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

Citation: *S. M. v Canada Employment Insurance Commission*, 2018 SST 1292

Tribunal File Number: AD-18-752

BETWEEN:

S. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: December 14, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] S. M. (Claimant) worked for many years as a seasonal firefighter and claimed Employment Insurance (EI) benefits during the off-season. At the end of the 2017 season, the Claimant turned 65 years old and told his employer that he would be retiring, which is what his employer marked on his Record of Employment.[1]

[3] In August 2017, however, when the Claimant filed his application for EI benefits, he indicated that he had stopped working because of a shortage of work, as he had done in previous years.[2] Between these two reasons for stopping work, the Canada Employment Insurance Commission (Commission) chose the one that appeared on his Record of Employment: the Claimant quit or took voluntary retirement.[3] Because the Commission concluded that the Claimant had voluntarily left his employment without just cause, it imposed an indefinite disqualification against him.[4]

[4] Although the Claimant has continued to say that he stopped working in August 2017 because of a shortage of work, he never challenged the Commission's October 2017 decision that he voluntarily left his employment without just cause. As a result, that decision is not the one that is now before the Tribunal and I must accept it as having been correctly made.

[5] Rather, in November 2017, the Claimant filed another application for EI benefits, again relying on the work that he had done during the 2017 firefighting season. Because of the earlier disqualification, however, the Commission concluded in December 2017 that it could not consider hours earned before August 2017 when it assessed his eligibility for benefits. Instead, the Claimant needed to accumulate an additional 420 hours of insurable employment before he

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[1] GD2-2; GD2-4; GD3-24.
[2] GD3-12 to 23.
[3] GD3-25 to 26.
[4] *Employment Insurance Act* (EI Act), s 30.

could be considered for EI benefits again.[5] In fact, the Claimant had earned zero hours of insurable employment after August 2017.

[6] The Claimant challenged the Commission's December 2017 decision, but it maintained this decision on reconsideration. He then appealed that decision to the Tribunal's General Division, but it dismissed his appeal.

[7] The Claimant now wants to appeal the General Division decision to the Appeal Division, but he requires leave to appeal (or permission) for the file to move forward. Unfortunately for the Claimant, I have concluded that his appeal has no reasonable chance of success and that leave to appeal must therefore be denied.

ISSUES

[8] In reaching this decision, I focused on the following issues:

a) Do any of the Claimant's arguments fall within a recognized ground of appeal and, if so, do they amount to an arguable ground on which the appeal might succeed?

b) Did the General Division arguably overlook or misinterpret relevant evidence?

ANALYSIS

The Appeal Division's Legal Framework

[9] The Tribunal has two divisions that operate quite differently from one another. At the Appeal Division, the focus is on whether the General Division might have committed one or more of the three grounds of appeal (or errors) set out in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act). Generally speaking, the only relevant errors concern whether the General Division:

a) breached a principle of natural justice or made an error relating to its jurisdiction;

b) rendered a decision that contains an error of law; or

[5] EI Act, s 30(1)(a).

c) 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.

[10] There are also procedural differences between the Tribunal's two divisions. The Appeal Division's process is in two stages: the leave to appeal stage and the merits stage. This appeal is at the leave to appeal stage, meaning that permission must be granted for it to move forward. This is a preliminary hurdle aimed at filtering out cases that have no reasonable chance of success.[6] The legal test that applicants need to meet at this stage is a low one: Is there any arguable ground on which the appeal might succeed?[7]

Issue 1: Do any of the Claimant's arguments fall within a recognized ground of appeal and, if so, do they amount to an arguable ground on which the appeal might succeed?

[11] In short, the Claimant is arguing that the situation concerning his seasonal employment was the same in 2017 as it was in previous years. As a result, he is unable to understand why he was eligible for EI benefits then, but is not now. He also argues that the claim he filed in November 2017 should be considered as a renewal of his old claim that started in December 2016, rather than as a new claim.[8]

[12] In my view, the Claimant's arguments do not fall within a recognized ground of appeal that I can consider. They do not amount to an arguable ground on which the appeal might succeed, either.

[13] More specifically, the fact that the Claimant's application for EI benefits has been treated differently from one year to the next does not obviously point to one of the three errors that I am able to consider. In addition, the Claimant's argument regarding old and new claims has no particular relevance to the outcome of his case.

[14] What the Claimant might not have understood is that his situation changed in October 2017, when the Commission concluded that he had voluntarily left his employment in

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[6] DESD Act, s 58(2).
[7] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[8] AD1-5.

August 2017 without just cause.[9] Because of that decision, he became the subject of an indefinite disqualification, meaning that all of the hours of insurable employment that he accumulated before August 2017 could not be used to assess his future entitlement to EI benefits.[10]

[15] In addition, since the Claimant never asked the Commission to reconsider that decision, both the Commission and the Tribunal must accept it as a fact. As a result, the Claimant must accumulate another 420 hours of insurable employment before he can be considered for EI benefits again.

[16] I sympathize with the Claimant and understand that it might be difficult to know which decision needed to be challenged. Nevertheless, it does appear that the General Division held a pre-hearing conference on July 23, 2018, precisely for the purpose of confirming that no reconsideration decision had been made on the question of the Claimant's voluntary departure in August 2017.[11] Without a reconsideration decision on that issue, the General Division had no authority to reassess it.[12]

Issue 2: Is there an arguable case that the General Division overlooked or misinterpreted relevant evidence?

[17] Regardless of the conclusion above, I am mindful of Federal Court decisions in which the Appeal Division has been instructed to go beyond the four corners of the written materials and consider whether the General Division might have misinterpreted or failed to properly consider any of the evidence.[13] If this is the case, then leave to appeal should normally be granted even if there are technical problems with the request for leave to appeal.

[18] After reviewing the documentary record, listening to the audio recording of the General Division hearing, and examining the decision under appeal, I am satisfied that the General Division neither misinterpreted nor failed to consider relevant evidence. The question before the General Division arose from the Claimant's November 2017 application for EI benefits.

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[9] GD3-25.
[10] EI Act, s 30.
[11] General Division decision at para 3.
[12] EI Act, ss 112 and 113.
[13] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

However, it is clear that that application had to be denied because of the Commission's previous and unchallenged decision to impose a disqualification against the Claimant and because the Claimant had not accumulated any hours of insurable employment since that event.

CONCLUSION

[19] While I have sympathy for the Claimant, I have concluded that his appeal has no reasonable chance of success. As a result, I must refuse his application for leave to appeal.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	S. M., self-represented