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

Citation: T. R. v Canada Employment Insurance Commission, 2019 SST 371

Tribunal File Number: AD-19-181

BETWEEN:

T. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 23, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, T. R. (Claimant), a driver, was dismissed from his employment. He applied for Employment Insurance regular benefits but the Respondent, the Canada Employment Insurance Commission (Commission), determined that he had lost his employment because of misconduct. As such, the Commission determined that he was disqualified from receiving any benefits.[1] The Claimant appealed the reconsideration decision to the General Division. The General Division found that the Claimant's actions—failing to respond to the employer's messages in a timely manner—amounted to misconduct for the purposes of the *Employment Insurance Act*. The General Division dismissed the appeal.

[3] The Claimant is now seeking leave to appeal the General Division's decision, on the basis that the General Division failed to observe a principle of natural justice and based its decision on several erroneous findings of fact that it made without regard for the material before it. I must determine whether the appeal has a reasonable chance of success.

[4] For the reasons that follow, I am refusing the application because I am not satisfied that the appeal has a reasonable chance of success.

ISSUES

[5] The issues are:

> **Issue 1:** Is there an arguable case that the General Division failed to observe a principle of natural justice by rendering a decision later than it had indicated that it would?

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[1] Commission's initial and reconsideration decisions, dated October 30, 2018, and December 3, 2018, at GD3-32 and GD3-33 and GD3-63 to 64.

Issue 2: Is there an arguable case that the General Division based its decision on several erroneous findings of fact without regard for the material before it when it determined:

i) that the Claimant could have responded to his employer by any means, when there was evidence that his employer required him to "call" and expected "live voice communication;"

ii) that the Claimant had the capacity to immediately respond to his employer using a "satellite phone," without realizing that the device did not allow him to speak directly with his employer;

iii) that the Claimant's employer did not request him to "pull [his] truck over;"

iv) that he had the means to discharge his duties, without realizing that his employer had failed to provide him with the appropriate tools or equipment, such as a "working company phone;"

v) that the employer dismissed the Claimant for misconduct for failing to respond to it, without considering other reasons for his dismissal.

ANALYSIS

[6] Subsection 58(1) of the *Department of Employment and Social Development Act* sets out the grounds of appeal as being limited to the following:

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.

[7] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under section 58(1) of the DESDA and that the appeal has a reasonable chance of success. This is a relatively low bar and is akin to an arguable case at law.[2] At the leave to appeal stage, a claimant does not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.[3]

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice by rendering a decision later than it had indicated that it would?

[8] The Claimant argues that the General Division failed to observe a principle of natural justice because it failed to deliver its decision within 30 days of the hearing, as it had indicated it would. He notes that the General Division made its decision 31 days after the hearing and that the decision was communicated to him 35 days later. He claims that the delay has aggravated the hardship that he endures.

[9] I have listened to the recording of the hearing. The General Division member stated that the "goal is to get [the decision] to you within 30 days."[4] This was by no means a definitive deadline and, in fact, the General Division met the overall service standards set by the Social Security Tribunal.[5] I note that under section 33 of the *Social Security Tribunal Regulations*, the Employment Insurance section of the General Division is required to make its decision without delay after the conclusion of the hearing, but there is by no means any set date by which members are required to render their decisions.

[10] The principle of natural justice refers to the fundamental rules of procedure that apply in judicial or quasi-judicial environments. The principle exists to ensure that all parties receive adequate notice of any proceedings, that all parties have a full opportunity to present their case, and that proceedings are fair and free of bias or the reasonable apprehension of bias. It relates to issues of procedural fairness, rather than on the impact a decision might have on a party.

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[2] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] *Joseph v. Canada (Attorney General)*, 2017 FC 391.
[4] At approximately 1:36:19 of the audio recording of the General Division hearing.
[5] Service standards described at https://www1.canada.ca/en/sst/rdl/servicestandards.html.

[11] Here, the Claimant has not pointed to nor suggested that the General Division failed to provide him with adequate notice, that it might have deprived him of an opportunity to fully present his case, or that it might have exhibited any bias against him.

[12] At the same time, there is no suggestion that any delay after 30 days has prevented or caused any prejudice to the Claimant. After all, the Claimant retained the right to file an application seeking leave to appeal to the Appeal Division because he had 30 days from the date that the decision was communicated to him.

