for leave to appeal because I am not satisfied that the appeal has a reasonable chance of success or that there is an arguable case that the General Division failed to observe a principle of natural justice.

ISSUES

[6] There are two issues before me:

> Issue 1: Did the Claimant file her application requesting leave to appeal after the deadline? If so, should I grant an extension of time for her to file the application?
>
> Issue 2: Is there an arguable case that the General Division failed to observe a principle of natural justice by not providing the Claimant with a full and fair opportunity to present her case?

ANALYSIS

[7] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

---

[5] Commission's reconsideration decision dated June 8, 2017, at GD3-142 to GD3-143.

(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 the reasons for appeal fall within the grounds of appeal set out under s. 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v. Canada (Attorney General)*.[6]

[9] The Claimant argues that grounds exist under s. 58(1)(*a*) of the DESDA.

Issue 1: Did the Claimant file her application requesting leave to appeal after the deadline? If so, should I grant an extension of time for her to file the application?

[10] Yes. I find that the Clamant filed her application requesting leave to appeal after the deadline. However, I am prepared to grant an extension of time because I am of the view that it is in the interests of justice to consider whether the Claimant has an arguable case.[7] Furthermore, the delay involved is not excessive—it is little more than a month—considering that s. 57(2) of the DESDA provides that the Appeal Division may allow an extension if the application is not made more than one year after the day on which the Commission's reconsideration decision was communicated to the claimant. As well, the Commission is unlikely to face any prejudice if I grant an extension, and the Claimant's explanation for the delay (that she was provided with the

[6] *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[7] *Canada (Attorney General) v. Larkman*, 2012 FCA 204.

wrong appeal forms) is reasonable.[8] I will consider the issue of whether there is an arguable case in my assessment of the application requesting leave to appeal.

Issue 2: Is there an arguable case that the General Division failed to observe a principle of natural justice by not providing the Claimant with a full and fair opportunity to present her case?

[11] No. I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

[12] The Claimant submits that she was deprived of an opportunity to fully and fairly present her case because the videoconference hearing before the General Division was too short. The hearing took approximately one hour. The Claimant also argues that her file and the information before the General Division were incomplete.

[13] An advocate with the Unemployed Workers Help Centre represented the Claimant before the General Division.

[14] The Social Security Tribunal issued a notice of hearing in February 2018 to both the Claimant and her representative. The notice informed them that a videoconference hearing was scheduled for 60 minutes. There is no evidence that either the Claimant or her representative contacted the Tribunal to request a longer hearing or an adjournment so that the Claimant could obtain any missing records or for any other reason.

[15] During the hearing, the Claimant testified that she had attempted to convert her Employment Insurance regular benefits to sickness benefits in either August 2016 or September 2016. She believed that she had filed a medical certificate with the Commission to support her request to convert the benefits. The certificate allegedly established that the Claimant was unable to work in August 2016. More importantly, she argues that the date of the medical certificate supports her claim that she had requested the conversion of benefits in August or September 2016. The Claimant testified that she filed different “packages” with the Tribunal and had been under the impression that that particular medical certificate was also on file with the Tribunal.

[8] *Canada (Minister of Human Resources Development) v. Gattellaro*, 2005 FC 883.

[16] The hearing file before the General Division contained a medical certificate dated January 13, 2017, in which the Claimant's family physician provided an opinion that the Claimant was unable to work when he first saw her on August 18, 2016.[9] The General Division member noted, however, that the earlier medical certificate attesting to the Claimant's inability to work in August 2016 was missing from the hearing file.

[17] The General Division member invited the Claimant to file "any other documentation that [she] could find, like that original medical certificate."[10] The General Division also invited the Claimant to file copies of her calendar, a record of her job search history, and any medical certificates.[11] The General Division member stated that, in the meantime, she would ask the Commission for any relevant documents from August 2016 to December 2016.

[18] The General Division member stated that she would forward copies of any information she received from the Commission to the Claimant and that, if she deemed it necessary, she would provide the Claimant with an opportunity to respond. This could have involved convening another hearing, if it were convenient for the Claimant. The member set deadlines for the parties to file the additional documentation.

[19] Throughout the hearing, the General Division member provided the Claimant with an opportunity to give evidence. After an hour had passed, the member asked the Claimant whether she wanted to add anything further, saying, "So, I don't have any more questions. Do you have anything more you wish to add?"[12] The Claimant responded, "I was just hoping that, you know, with all this happening, you know, that everything could be wiped clean because I just don't understand why …." Her representative also responded that "they would keep working at it." Neither the Claimant nor her representative requested additional time to give evidence or to make any further submissions.

