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

Citation: *D. F. v Canada Employment Insurance Commission*, 2019 SST 194

Tribunal File Number: AD-18-432

BETWEEN:

D. F.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: March 11, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, D. F., applied for and received Employment Insurance (EI) benefits. While he was receiving EI benefits and attending school full-time, he accepted a part-time job. The Respondent, the Canada Employment Insurance Commission (Commission), allowed the Applicant to continue receiving benefits and advised him to maintain an active job search and report any changes to his employment status.

[3] The Applicant left his part-time job for another, and the Commission reassessed his availability. The Commission concluded that the Applicant was no longer demonstrating that he was available for work.

[4] The Applicant requested a reconsideration of that decision, and when the Commission maintained its decision, finding that the Applicant was not available for work because of the restrictions of his full-time studies, he appealed to the General Division of the Social Security Tribunal of Canada.

[5] The General Division found that the Applicant had demonstrated his desire to return to the labour market as soon as a suitable job was offered and had made efforts to find a suitable job. However, it also found that the Applicant set personal conditions that unduly limited his chances of returning to the labour market. Because of this, the Applicant did not prove availability for work.

[6] The Applicant filed the application for leave to appeal with the Appeal Division and submitted that the General Division erred in law by misapplying the binding jurisprudence by requiring him to apply for work that is contrary to his moral convictions, and by failing to consider the Digest of Benefit Entitlement Principles (Digest). His main argument, however, is that by disentitling him to EI benefits because of personal limitations in his employment search,

the Commission and the General Division violated his rights under sections 2 and 7 of the *Canadian Charter of Rights and Freedoms* (Charter).

[7] The appeal does not have a reasonable chance of success based on the Applicant's Charter arguments because he did not raise any Charter issues at the General Division. He did not argue that he was required to consider work that is contrary to his moral convictions, either.

[8] The appeal does not have a reasonable chance of success on the Applicant's other grounds because the Applicant simply repeats arguments he made to the General Division and does not raise any reviewable errors.

ISSUES

[9] Is there an arguable case that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction or erred in law by violating sections 2 and 7 of the Charter?

[10] Is there an arguable case that the General Division based its decision on an error of law by:

a) misapplying the legal test for availability set out in binding jurisprudence;

b) failing to consider that requiring the Applicant to consider less desirable work was contrary to his moral convictions; or

c) failing to consider the Digest?

ANALYSIS

[11] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can move forward only if leave to appeal is granted.[1]

[1] *Department of Employment and Social Development Act* (DESD Act), ss 56(1) and 58(3).

[12] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground on which the proposed appeal might succeed?[2]

[13] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error.[4] The only reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; 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.

[14] The Applicant submits that the General Division failed to consider his specific circumstances. He argues that it was against his moral convictions to apply for a job that was "far removed from [his] level of education and relative experience" and that, by requiring this, the Commission and the Tribunal violated his right to freedom of conscience and to liberty in the form of personal autonomy over important decisions.

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction or erred in law by violating sections 2 and 7 of the Charter?

[15] I find that there is no arguable case that the General Division failed to observe a principle of natural justice or refused to exercise its jurisdiction.

[16] "Natural justice" refers to fairness of process and includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against them. It is settled law that an applicant has the right to expect a fair hearing with a full opportunity to present their case before an impartial decision-maker.[5]

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[2] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208 at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363 at para 22.
[3] DESD Act, s 58(2).
[4] *Ibid.*, s 58(1).
[5] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 22.

[17] The Applicant has not raised concerns with the fairness of process at the Tribunal. He argued a violation of his Charter rights for the first time at the Appeal Division. He was not denied an opportunity to raise these arguments at the General Division.

[18] The Applicant did not raise any Charter-based arguments at the General Division. He confirmed this fact in writing after the Appeal Division asked him to do so.[6]

[19] Charter-based arguments cannot normally be raised for the first time on appeal. They must first be raised at the General Division of this Tribunal,[7] not at the Appeal Division.

[20] The Appeal Division has consistently refused to grant leave to appeal based on Charter arguments where the applicant did not raise the Charter issue at the General Division.[8] While an earlier Appeal Division decision is not binding on me, it might have persuasive value. I note also that, "while it is true that later tribunal panels are not bound by the decisions of earlier tribunal panels, it is equally true that later panels should not depart from the decisions of earlier panels unless there is good reason."[9]

[21] In *Papouchine v Canada (Attorney General)*,[10] the Federal Court recently reviewed a matter in which the claimant made a Charter challenge at the Appeal Division of this Tribunal without pursuing this issue at the General Division first. The claimant had raised a Charter-based argument at the General Division, but did not file the notices required by the *Social Security Regulations*. There was no evidentiary record or any findings of fact dealing with the Charter-based issue, and the General Division treated those arguments as abandoned. The Appeal Division refused to consider the Charter-based arguments on appeal. The Federal Court upheld the Appeal Division's decision.