[13] I am not satisfied that there is an arguable case that the General Division failed to communicate its decision in a timely manner or that it failed to observe a principle of natural justice.

Issue 2: Is there an arguable case that the General Division based its decision on several erroneous findings of fact without regard for the material before it?

i) "Live voice communications"

[14] The Claimant argues that the General Division acted beyond its jurisdiction or based its decision on an erroneous finding of fact when it determined that

> [37] … rather than responding … which the [Claimant] could have done on the satellite equipment, the [Claimant] chose to return back to back to [sic] Oshawa to wait to speak to Mr. Mackie when he arrived an hour and 15 minutes later.

[15] The Claimant submits that the General Division acted beyond its jurisdiction by interpreting the employer's instruction that he "call" in a manner contrary to its everyday, common sense meaning. The Claimant argues that, in each case, the only way he could fulfill the employer's instructions was if he called by phone, or by what he describes as "live voice communications." The Claimant further submits that the General Division's findings are contradictory.

[16] I do not see that the General Division acted beyond its jurisdiction because it was entitled to interpret the evidence before it and to make findings based on that evidence. The General

Division was entitled to interpret the employer's instructions to "call" rather broadly. Indeed, the Claimant acknowledged that there were other means—other than by telephone or "live voice communications"—by which he could have contacted his employer before returning to Oshawa and seeing his employer in person. For instance, the Claimant noted that he could have rebooted the satellite system and texted a message to his employer. However, in the proceedings before the General Division, the Claimant did not try to suggest that he avoided texting his employer via the satellite system because he thought his employer required "live voice communications." His excuse was that rebooting the satellite system would have taken him too long before he could resume driving.[6] I note also that the Claimant also acknowledged that he could have tried finding a telephone in Trenton because he thought that this would have resulted in a cancelled load.

[17] In any event, the General Division was simply citing a means by which the Claimant could have responded to his employer. Its focus was merely on whether the Claimant had responded to his employer.

[18] I am not satisfied that this issue raises an arguable case.

ii) Satellite phone

[19] The Claimant argues that the General Division based its decision on an erroneous finding of fact that it made without regard to the material before it when it found that he had the capacity to immediately and directly respond to his employer.

[20] The Claimant argues that the General Division failed to recognize that, although his employer equipped him with a satellite device, he did not otherwise have the capacity to speak directly with his employer because the satellite system has limitations and does not operate like a telephone. As well, he was not carrying a cellular telephone with him at the time. The Claimant cites paragraph 62, where the General Division wrote, "Rather than returning the message as soon as possible, which he could have done from the satellite phone while he was in Trenton, he chose instead to … wait until he was back …" [my emphasis].

[6] General Division decision, at para. 23.

[21] The General Division noted the employer's advice that the satellite system allows the employer to send both text and audible messages and that it also allows drivers to communicate with the employer without having to use their own personal cellular phones.[7] The Claimant confirmed that if there was an urgent message, he could receive and return messages at customer locations. Despite using the word "phone," there is no clear indication that the General Division found that the Claimant could rely on the satellite system as if it functioned like a telephone or two-way radio. Indeed, the General Division noted that the employer had explained that the satellite system generated an audible equivalent of the text messages.

[22] It is unclear whether the General Division determined that the satellite system operated like a telephone, but even if it had, nothing turns on it because the General Division was merely citing an example by which the Claimant could have attempted to contact his employer as soon as possible. As noted above, the General Division's primary focus was determining whether the Claimant had taken any steps to respond to his employer as soon as possible, rather than on the means by which the Claimant attempted to contact his employer. As such, I am not satisfied that there is an arguable case on this point.

iii) Pulling his truck over

[23] The Claimant submits that the General Division based its decision on an erroneous finding of fact at paragraph 63 where it determined that his manager did not require him to breach the *Ontario Highway Traffic Act* by pulling his truck over to the side of the highway. The General Division wrote, "The [Claimant] was directed to call as soon as possible, not to pull his truck over to the side of the highway." The Claimant submits that this ignored the evidence set out at paragraph 51. The employer left a message with him that he "please pull the truck over."

[24] Clearly, there was some evidence that the employer had requested the Claimant to "pull [his] truck over." While the General Division may have misstated the evidence in this regard, I find that it is unclear whether the employer in fact intended that the Claimant remain on the highway—but off on the shoulder—or whether it meant that the Claimant should have left the highway altogether and that he pull over at a truck stop, for instance.

