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

Citation: *R. B. v Canada Employment Insurance Commission*, 2019 SST 60

Tribunal File Number: AD-18-807

BETWEEN:

R. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: January 28, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. B. (Claimant), collected Employment Insurance regular benefits between November 3, 2013 and July 13, 2014. In a letter dated April 18, 2018, the Respondent, the Canada Employment Commission (Commission), notified the Claimant that it had re-examined his claim and had determined that he had been unavailable for work from January 6, 2014, to October 18, 2014, because he was self-employed. It concluded that the Claimant was disentitled from receiving Employment Insurance regular benefits and that an overpayment had therefore been incurred. It maintained this decision on reconsideration. The General Division found that the Claimant had been focused on setting up his own business. It upheld the Commission's reconsideration decision.

[3] The Claimant had received regular benefits between November 2013 and July 2014, but the General Division's decision requires the Claimant to repay the benefits that he had received. The Claimant is now appealing the General Division's decision. The Claimant maintains that he had been available for work throughout that period and denies that he was involved in setting up his business. He also submits that it was unjust for the General Division to expect him to be able to respond to any questions about his availability for work because more than four years has passed since his claim for benefits.

[4] I must decide whether the appeal has a reasonable chance of success. I am refusing leave to appeal because there is no reasonable chance of success on appeal.

ISSUES

[5] The issues are:

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice by expecting the Claimant to give evidence on matters that occurred years ago?

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact without regard for the Claimant's evidence regarding his involvement with his business or the sale of his house?

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. A claimant does 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]

[1] In *Fancy v Canada (Attorney General)*, 2010 FCA 63, the Federal Court of Appeal 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.

[8] Section 58(1) of the DESDA provides for limited grounds of appeal. It does not give the Appeal Division any jurisdiction to conduct any reassessments.

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice by expecting the Claimant to give evidence on matters that occurred years ago?

[9] The Claimant argues that the General Division failed to observe a principle of natural justice. He claims that it was unjust to expect him to be able to respond to any questions about his availability for work because more than four years has passed since his claim for benefits. In particular, he claims that he was hard-pressed to provide specific dates and names of prospective employers where he applied to show that he was making reasonable and customary efforts to find work. In other words, he claims that the delay of approximately four years caused him undue prejudice.

[10] I do not find the cause of any delay to have been attributable to the General Division or, for that matter, the Social Security Tribunal. The Claimant filed his appeal with the Tribunal on June 20, 2018, and the General Division proceeded with hearing the appeal on October 10, 2018. I note, in any event, that the Claimant has not provided any evidence to suggest that any prejudice was of such magnitude that it impacted on the fairness of the hearing or that it amounted to an abuse of process. The General Division was unconcerned with the specifics of the Claimant's efforts at looking for work. Indeed, the General Division accepted general information regarding the Claimant's job search efforts.

[11] The Claimant is essentially arguing that the Commission should not be allowed to re-open his claim years later because this impairs his ability to show sustained efforts on his part to seek work. However, the *Employment Insurance Act* allows the Commission to reconsider a claim for benefits within 36 months after benefits have been paid or would have been payable.[3] Furthermore, if the Commission is of the opinion that a false or misleading statement or representation has been made in connection with a claim, the Commission has 72 months to reconsider the claim.[4] In April 2018, the Commission notified the Claimant that it was re-examining his claim within the 72-month timeframe because it was of the opinion that the

[3] *Employment Insurance Act*, s 52(1).
[4] *Employment Insurance Act*, s 52(5).

Claimant had made inaccurate statements or false or misleading representations. In its submissions to the General Division, the Commission noted that the Claimant had stated in his application for Employment Insurance benefits that he did not own any part of a business and that he was not self-employed.[5] The Commission was clearly acting within its authority to re-examine the Claimant's claim.

[12] I am not satisfied that the appeal has a reasonable chance of success on this particular ground.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact without regard for the Claimant's evidence regarding his involvement with his business or the sale of his house?

[13] The Claimant argues that the General Division based its decision on erroneous findings of fact that it made without regard for the evidence when it determined that he was unavailable for work and when it found that he failed to prove that he was not making reasonable and customary efforts to find suitable employment.

a. Claimant's business

[14] The General Division determined that the Claimant did not have a sincere desire to return to the labour market as soon as a suitable job was offered because he "was focused on moving towards his self-employment and creating a business for himself."[6] It found that he had entered into a franchise agreement in January 2014 and that he contacted few prospective employers while he was unemployed. The General Division found that the Claimant's job search was limited and showed that he was not actively seeking work. The General Division noted the Claimant's evidence that he was ready, willing, and available for work, but it found that he was more focused on his self-employment, given the time that he spent on his business over looking

[5] Representations of the Commission to the Social Security Tribunal – Employment Insurance form, at GD4-1.
[6] General Division decision at para 15.

for work and given that he had sold his home in X, B.C., to relocate to X, B.C., where his franchise would be located.

