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

Citation: *M. W. v Canada Employment Insurance Commission*, 2019 SST 301

Tribunal File Number: AD-19-123

BETWEEN:

M. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: March 22, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] While at work, the Applicant, M. W. (Claimant), was informed that he had sleeping tuberculosis (TB). He left his employment in September 2017 to return to his home community and applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, finding that he had left his employment without just cause. At the same time, the Commission found that he was not available for work from September 26, 2017, to December 18, 2018, and that he was therefore ineligible for benefits in that period.

[3] The Claimant asked the Commission to reconsider but the Commission maintained its decision. The Claimant next appealed to the General Division of the Social Security Tribunal. When the General Division dismissed his appeal, the Claimant requested leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. He has not made out an arguable case that the General Division failed to observe any principle of natural justice or made an error of jurisdiction and I have been unable to discover an arguable case that the General Division made any finding of fact that ignored or overlooked evidence.

ISSUES

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice, or that it erred by acting beyond or refusing to exercise its jurisdiction?

[6] Is there an arguable case that 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?

ANALYSIS

General Principles

[7] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[8] The only grounds of appeal are described below:

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.

[9] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case[1].

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice, or that it erred by acting beyond or refusing to exercise its jurisdiction?

[10] The only ground of appeal that the Claimant selected in completing his application for leave to appeal is the ground of appeal concerned with natural justice and jurisdiction.

[11] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Claimant has not raised a concern with the adequacy of the notice of the General Division hearing, with the pre-hearing exchange or disclosure of documents, with the manner in which the General Division hearing was conducted or the Claimant's understanding of the

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41*; Ingram v. Canada (Attorney General)*, 2017 FC 259

process, or with any other action or procedure that could have affected his right to be heard or to answer the case. Nor has he suggested that the General Division member was biased or that the member had prejudged the matter. Therefore, there is no arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by failing to observe a principle of natural justice.

[12] Turning to jurisdiction; there were three issues that were before the General Division. The first two issues were whether the Claimant voluntarily left his employment and whether he did so without just cause. The Commission failed to confirm its decision on these issues in its follow-up letter dated October 26, 2018, but I am satisfied that the decision was communicated in a telephone conversation between the Commission and the Claimant also on October 26, 2018. In that conversation, the Commission told the Claimant that it would be maintaining the original decision made on his claim as he has not shown just cause for leaving his employment.[2]

[13] The third issue before the General Division concerned the Claimant's availability for work. The Commission communicated this decision in the October 26, 2018, telephone conversation, and again in a second letter of October 26.

[14] The Claimant did not suggest that the General Division failed to consider these issues or that it considered issues that it should not have considered, and he did not identify any other jurisdictional error. Therefore, there is no arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by refusing to exercise its jurisdiction or by acting beyond its jurisdiction.

Issue 2: Is there an arguable case that 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?

[15] Although the only ground of appeal selected by the Claimant involves his assertion of a natural justice error, the Claimant has argued that the General Division failed to consider his health as well as his family circumstances, namely; that his daughter-in-law had died in tragic circumstances and that his son and grandchildren needed him.

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[2] GD-74

[16] The Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. In *Karadeolian v. Canada (Attorney General)*[3], the Court states as follows: "[T]he Tribunal must be wary of mechanistically applying the language of section 58 of the [DESD] Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party".

[17] The Claimant did not point to any particular error or to specific evidence that the General Division may have ignored or misunderstood when it reached its conclusions. However, in accordance with the direction of *Kardeolian*, I have reviewed the record for any other significant evidence that might have been ignored or overlooked and that may, therefore, raise an arguable case.

[18] I note that the Claimant has not disputed at any point that he left his work voluntarily and there is no argument before me that the General Division erred in finding that he did. Therefore, the only issues are whether he left without just cause and whether he was available for work from September 26, 2017, to December 18, 2017.

The Claimant's health

[19] Section 29(c) of the *Employment Insurance Act* (EI Act) states that just cause for voluntarily leaving an employment exists if a claimant has no reasonable alternative to leaving having regard to all of the circumstances. According to section 29(c)(iv), one of the circumstances that must be taken into account is "working conditions that constitute a danger to health or safety".

[20] It is clear on the face of the decision that the General Division considered the Claimant's diagnosis of sleeping TB. The General Division also reviewed how the Claimant was confused when he learned about his diagnosis and that he left at the end of his work period without telling anyone about his diagnosis because he did not want to scare them.[4] The General Division noted that the Claimant was told that the condition was not contagious at the same time he learned of his diagnosis.

