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

Citation: *S. X. v Canada Employment Insurance Commission*, 2019 SST 304

Tribunal File Number: AD-19-122

BETWEEN:

S. X.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: March 25, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. X. (Claimant), took sick leave from his employer beginning in May 2017. He continued to be paid by his employer through the employer's sick leave provisions until December 22, 2017. The Claimant tried to access additional long-term disability benefits through his employment, but his application was finally denied on March 2018. He eventually returned to work in May 2018.

[3] The Claimant applied for Employment Insurance sickness benefits on July 18, 2018, and requested an antedate to December 22, 2017. The Respondent, the Canada Employment Insurance Commission (Commission) approved benefits starting July 29, 2018, but the Claimant had already returned to work. The Claimant asked the Commission to reconsider, citing his request to have the claim antedated, but the Commission maintained its original decision. It found that the Claimant did not have good cause for delaying his application over the entire period of the delay, and specifically from February 2018 to July 2018. When the Claimant appealed the reconsideration decision to the General Division of the Social Security Tribunal, the General Division dismissed his appeal. He now seeks leave to appeal to the Appeal Division.

[4] There is no reasonable chance of success. The Claimant has not raised an arguable case that the General Division based its decision on any finding that ignored or misunderstood significant evidence. I have likewise been unable to identify any evidence that was ignored or misunderstood that could have affected the decision.

ISSUE

[5] 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 materials before it?

ANALYSIS

General Principles

[6] 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).

[7] 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.

[8] 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]

[9] The Claimant did not select a ground of appeal when he completed his Leave to Appeal application, but he did provide some explanation as to why he was appealing. His explanation restates his position at the General Division, namely; that he had not known he could apply for benefits and that he applied as soon as he learned that he could. He also states that the General Division was mistaken in its understanding that his employer asked him in July why he did not apply for Employment Insurance benefits.

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

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?

[10] The Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. In *Karadeolian v. Canada (Attorney General)*[2], 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".

[11] The Claimant did not point to any specific evidence that the General Division ignored or misunderstood when it reached its conclusions but, 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.

[12] The General Division decided as it did because the Claimant's only reason for having delayed his application for sick benefits was that he did not know he could. The Claimant does not agree that it is fair that he should not be entitled to have his benefits backdated when he did not know he could apply. However, the points he raises in his Leave to Appeal application only serve to confirm that the General Division correctly understood that his reason for delay was that he did not know he could apply. Therefore, the Claimant has not raised an arguable case that the General Division's findings were based on any failure to consider or understand the evidence.

[13] The Claimant also argued that the General division misunderstood that his employer had asked him in July why he did not apply for Employment Insurance benefits[3]. In fact, there was evidence on the file that supports the General Division's statement: The Claimant initially told the Commission that he went immediately to an Employment Insurance office after a human resources representative at his employer asked him in July 2018 if he had applied for benefits.[4] However, the Claimant also stated on the Request for Reconsideration form that he did not know he could apply until he was told by a colleague,[5] and he told the Commission during the

[2] *Karadeolian v Canada (Attorney General)*, 2016 FC 615
[3] The Claimant refers to para. 14 of the General Division decision
[4] GD3-23
[5] GD3-28

reconsideration that a friend at work had told him about the benefit when he came back to work, possibly in May (2018).[6] His testimony to the General Division provided a third variation. He testified that he learned that he could have applied for Employment Insurance benefits from a co-worker (as he said in connection with his reconsideration request), but that he learned this in July (as he initially told the Commission). [7]

[14] Although there are inconsistencies in the Claimant's evidence related to how or when the Claimant first learned that Employment Insurance benefits might have been available, the General Division determined, as a matter of law, that the Claimant lack of knowledge did not excuse any part of his delay. Therefore, the General Division's decision is not ultimately based on its view of this evidence. It might have been preferable if the General Division member had addressed the inconsistencies and explained why it (apparently) accepted the first version recorded by the Commission, but there can be no arguable case that the General Division *based its decision* on an erroneous finding of fact.

[15] I appreciate that the Claimant does not agree that he should be denied Employment Insurance benefits just because he did not know he could apply for them. However, the General Division was required to apply the case law from the Federal Court of Appeal. The case law has determined that ignorance of the law (in this case, the Claimant's ignorance that he could apply for benefits and should not delay in applying), on its own, is not "good cause" for delay within the meaning of section 10(4) of the Employment Insurance Act.[8]

[16] The General Division correctly noted that a Claimant must show that he did what a reasonable person in his situation would have done to satisfy himself as to his rights and obligations under the Act[9]. Unless there are exceptional circumstances, this means that a claimant must take reasonably prompt steps to understand his or her entitlement to benefits.[10]

[17] The Claimant did suggest in his arguments to the Appeal Division that the General Division should have considered his particular circumstances to be exceptional or should have

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[6] GD3-29
[7] Audio recording of General Division hearing at 13:25
[8] General Division decision, para. 17
[9] Ibid. para 20
[10] Ibid. para 18

found that he was reasonably prompt in taking steps to learn what benefits might be available. However, even if he had, I would not have the jurisdiction to consider such questions because they are questions of mixed fact and law. The Federal Court of Appeal in *Quadir* v *Canada (Attorney General)* [11] has confirmed that the Appeal Division has no jurisdiction to consider questions of mixed fact and law.

[18] There is no arguable case that the General Division decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	S. X., Self-represented

[11] *Quadir v Canada (Attorney General)*, 2018 FCA 21