[15] Although the Claimant acknowledges that he "was pursuing a business," he claims that he "literally had no involvement"[7] in setting it up. He testified at the General Division hearing that his involvement was limited to writing a cheque for the franchise fee, but otherwise he had "zero involvement."[8] He was not responsible for finding a storefront, negotiating the lease, design, or construction of the property, or even purchasing any equipment or supplies for the business. It was just a "turnkey operation."[9] He noted that his business did not become operational until November 21, 2014, and he did not receive any compensation from his business while he received Employment Insurance benefits. He maintains that he had been ready and willing to return to work if suitable employment were to be found.

[16] The General Division was mindful of the Claimant's evidence in this regard. The General Division noted the Claimant's evidence that the franchisee "looked after everything until the doors were ready to open on November 21, 2014."[10] As such, I find that there is no basis to the Claimant's allegations that the General Division based its decision on an erroneous finding of fact without regard to the material before it. The General Division weighed this consideration against its findings that the Claimant had stated to the Commission that he spent two hours per week on his business. Additionally, the General Division determined that it was inconsequential whether the Claimant received any compensation or income from his business while he received Employment Insurance benefits because what was determinative was whether, overall, the Claimant was actively seeking out employment.

b. Claimant's sale of his house

[17] The General Division found that the Claimant's sale of his house was another example of the Claimant's focus on his business. The General Division considered the Claimant's sale of his house relevant to the question of whether he set personal conditions that might have unduly limited his chances of returning to the labour market. At paragraphs 20 and 26 of its decision, the

[7] Application to the Appeal Division, at AD1-3.
[8] At approximately 17:47 to 19:09 of the audio recording of the General Division hearing.
[9] At approximately 18:20 to 19:10 of the audio recording of the General Division hearing.
[10] General Division decision at para 2.

General Division found that the Claimant's priority was moving forward with his franchise business and that this involved selling his house, moving, and cleaning and renovating his apartment to provide a place to live close to the business.

[18] The Claimant argues that the General Division erred in drawing a connection between the sale of his house and his business pursuit because he had already sold his house long before he signed any contracts regarding his business. Besides, the sale of his house had been inevitable because he could no longer afford his house and planned to reside in his parents' vacant apartment. However, the Claimant's statements in this regard constitute new evidence before me. New evidence generally is inadmissible on appeal, except in very limited circumstances. Those circumstances do not exist here.[11]

[19] The Claimant did testify before the General Division that his father has a rental unit in an apartment complex and that, because the strata bylaws no longer permitted rentals, he occupied the unit.[12]

[20] It was immaterial why the Claimant sold his house—whether it was to occupy his family's vacant apartment or otherwise—but the sale and move to another location was a significant consideration for the General Division because it detracted from the Claimant's ability to devote time to looking for work. The General Division wrote that the Claimant did not provide sufficient evidence to show that his efforts at seeking work were sustained, in part, because he was selling his house, moving, and renovating and cleaning the apartment inX, B.C. In other words, the General Division did not base its decision on an erroneous finding that the Claimant might have sold his house in X for the sole reason that it would allow him to pursue his business in X.

[21] The General Division may not have set it out in its reasons, but the sale of the house was going to occur anyway, to enable the Claimant to move and occupy his family's empty apartment. He would have necessarily ended up taking the time to move, renovate, and clean the

[11] *Sharma v Canada (Attorney General)*, 2018 FCA 48.
[12] At approximately 36:34 of the audio recording of the General Division decision.

apartment to which he was moving. The General Division's decision would have been no different, irrespective the reason for the sale of the Claimant's house.

[22] Essentially the Claimant is seeking a reassessment, but an appeal before the Appeal Division does not entail a reassessment or rehearing. As I have noted above, there are limited grounds of appeal under section 58(1) of the DESDA. As Gleason, J.A., wrote in *Garvey v Canada*,[13] mere disagreement with the application of settled principles to the facts of a case does not provide me with the basis to intervene. Such a disagreement does not constitute an error of law or an erroneous finding of fact made in a perverse or capricious manner or without regard to the evidence, as set out under section 58(1) of the DESDA.

[23] 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 evidence before it.

CONCLUSION

[24] I am not satisfied that the appeal has a reasonable chance of success. Accordingly, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

SUBMISSIONS:	R. B., Applicant

[13] *Garvey v Canada (Attorney General)*, 2018 FCA 118.