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[3] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[4] General Division decision, para 11

[21] The evidence was conflicted as to whether he would be required to take the medication in his home community. A letter from his doctor said that this was not required but the Claimant stated he was told at the nursing station in his home community that he could not take the medication out of the community. However, the Claimant did not dispute that the medication did not arrive in his home community until late December and that he had left his employment to return to his home community on September 25, 2017. The Claimant confirmed that he did not return to work while he was waiting to be treated.

[22] The General Division referred to the doctor's letter of January 23, 2018, which confirmed that he was not contagious and that his condition does not make him sick.[5] It found that the Claimant's medical condition did not require him to leave work when he did, and that his doctor did not advise him to leave his employment.[6] It further found that the Appellant could have advised his employer of his health situation and discussed whether there would be any issues with him remaining in the camp. The General Division found that a reasonable alternative would have been for the Claimant to request a leave of absence or attempt to find other suitable employment before leaving.

[23] I was unable to discover an arguable case that the General Division ignored or misunderstood evidence to find as it did.

Family Circumstances

[24] According to section 29(c)(v) of the EI Act, where there is an obligation to care for a child or a member of the immediate family, this circumstance must also be taken into account in determining whether there are reasonable alternatives to leaving.

[25] The General Division decision reveals that the member was aware of the death of the Claimant's daughter-in-law and that she was survived by two young children and her husband, the Claimant's son.[7] The General Division also referred to a November 14, 2018, letter from a

[5] GD3-31
[6] General Division decision para. 22.
[7] *Ibid*, para. 19

mental health therapist[8] that suggested the Claimant's presence in the community would be helpful to support his family.[9]

[26] The General Division noted that the therapist's letter did not support the Claimant's need to leave his employment when he did in September 2017. The Claimant returned to work in the summer of 2018 for a time and then returned home a second time, well before the therapist offered his opinion.

[27] Once again, the General Division again found that a reasonable alternative to leaving in September would have been to remain employed until he was able to secure employment closer to home. I have not discovered any evidence that the General Division ignored or misunderstood to reach this finding.

Availability for work

[28] Section 18(1) of the EI Act states that a claimant is not entitled to be paid benefits for a working day in a benefit period if the claimant cannot prove that he or she is capable of an available for work and unable to obtain suitable employment. The period of disentitlement under consideration in this appeal is from September 26, 2017, to December 18, 2017.

[29] The General Division considered the Claimant's testimony that he was available only for jobs within his home community and that, when he left his job and made the decision to return to his community, he knew there were no jobs for X available.10 The General Division also noted the Claimant's testimony that working outside the community was very hard on his family and that he did not intend to leave his grandchildren again.11

[30] The General Division did not accept that the medical evidence confirmed that the Claimant was required to remain in his home community to be treated for his sleeping TB in the period between September 26, 2017, and December 18, 12017. It also found that the therapist's letter was not evidence that he was urgently required at home in that same period.[12] The General Division

[8] General Division decision, para. 31
[9] GD2-6
[10] *Supra* note 8, para. 41
[11] *Supra* note 8, para. 39
[12] *Supra* note 8, para. 33

noted that the Claimant's home community is an isolated, fly-in community,[13] and it found that, by restricting his search for work to that community, the Claimant set personal conditions that might unduly limit the chances of returning to the labour market. Also related to the limited scope of his job search, the General Division found that the Claimant did not demonstrate serious efforts to find work in that period, or demonstrate a desire to return to work as soon he could find a suitable job.

[1] I have not discovered any significant or relevant evidence that the General Division ignored in reaching its findings.

[2] There is no arguable case that the General Division based its decision on any erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it—as would be required to find grounds for appeal under section 58(1)(c) of the DESD Act.

[3] I understand that the Claimant does not agree with the decision of the General Division and that he feels the decision is both unfair and lacking in compassion. In his leave to appeal application he has asked that I make a reasonable decision and not let bureaucracy get in my way.

[4] Unfortunately, I am required to follow the law and I am only authorized to intervene in the General Division decision if I find that it has made an error under section 58(1) of the DESD Act. Even if the decision is harsh in its result or if I disagree with the decision, I cannot reweigh or reassess the evidence to reach a different conclusion.[14]

[5] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	M. W., Self-represented

[13] *Supra* note 8, para. 39
[14] *Griffin v. Canada (Attorney General)*, 2016 FC 874; *Tracey v. Canada (Attorney General)*, 2015 FC 1300