[20] On May 10, 2018, the Claimant notified the Tribunal that she was unable to obtain any medical information or documentation from her physician for the applicable period. The

---

[9] Medical certificate dated January 13, 2017, at GD3-16.
[10] At approximately 57:46 of the audio recording of the General Division hearing on May 2, 2018.
[11] At approximately 58:31 of the audio recording.
[12] At approximately 1:05:13 of the audio recording.

Claimant filed a copy of the calendar that she had referred to during the hearing.[13] The Commission did not file any additional records. Neither the Claimant nor her representative requested a further hearing, either to give evidence or to make further submissions. The General Division did not convene another hearing. It rendered its decision on June 5, 2018.

[21] The Claimant argues that there was insufficient time allotted to the hearing, but it is clear to me after reviewing the audio recording of the hearing that the General Division was prepared to continue the hearing and provide the Claimant with a chance to say more. The Claimant stated that she wanted the overpayment waived but otherwise did not add anything else. There was no indication that she had further evidence to give or additional submissions to make. The General Division also provided the Claimant with an opportunity to file any additional records after the hearing. Despite arguing that one hour was insufficient to present her case, the Claimant has not explained why additional time was necessary or what impact that would have had on her case. For instance, she has not stated that she did not have the opportunity to give evidence on any particular issue. Given these considerations, I am not satisfied that there is an arguable case that the General Division failed to provide the Claimant with a full and fair opportunity to present her case.

[22] The Claimant also argues that her file was incomplete. She does not allege that the General Division is responsible for the incomplete file, but she suggests that once the General Division learned that the file was incomplete, it should have taken steps to ensure that the hearing record was complete. However, the General Division did provide the Claimant with an opportunity to file any missing records to ensure that the file was complete. The General Division also asked the Commission to provide any records that had not already been produced, although it had no duty to do so. As a result, I am not satisfied that the General Division failed to provide the Claimant with an opportunity to file a complete hearing record.

New Evidence

[23] I note that the Claimant's application requesting leave to appeal includes several medical records, annotated calendars from April 2016 to April 2017, records of the Claimant's job search

---

[13] Week Code Calendar for 2016, at GD9-3.

history, pay cheque stubs, Employment Insurance records, and miscellaneous records. The General Division did not have copies of much of this documentation.

[24] The Tribunal wrote to the Claimant, asking if she wished to make an application to rescind or amend the General Division's decision. It informed her that, if she did not, the Appeal Division would generally not consider any new evidence that she filed.[14]

[25] The Federal Court of Appeal set out the exceptions to this general rule to exclude new evidence in *Sharma v. Canada (Attorney General).*[15] New evidence should be excluded if it "does not provide general background information, highlight the complete lack of evidence before the decision-maker on a particular finding, or point out defects not evident in the record." The new documentation does not fall under any of the categories in the list of exceptions.

[26] Under s. 66 of the DESDA, the General Division can choose to rescind or amend its decision if new facts are presented to the Tribunal or the Tribunal is satisfied that its decision was made without knowledge of, or was based on a mistake as to, some material fact. However, the Claimant declined to make an application to rescind or amend.

[27] Even if any of this documentation had been before the General Division, it would have been of no assistance to the Claimant. She is relying on this documentation to establish that she has been sick and unable to work since August or September 2016. However, the Commission and the General Division have both accepted that the Claimant has been unable to work since then, but, because she was sick and unable to work, the General Division concluded that the Claimant was not available for work. Once she was no longer available for work, she was not entitled to receive any Employment Insurance regular benefits. Yet, the Claimant had already received the maximum in Employment Insurance sickness benefits, as well as Employment Insurance regular benefits to which she ultimately was not entitled. She was therefore required to repay any amounts to which she was not entitled.

[14] Tribunal's letters to the Claimant, dated September 4 and 28, 2018.
[15] *Sharma v. Canada (Attorney General)*, 2018 FCA 48.

[28] Finally, I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it failed to properly account for any of the key evidence before it.

[29] The Claimant is seeking a write-off of the overpayment, but, as the General Division noted, any recourse she might have to dispute any obligation to repay a debt lies with the Federal Court.

CONCLUSION

[30] Given the above reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

APPEARANCES:	G. G., self-represented