



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *A. S. v Canada Employment Insurance Commission*, 2019 SST 6

Tribunal File Number: AD-19-8

BETWEEN:

A. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: January 8, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] At its root, this case is about whether the Appeal Division has any jurisdiction to decide whether the Applicant, A. S. (Claimant), is entitled to have her claim for Employment Insurance special benefits antedated. She is seeking an antedate because an antedate could then provide her with sufficient insurable hours to qualify for benefits.

[3] The General Division determined that the Claimant does not have sufficient hours within her qualifying period between April 16, 2017, and April 14, 2018, to establish a claim for special benefits. The Claimant is seeking leave to appeal the General Division's decision, on the grounds that the General Division failed to observe a principle of natural justice and based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

[4] I must determine whether the appeal has a reasonable chance of success; in other words, I must decide whether there is an arguable case. I am refusing leave to appeal because I am not satisfied that the Claimant has an arguable case.

ISSUES

[5] The issues are:

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

Issue 2: Does the Appeal Division have the jurisdiction to determine whether the Claimant is entitled to an antedate?

ANALYSIS

[6] Section 58(1) of the *Department of Employment and Social Development Act* (DESDA) sets out the grounds of appeal as being limited to the following:

- (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.

[7] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under section 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.¹ The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.²

Issue 1: Is there an arguable case that the General Division either failed to observe a principle of natural justice or 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] Natural justice is concerned with ensuring that claimants have a fair opportunity to present their case and that proceedings are fair and free of any bias. It relates to issues of procedural fairness before the General Division and how the General Division may have conducted itself, rather than the impact of any decisions on claimants. There are no allegations involving any issues of procedural fairness or natural justice as they relate to the General Division. The Claimant has not pointed to or provided any evidence—nor do I see any

¹ In *Fancy v Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal has held that an arguable case is the same test as a “reasonable chance of success on appeal.”

² *Joseph v Canada (Attorney General)*, 2017 FC 391.

evidence—to suggest that the General Division might have deprived her of an opportunity to fully and fairly present her case or that the General Division might have exhibited any bias against her.

[9] The Claimant has not identified any erroneous findings of fact that the General Division allegedly based its decision on or that it made in a perverse or capricious manner or without regard for the material before it. I have examined the underlying record, and I do not see any indication that the General Division either overlooked or misconstrued any important evidence.

[10] Accordingly, I am not satisfied that the appeal has a reasonable chance of success on either of these grounds.

Issue 2: Does the Appeal Division have the jurisdiction to determine whether the Claimant is entitled to an antedate?

[11] The Claimant states that on October 16, 2018, she applied to antedate her claim for benefits to January 6, 2018.³ The Claimant prepared this application one week after her hearing before the General Division. In other words, the Respondent, the Canada Employment Insurance Commission (Commission), had yet to decide whether the Claimant could antedate her claim for benefits. Therefore, the antedate issue had yet to come before the General Division. At most, the General Division simply noted the Claimant's intentions to apply for an antedate.

[12] The Claimant indicates in her application requesting leave to appeal that the Commission has denied her request for an antedate. I do not have a copy of the Commission's decision in this regard, but, if the Claimant has indeed received a decision from the Commission denying her request for an antedate, her recourse is to seek a reconsideration of that decision directly from the Commission. This is the appropriate avenue for the Claimant to pursue. She must pursue all of her options and exhaust her recourse rights with the Commission on the antedate issue before proceeding with an appeal to the General Division and then to the Appeal Division. Without a reconsideration decision and a decision from the General Division on the antedate issue, the Appeal Division does not have any jurisdiction to address this matter.

³ Application to Antedate Claim for Benefit, at AD1-9.

CONCLUSION

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

Janet Lew
Member, Appeal Division

SUBMISSIONS:	A. S., Applicant
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