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

Citation: *R. M. v Canada Employment Insurance Commission and X*, 2019 SST 326

Tribunal File Number: AD-19-169

BETWEEN:

R. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 3, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. M. (Claimant), left his employment in disputed circumstances. The Added Party (X (Employer) said that the Claimant had quit and the Claimed said that he had been unfairly dismissed. The Respondent, the Canada Employment Insurance Commission (Commission) gave the Claimant the benefit of the doubt and decided that he had been dismissed in circumstances that did not amount to misconduct. It allowed his claim for Employment Insurance benefits.

[3] The asked the Commission to reconsider but the Commission maintained its decision. The Employer then appealed to the General Division of the Social Security Tribunal where he was successful. The General Division allowed his appeal, finding that the Claimant had voluntarily left his employment and that he had left without just cause. The Claimant now seeks leave to appeal to the Appeal Division.

[4] There is no reasonable chance of success on appeal. There is no arguable case that the General Division failed to observe a principle of natural justice, exceeded its jurisdiction, made an error of law or that it ignored or misunderstood any relevant evidence.

ISSUES

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice?

[6] Is there an arguable case that the General Division exceeded its jurisdiction by considering whether the Claimant quit without just cause?

[7] Is there an arguable case that the General Division erred in law by failing to consider all the circumstances including the Claimant’s payments to purchase company property, his claim to compensation for damage to his X, and unpaid overtime hours?

[8] 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 to the material before it?

ANALYSIS

[9] 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 DESD Act.

[10] 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.

[11] 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?

[12] The Claimant indicated on his leave to appeal application that the General Division erred by failing to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

[13] 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

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

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 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.

[14] 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.

Issue 2: Is there an arguable case that the General Division exceeded its jurisdiction by considering whether the Claimant quit without just cause?

[15] The Claimant asserts that the General Division did not "deal with the complaint that was given".

[16] The original Commission decision found that the Employer did not dismiss the Claimant for his misconduct and approved the Claimant's reason for separation from employment. The reconsideration decision that was on appeal to the General Division maintained the original decision. The General Division agreed that the Claimant was not dismissed for misconduct but found, instead, that the Claimant voluntarily left his employment without just cause.

[17] I presume that the Claimant's concern is with the apparent difference between the basis for the General Division decision and the issue that was apparently on appeal. The question is whether the General Division acted within its jurisdiction, finding that the Claimant voluntarily left his employment without just cause even though the reconsideration letter framed the issue as misconduct.

[18] The General Division apparently considered its jurisdiction. Immediately prior to opening the analysis that eventually concluded that the Claimant voluntarily left his employment [2] rather than that the employer terminated the Claimant,[3] the General Division referenced the Federal Court of Appeal decisions in *Canada (Attorney General) v Easson, Canada (Attorney General) v*

[2] General Division decision, para. 49
[3] General Division decision, para. 50

Borden, and *Canada (Attorney General) v Desson*.[4] The General Division summarized those decisions as having confirmed that it had jurisdiction to decide on either voluntary leaving without just cause or misconduct, in circumstances where both reasons are offered for the separation.

[19] Of the cited cases, *Easson* is most directly comparable. It said the following:

> Legally speaking, the subject matter of the appeal … was a disqualification under [the section of the former Unemployment Insurance Act similar to the current section 30(1) of the *Employment Insurance Act*]. By interpreting the facts in a slightly different manner so as to conclude that the case was one of quitting without cause rather than one of being fired, the [former Board of Referees] did not stray from the subject matter it was called upon to consider.

[20] Under the *Employment Insurance Act* (EI Act), if the Claimant left his employment voluntarily, he could only be found to be entitled to benefits where he had just cause for leaving. On the other hand, if the employer terminated the Claimant, the Claimant could only be found to be entitled to benefits if his actions did not amount to misconduct.

[21] In this case, the employer maintained that the Claimant quit, and that he quit because of a dispute over payment for damages to the Claimant's X. The Claimant, on the other hand, maintained that he was fired, and that he was fired because he reported the employer's unsafe practices. However, regardless of which is correct, the underlying issue is whether the Claimant is disqualified from receiving benefits under section 30(1) of the EI Act.

[22] The General Division is required to follow the direction of the Federal Court of Appeal. There is no arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by exceeding its jurisdiction when it considered the question of voluntary leaving without just cause in addition to the question of termination for misconduct.

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[4] General Division, para. 10

Issue 3: Is there an arguable case that the General Division erred in law by failing to consider all the circumstances including the Claimant's payments to purchase company property, his claim to compensation for damage to his X, and unpaid overtime hours?

[23] In his leave to appeal application, the Claimant has raised a number of circumstances that he believes should be considered in determining the reason for his separation from employment. Two of those circumstances are related to circumstances listed in section 29(c) of the EI Act. The circumstances described in section 29(c) are not an exclusive list of the only circumstances that may be relevant to whether a claimant has no reasonable alternative to leaving his or her employment (which is how "just cause" is found to exist under section 29(c)). However, any circumstance that is specifically identified in section 29(c) is necessarily relevant and must be considered where the evidence suggests that it is present.

