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

Citation: *A. K. v Canada Employment Insurance Commission*, 2019 SST 325

Tribunal File Number: AD-19-111

BETWEEN:

A. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 2, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Respondent, the Canada Employment Insurance Commission (Commission) determined that the Applicant, A. K. (Claimant) obtained Employment Insurance benefits using a fraudulently obtained Record of Employment. As a result, the Commission required the Claimant to return the benefits that had been paid, and it imposed a penalty. The Commission maintained this decision on reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division found that she had filed her appeal more than one year from the day on which the reconsideration decision had been communicated. The appeal was dismissed for having been filed out of time (the First Decision). The Claimant applied for leave to appeal the First Decision to the Appeal Division, but she also filed an application to the General Division to rescind and amend its decision. The application for leave to appeal the First Decision, filed to the Appeal Division, was suspended to wait for the decision from the General Division on the rescind and amend application.

[4] The General Division dismissed the rescind and amend application, and the Claimant filed a second leave to appeal application to the Appeal Division; this time seeking leave to appeal the rescind and amend dismissal. This second application is the application that is now under consideration.

[5] There is no reasonable chance of success. The Claimant has not identified how the General Division failed to observe any principle of natural justice and has not otherwise pointed to any error in the General Division decision. She has not made out an arguable case that the General Division erred under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

PRELIMINARY MATTERS

Joining of leave to appeal applications

[6] The Claimant has asked that this leave to appeal application be joined to the leave to appeal application of the First Decision of the General Division dated August 10, 2018 and filed under GE-18-2384.

[7] I will not be joining the two Appeal Division files because I must either finally determine this matter (that means that I must deny leave to appeal in this application, or else I must allow the leave to appeal application and also complete a final decision on the merits of the appeal), before I will know how best to proceed on the other file.

Is the application for leave to appeal late?

[8] I considered also whether this leave to appeal application has been filed late. Section 57(1) of the DESD Act requires that application for leave be made 30 days after the day on which a decision of the Employment Insurance Section of the General Division is communicated to the appellant. The rescind and amend application is dated October 26, 2018, and may be presumed to have been communicated within 10 days according to section 19 of the Social Security Tribunal Regulations. The application for leave to appeal would need to have been filed on December 5, 2018, but the Claimant did not apply for leave to appeal until January 24, 2019, which would be late.

[9] However, in this case I had written the Claimant in connection with her leave to appeal application of the First Decision, suspending that application, and informing her that she had 90 days, from the date the General Division rescind and amend decision was communicated to her, to appeal the rescind and amend decision.

[10] I therefore confirm that I granted additional time for the Claimant to bring this leave to appeal application and that she is not out of time - relative to the extension already granted. I will consider the leave to appeal application.

ISSUES

[11] Is there is an arguable case that the General Division failed to observe a principle of natural justice or make an error of jurisdiction under section 58(1)(a) of the DESD Act?

[12] 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, per section 58(1)(c) of the DESD Act?

ANALYSIS

[13] The Appeal Division cannot intervene in a General Division decision unless 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) and set out 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.

[14] Unless the General Division erred in one of these ways, the appeal cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion.

[15] At this stage, I must find that there is a reasonable chance of success on one or more grounds of appeal in order to grant leave and allow the appeal to go forward. A reasonable chance of success has been equated to an arguable case[1].

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

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?

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

[17] 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 hearing at the General Division, 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 process, or with any other action or procedure that could have affected her right to be heard or to answer the case. Nor has she 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.

[18] Turning to jurisdiction; there are only two legal questions to determine on any rescind and amend application that is properly before the General Division under section 66 of the DESD Act: The first question is whether the Claimant provided a new material fact that could not have been discovered at the time of the hearing. The second question is whether the First Decision was made without knowledge of, or was based on a mistake as to, some material fact.

[19] 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, nor did she 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.

[20] There is no arguable case that the General Division failed to observe a principle of natural justice under section 58(1)(a) of the DESD Act.

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, per section 58(1)(c) of the DESD Act?

[21] The only ground of appeal selected by the Claimant involves her assertion of a natural justice error. The Claimant did not identify any evidence that the General Division ignored or misunderstood when it reached its conclusions.

[22] However, the Federal Court of Appeal in *Karadeolian v. Canada (Attorney General)*[2], the Court stated 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". In accordance with the direction of *Karadeolian*, I have reviewed the record for any other significant evidence that the General Division might have been ignored or overlooked and that may, therefore, raise an arguable case.

[23] However, I have been unable to discover any other arguable case. In the rescind and amend decision, the General Division found that the Claimant had submitted her medical evidence to the General Division on August 2, 2018 before the General Division reached the First Decision, and that the evidence was therefore not "new".

[24] The General Division also considered whether it had made the First Decision without knowledge of, or based on a mistake as to, some material fact. The Claimant argued that Service Canada was mistaken in assuming that the paralegal would have communicated with her.

[25] The legal issue before the General Division in the First Decision was whether the Claimant filed her appeal more than a year from the date the decision had been communicated. Section 52(2) of the DESD Act states that in no case may an appeal be brought more than a year after the date it is communicated to the appellant. However, the factual issue was the actual date that the decision was communicated. In the First Decision, the General Division found that the Commission's reconsideration decision had been communicated on January 11, 2017 (and that therefore more than a year had lapsed).

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[2] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615

[26] The General Division did not ignore the Claimant's evidence that she had not retained her current legal representation until May 2018 and that she had not communicated with her previous paralegal since January 2017. In fact, the General Division referred to the Claimant's rescind or amend application where she stated that all she could recall, in January 2017, was that she had instructed a paralegal to appeal on her behalf.[3] This evidence was taken, together with the Claimant's indication that she received the reconsideration decision on January 11, 2017 in her Notice of Appeal form, to form the basis for the General Division's decision.

[27] The First Decision was not made "without knowledge or based on a mistake as to some material fact." The material fact found was that the decision was communicated on January 11, 2017. It was not material whether the Claimant's paralegal failed to appeal as he had said he would, or failed to inform the Claimant that he had not appealed, or whether the Claimant had the capacity to follow up to determine whether the appeal had been filed.

[28] I have found no evidence that was ignored or misunderstood by the General Division when it found that the Claimant had not brought her appeal to the General Division within a year of the date the reconsideration decision was communicated. Therefore, there is no arguable case that the General Division based its rescind and amend decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	A. K., Self-represented

[3] RAGD2-1