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[7] Ibid, at para. 11.

[25] Despite this, I find that the General Division did not base its decision on whether the employer required the Claimant to "pull the truck over" because, as the General Division determined, the employer's request was irrelevant in that the Claimant retrieved the message when he was already off the highway.

[26] I am not satisfied that there is an arguable case that the General Division based its decision on erroneous findings relating to the employer's instructions that he "pull the truck over." The General Division simply did not base its decision on this point.

iv) Employer's obligations

[27] The Claimant argues that the General Division refused to exercise its jurisdiction and that it based its decision on an erroneous finding of fact without regard to the material before it, when it suggested that he had the means to discharge his duties. In particular, he argues that if his employer expected him to be able to contact and directly speak with it, it should have provided him with the means to do so. In this regard, he contends that the General Division overlooked the fact that his employer failed to provide appropriate tools and equipment for him to be able to discharge his duties. For instance, the employer could have provided him with a "working company phone" rather than with satellite equipment that was capable of only "the most rudimentary of text messaging." I find that this argument is similar to the one above, regarding the satellite device.

[28] I am not satisfied that there is an arguable case on this point because the employer did not restrict how the Claimant could respond, nor require the Claimant to phone from within his vehicle. Indeed, the Claimant acknowledges that once he was in Trenton, he could have found a phone to call his employer. (He did not do so because he did not want to risk having his employer cancel his load, as it had done so previously.) The Claimant also suggests that he could have responded (by text messaging) on the satellite system, but for the fact that rebooting the system would have taken upwards of 10 minutes. He testified that he was already back on the road before the system could have rebooted.

v) Other reasons for the Claimant's dismissal

[29] The Claimant argues that the General Division based its decision on an erroneous finding of fact without regard for the material before it. In particular, he argues that the General Division determined that his employer had dismissed him for misconduct for failing to respond to his employer without considering that there were likely other reasons for the dismissal. The Claimant argues that the General Division failed to grasp that the dismissal was because he refused to accept the employer's "implied demands" to perform an illegal act.

[30] The Claimant argues that the General Division should have considered the growing animosity between him and the employer following his refusal to smuggle cigarettes for the employer on June 27, 2018. He notes the similarities between what the employer likely expected of him on September 19, 2018 and what happened on June 27, 2018. The Claimant asserts that if the employer had legitimate business, it could have conveyed this to the Claimant by satellite. Instead, it directed the Claimant to contact it by telephone, so that the employer could avoid detection. The Claimant states that he had reservations about responding by telephone, as he felt that his employer would attempt to force him to smuggle cigarettes.

[31] The Claimant claims that, although the employer ostensibly dismissed him for his failure to respond after he had received a message to call, the real reason his employer dismissed him was because he had again refused to comply with the employer's implied demand that he smuggle cigarettes. The Claimant argues that his refusal to break the law should not amount to misconduct for the purposes of the *Employment Insurance Act*.

[32] The General Division stated that animosity emerged after he refused to smuggle cigarettes in June 2018. The General Division addressed other issues that could have led to his dismissal, that he would be filing a grievance about his workload or that the employer wanted a certain racial make-up for its dispatch board. There was significant evidence before the General Division regarding the Claimant's concerns over his reduced workload.

[33] I have reviewed the Claimant's testimony, as well as the documentary evidence that was before the General Division. However, until the application requesting leave to appeal to the Appeal Division, the Claimant did not allege that the underlying reason his employer dismissed

him was because he had refused to smuggle cigarettes for the company. Insofar as I can determine, there was no evidence before the General Division that the Claimant had avoided responding to the employer's request that he call in order to avoid the employer's attempts to force him to smuggle cigarettes. In fact, the Claimant testified that if his employer intended to switch his run, he would have "gladly done it" because he was short on runs.[8] The Claimant did not express any reservations during his testimony that the switch to his schedule could have involved the smuggling of cigarettes.

[34] The General Division could make findings on only the evidence before it. There simply was no evidence of this other, alleged underlying reason for the Claimant's dismissal. As such, I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding without regard for the material before it.

CONCLUSION

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

Janet Lew
Member, Appeal Division

SUBMISSIONS:	T. R., Self-represented

[8] At approximately 58:25 to 59:39 of the General Division hearing.