[24] The first circumstance is set out in section 29((c)(iii), "excessive overtime hours or refusal to pay for overtime work". The Claimant argued that his employer has denied a significant number of overtime hours. He raised his unpaid hours in one of his discussions with the Commission where he said that he had received his T4 and [determined that] the employer "skimmed 270 hours off", that he is "missing $5000.00" or more , and that he, "worked more hours" and "had banked hours which would get paid out every two months".[5]

[25] The Claimant did not mention unpaid overtime in any other document or statement to the Commission and he did not appear at the General Division hearing or submit any evidence or argument in response to the employer's appeal. The above statement is the only evidence from the Claimant on unpaid work.

[26] While the Claimant apparently has some kind of dispute with the employer as to unpaid hours, the dispute only appears to have arisen after the Claimant received his T4 slip. There is no evidence that the Claimant was either aware of, or concerned about, not being paid for any of his work while he was still employed, so it is difficult to imagine how this could have been a factor in his quitting or affected what reasonable alternatives were available to him. In fact, he maintained in all of his discussions with the Commission that he did not quit, or had not meant to

[5] GD3-93, 95

quit. Therefore, there is no arguable case that the General Division failed to take this circumstance into account when it determined that the Claimant had reasonable alternatives to leaving.

[27] There was also some evidence on the file that suggested that "working conditions that constitute a danger to health or safety" (s.29(c)(iv) of the EI Act) may have been involved in the Claimant's decision to leave. The Claimant's leave to appeal application notes that his complaint had something to do with an unpermitted demolition. This suggests an argument that the General Division may not have considered that the employer terminated him because of his concern with the safety of the demolition. If a legitimate safety concern existed, this would also be relevant to whether the Claimant had just cause for leaving voluntarily.

[28] The General Division appears to have considered the safety concerns raised by the Claimant at length.[6] I acknowledge that this circumstance was reviewed in the context of the Claimant's assertion that the employer fired him for reporting them, but it nonetheless reviewed and addressed the justification for the Claimant's stated concerns. The General Division found that the Claimant did not refuse to work owing to safety concerns and the employer "reacted to the claimant's concerns about the way he was asked to do the work not by dismissing them, but by sending out an engineer to look over the situation."[7] In so finding, the General Division has determined that the employer was making efforts to address the Claimant's safety concern, a finding that effectively rules out that the possibility that the Claimant's stated safety concerns would have affected the availability of reasonable alternatives to leaving. There is no arguable case that the General Division erred in law by failing to consider "working conditions that constitute a danger to health and safety."

[29] So far as the question of whether the Claimant had paid for the X or was entitled to ownership of the X, the Claimant told the Commission that the employer was deducting money off his checks for the X[8] and was understood by the Commission to be claiming that he had bought the X. The employer stated that the Claimant had the use of the X while he was working.[9]

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[6] General Division decision, paras. 19-24, 27-30, 33-35, 37, 40, and 50
[7] General Division decision, para. 50
[8] GD3-92
[9] GD3-94

Regardless of which version of events one accepts, it is apparent that title to the X only became an issue once the Claimant was no longer an employee. This could not have been a relevant factor in the Claimant's decision to leave or in the General Division's determination that he had reasonable alternatives to leaving, and it was not necessary for the General Division to address it in its analysis.

[30] The Claimant also raised the issue of compensation for damage to his X (or X). It is obvious that the General Division considered this circumstance. The General Division even found that the Claimant quit because of the employer's refusal to pay for damage to the Claimant's X.[10] However, the General Division also found that the question of who was responsible for the damage was in dispute.[11] The General Division clearly acknowledged the outstanding dispute regarding the damage to the Claimant's X but was not in a position to determine its effect on the Claimant's reasonable alternatives. It therefore did not err in law by not considering it.

[31] I find that the Claimant has not made out an arguable case that the General Division failed to consider all the circumstances in finding that the Claimant had reasonable alternatives to leaving. There is no arguable case that the general Division erred in law under section 58(1)(b) of the DESD Act.

Issue 4: 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 to the material before it?

[32] I have noted that the General Division considered the compensation for damage to the X but that it did not reference the Claimant's dispute with his employer over unpaid hours of work or title to the X. However, these other factors are not so significant or so relevant, that I would consider the General Division to have erred by not mentioning them in its decision. As the Federal Court of Appeal in *Simpson v. Canada (Attorney General)* noted, "a tribunal need not

[10] General Division decision, para. 49
[11] General Division decision, para. 60

refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence."[12]

[33] The Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. In *Karadeolian v. Canada (Attorney General)*[13], 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".

[34] In accordance with the direction of *Karadeolian*, 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. However, I have not been able to discover significant, relevant evidence that the General Division ignored or overlooked that might give rise to an arguable case.

[35] There is no arguable case that the General Division based its decision on any finding that ignored or overlooked evidence or that did not follow rationally from the evidence, which means that there is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act.

[36] The Applicant has no reasonable chance of success.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	R. M., Self-represented

[12] *Simpson v. Canada (Attorney General)*, 2012 FCA 82
[13] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615