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

Citation: *B. B. v Canada Employment Insurance Commission*, 2019 SST 333

Tribunal File Number: AD-19-183

BETWEEN:

B. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 5, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, B. B. (Claimant), lost her employment in connection with a change of ownership of her employer business, and she applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim finding that she did not have sufficient hours of insurable employment to qualify.

[3] The Claimant asked the Commission to reconsider, but the Commission maintained its decision. The Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed her appeal and she now seeks leave to appeal to the Appeal Commission.

[4] The Claimant has no reasonable chance of success. The General Division did not make an error of law by failing to extend her qualifying period.

ISSUE

[5] Is there an arguable case that the General Division made an error of law by failing to extend the qualifying period?

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]

Is there an arguable case that the General Division made an error of law by failing to extend the qualifying period?

[9] Section 8(1) of the Employment Insurance Act (EI Act), states that the qualifying period is the shorter of: a) the 52-week period immediately before the beginning of a benefit period, and; b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period (that is associated with the present claim). In this case, the Commission determined that the qualifying period should be the 52-week period prior to the benefit period.

[10] However, the Claimant argues that the General Division should have extended her qualifying period. She argues for such an extension solely on the basis that he did not work in one of the two-week pay periods included within her qualifying period.

[11] According to section 8(2) of the EI Act, a qualifying period may be extended by the same number of weeks as a claimant can prove that he or she was not employed in insurable employment because that person:

a) was incapable of working due to illness, injury, quarantine or pregnancy;
b) was confined in jail or other similar institution and was not found guilty of the offence for which that person was held;

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

c) was receiving assistance under employment benefits; or,
d) was receiving payment of provincial payments because working would put the person or her unborn or breast-feeding child at risk.

[12] The Claimant and a Commission agent had a discussion in October 2018 following the Claimant's reconsideration request. In the course of that discussion, the Commission considered whether the Claimant's qualifying period might be extended and it questioned the Claimant on whether she had been incarcerated or had been involved in approved training or preventative withdrawal[2]. The Claimant's response to those questions is not recorded but she is said to have denied being unable to work due to illness. The Claimant explained that the nil period on her Record of Employment was during a period when her employer had closed the office for several weeks.

[13] There is no indication that the Claimant raised, or provided evidence to support, any of the grounds for extension described in sections 8(2) of the EI Act. When she appealed to the General Division, she likewise did not identify or provide evidence to support an extension of her qualifying period under section 8(2).

[14] The Commission may also allow an extension to a qualifying period under section 8(3) of the EI Act. However, section 8(3) only allows that a qualifying period may be extended where a claimant can prove that his or her severance has been allocated to weeks and where the allocation has prevented the claimant from establishing an interruption of earnings. There is no suggestion on the face of the Commission file or in any submission to the General Division that the Commission had had allocated a severance payment in such a way as to prevent the Claimant from establishing an interruption of earnings. Section 8(3) is clearly inapplicable to the Claimant's circumstances.

[15] In summary, the EI Act authorizes an extension to a qualifying period only where a claimant can prove that one of the circumstances described in sections 8(2) exists or in the situation described in 8(3). The EI Act does not authorize the Commission to extend the

[2] GD3-26

Claimant's qualifying period simply because her employer temporarily closed the business within her qualifying period.

[16] There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act by failing to find that the Claimant's qualifying period should be extended.

[17] I have also reviewed the record for any mistaken or overlooked evidence that might raise an arguable case that the General Division based its decision on an erroneous finding of fact. This is consistent with the Federal Court's decision in *Karadeolian v Canada (Attorney General)*,[3] in which the court determined that leave to appeal might still be granted where the General Division arguably overlooked or misunderstood key evidence, even where an applicant has not properly identified such an error under the grounds of appeal.

[18] The General Division confirmed that the information provided by the Claimant in her statement of hours worked[4] was consistent with the Record of Employment but it found that there were discrepancies between the Claimant's individual time sheets[5] and the statement of hours. The General Division corrected for the discrepancy and allowed an increase in the number of hours of insurable employment by eight hours.

[19] The General Division adjusted the qualifying period to be that 52-week period between August 27, 2017 and August 25, 2018, and it included the additional eight hours that it had discovered in the time sheets. However, it still found that the total number of hours of insurable employment within the qualifying period was only 680 hours; short of the 700 hours required to qualify when the regional rate of unemployment is less than 6% (as it was in her economic region and at the relevant time).

[20] The Claimant did not point to any significant evidence that the General Division overlooked or misunderstood. Likewise, I have not identified any evidence that was overlooked or mistaken such that an arguable case could be made that the General Division based its decision on an erroneous finding of fact under section 58(1)(c) of the DESD Act.

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[3] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.
[4] GD2-9
[5] GD2-53,78

[21] There is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	E. B., for the Applicant