[22] Here, the Applicant did not raise Charter-based arguments at the General Division, either in writing or orally at the hearing. There is, therefore, no evidentiary record or any findings of fact dealing with his Charter-based arguments. Although there may be some exceptional cases

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[6] AD3-1: Additional submissions of the Applicant.
[7] *Garshowitz v Canada (Attorney General)*, 2017 FCA 251 at para 11.
[8] *C.F. v Minister of Employment and Social Development*, 2016 SSTADIS 86; *P. T. v Minister of Employment and Social Development*, 2016 SSTADIS 162.
[9] *Canada (Attorney General) v Bri-Chem Supply Ltd.*, 2016 FCA 257 at para 44.
[10] *Papouchine v Canada (Attorney General)*, 2018 FC 1138.

where the Courts have allowed a Charter argument to be raised for the first time on appeal, none of the exceptions applies to the present case.[11] Also, I see no reason to depart from earlier decisions of the Appeal Division that refused to grant leave to appeal based on Charter arguments where the applicant did not raise the Charter issue at the General Division. Further, allowing Charter-based arguments to be raised for the first time at the Appeal Division in this matter would deprive the Commission of an opportunity to appeal.[12]

[23] The General Division did not fail to observe a principle of natural justice or otherwise act beyond or refuse to exercise its jurisdiction or err in law with respect to sections 2 and 7 of the Charter. The Applicant did not raise any Charter-based arguments at the General Division.

[24] The appeal does not have a reasonable chance of success based on this ground.

Issue 2: Is there an arguable case that the General Division based its decision on an error of law?

[25] I find that there is no arguable case that the General Division erred in law regarding any of the Applicant's arguments.

Misapplying the legal test for availability set out in binding jurisprudence

[26] This appeal turns on whether the Applicant proved that he was available for work, as defined in the *Employment Insurance Act* and Federal Court of Appeal jurisprudence.

[27] The General Division correctly stated the binding jurisprudence and the applicable legal tests,[13] and, as a result, did not err in law.

[28] The Applicant submits that the General Division misapplied the legal test set out in *Faucher v Canada (Attorney General)*[14] by weighing the third criteria more heavily than the first two.

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[11] *M.(K.) v M.(H.)*, [1992] 3 S.C.R. 3 (using the *Charter* as an interpretive tool); and *R. v Brown*, [1993] 2 S.C.R. 918 at para 20 (where there is a sufficient evidentiary record to resolve the issue, it is not an instance in which a *Charter* argument is being used for tactical reasons, and the court is satisfied that no miscarriage of justice will result); *Guindon v Canada* [2015] 3 S.C.R. 3, at paras 20 and 22.
[12] AD4: Additional Submissions of the Respondent at page 3.
[13] General Division decision at paras 6 to 10.
[14] *Faucher v Canada (Attorney General)*, 1997 CanLII 4856 (FCA).

[29] I find that the General Division considered each of the three *Faucher* factors. It found that the Applicant met the first two factors, but not the third. All three must be met in order to prove availability. The General Division did not err in law in this regard.

[30] The General Division found that the Applicant set two personal conditions that unduly limited his chances of returning to the labor market. First, the Applicant confirmed that he was limiting his job search to employment in the legal field, and second, that he was only available to work during hours that did not conflict with his course schedule.

[31] The General Division referred to applicable jurisprudence and considered the evidence in the appeal record to come to these conclusions.

[32] The appeal does not have a reasonable chance of success based on this ground.

Failing to consider that requiring the Applicant to consider less desirable work was contrary to his moral convictions

[33] The Applicant did not raise this specific argument at the General Division. His position at the General Division was that he was looking for such jobs as legal assistant, law clerk, or paralegal assistant because they are in his field of study and could lead to full-time work as a paralegal—his desired career.

[34] The Applicant now argues that "forcing [him] to find work removed from [his] level of education and relative experience would be contrary to [his] personal moral convictions."[15] This is a repackaging of the submission he made at the General Division and to the Commission that he should not apply for work below his level.

[35] The General Division did not frame the issue as one of moral convictions because the Applicant did not make his arguments using these terms. It did not err in law by failing to consider that less desirable work was contrary to the Applicant's moral convictions.

[36] The appeal does not have a reasonable chance of success based on this ground.

[15] AD1: Application for Leave to Appeal at page 12.

Failing to consider the Digest

[37] The Applicant makes numerous arguments that the General Division failed to consider portions of the Digest.

[38] Indeed, the General Division did not refer to the Digest. The General Division did refer to the applicable legislative provisions and binding jurisprudence, and it applied them properly. The legislative provisions and jurisprudence are the authorities that the General Division must interpret and apply. The Digest is not. It is not an error of law to fail to mention a document that is not the authoritative source for decision-making at the Tribunal.

[39] The appeal does not have a reasonable chance of success based on this ground.

CONCLUSION

[40] I am satisfied that the appeal has no reasonable chance of success, so the application for leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVES:	D. F., self-represented Christian Malciw, Counsel for the Respondent