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

Citation: *R. T. v Canada Employment Insurance Commission*, 2019 SST 503

Tribunal File Number: AD-19-339

BETWEEN:

R. T.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 22, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. T. (Claimant), left Canada on December 20, 2018, to start a new job in the United States the next day. However, his flight was delayed and by the time he arrived, his new employer decided that he should start working on December 26, 2018.

[3] Because the Claimant did not have any income for December 21, 2018, he asked the Respondent, the Canada Employment Insurance Commission (Commission) for Employment Insurance benefits for that day. The Commission refused his request. It decided that he was disentitled from receiving benefits, having found that he was unavailable for work and that he had been out of Canada.[1] The Claimant appealed this decision to the General Division. Although it found that he was available for work, it dismissed his appeal because he was outside of Canada and because he did not fall within any of the exceptions under section 55 of the *Employment Insurance Regulations*.

[4] The Claimant is now seeking leave to appeal the General Division's decision. To determine whether leave to appeal can be granted, I must decide whether the appeal has a reasonable chance of success. Because I am not satisfied that the appeal has a reasonable chance of success, the application for leave to appeal is refused.

ISSUES

[5] The issues are:

> **Issue 1:** Is there an arguable case that the General Division failed to observe a principle of natural justice?

[1] Commission's reconsideration decision dated March 8, 2019, at GD3-36 to GD3-37.

Issue 2: Is there an arguable case that the General Division erred in law or by failing to accept that he was conducting a *bona fide* job search?

Issue 3: Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it when it failed to consider the fact that he could have returned to Canada within 24 hours?

Issue 4: Is there an arguable case that the General Division erred in law when it failed to consider his request for reimbursement of his job search expenses?

ANALYSIS

General Principles

[6] If I am to grant leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA) and that the appeal has a reasonable chance of success. The grounds of appeal under subsection 58(1) of the DESDA are 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] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[2] This is a relatively low bar. At the leave to appeal stage, it is a lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits. Claimants do not have to prove their case; they simply have to establish that the appeal has a

[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

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?

[8] The Claimant argues that the General Division failed to observe a principle of natural justice because he is left with an outcome that is unjust. He had expected to start working on December 21, 2018, but he was delayed, for reasons beyond his control. He states that while in the U.S. on December 21, 2018, he met his future manager and on the same day, sought another opportunity.

[9] 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.

[10] 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.

[11] I am not satisfied that the appeal has a reasonable chance of success on this ground.

Issue 2: Is there an arguable case that the General Division erred in law by failing to accept that he was conducting a *bona fide* job search?

[12] The Claimant submits that the General Division erred in law when it failed to accept that he was conducting a *bona fide* job search as defined by the *Employment Insurance Regulations*. He claims that he was necessarily conducting a *bona fide* job search, given that his "employer could deny the job any time." He states that he sought out an opportunity on December 21, 2018. He presently works there now. In other words, he claims that a job search is *bona fide* as long as one's employment is insecure and it forces him to continue looking for work. The Claimant

[3] *Joseph v Canada (Attorney General)*, 2017 FC 391.

suggests that the General Division should have accepted his job search as *bona* as defined by the Regulations because his "employer could deny the job any time."

[13] The General Division was aware of the Claimant's assertions that he was looking for other work. At paragraph 15 of its decision, the General Division addressed the Claimant's assertions. It found that he had not gone to the United States to conduct a *bona fide* job search; rather, the General Division found that he could not have been conducting a *bona fide* job search because he was primarily in the U.S. to start an employment contract. The General Division found that the Claimant's job search occurred incidentally to his primary purpose for being in the U.S.

[14] In assessing whether the Claimant had been conducting a *bona fide* job search, the General Division did not consider whether the Claimant's employer could terminate his employment at any time. The fact that his employer could terminate his employment might explain why the Claimant was looking for work, but it would not necessarily show that he was in fact looking for work. Subsection 55(1) (f) of the Regulations does not define a *bona fide* job search. Clearly, it is a matter of a factual determination.

[15] Essentially the Claimant is arguing that the General Division erred in applying settled law to the facts. However, the Federal Court of Appeal has affirmed that the Appeal Division has no jurisdiction to consider errors that merely involve a disagreement on the application of settled law to the facts.[4] The Appeal Division may intervene under subsection 58(1) of the DESDA where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, but such is not the case here. The Claimant does not contest the General Division's determination that the Claimant's job search could not have been *bona fide* if his primary purpose was in the U.S. for reasons apart from looking for work. Indeed, he has not directed me to any authorities to show that the General Division's interpretation of the Regulation is incorrect.

[16] The Claimant is simply re-arguing his case before the General Division and asserting that I should reassess the evidence and come to a different conclusion based on the same facts before

[4] *Cameron v Canada (Attorney General)*, 2018 FCA 100 and *Garvey v Canada (Attorney General)*, 2018 FCA 118

the General Division. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter. Accordingly, I am not satisfied that there is an arguable case on this basis.

[17] Finally, I note that the language of subsection 55(1)(f) suggests that a claimant who is seeking to fall within the exception must actually be outside the country to conduct a *bona fide* job search. The language reads, "outside Canada … to conduct a *bona fide* job search." The subsection would seem to suggest that the job search can be conducted only outside the country and that it is the job search itself that brings that claimant outside the country.

[18] In this case, the Claimant relied on his email exchange with a prospective employer to show that he was in a *bona fide* job search. However, that email exchange could have occurred while the Claimant continued to be in Canada. The email exchange certainly did not require him to be outside of Canada. But, the General Division did not address this evidence and whether it too would have placed the Claimant outside the exception under subsection 55(1)(f) of the Regulations. I raise this matter only to query whether it might have disentitled the Claimant from receiving benefits, given the facts.

Issue 3: Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it when it failed to consider the fact that he could have returned to Canada within 24 hours?

[19] The Claimant submits that he could have returned to Canada within 24 hours—had there been work available for him—given that he became available to work on December 21, 2018. The Claimant argues that Service Canada should be required to prove that he was unable to return to Canada within 48 hours.

[20] At paragraph 6, the General Division noted the Commission's arguments that the Claimant had not proven that he was available for work. The General Division also noted that the Commission argued that the Claimant was unable to return to Canada within 48 hours as he would be required to give his U.S. employer two weeks' notice prior to leaving his employment.

[21] The General Division determined that the Claimant was available for work on December 21, 2018. As such, I find it irrelevant at this stage whether the Claimant was able to return to Canada within 24 or 48 hours. I am not satisfied that there is an arguable case on this basis.

Issue 4: Is there an arguable case that the General Division erred in law when it failed to consider his request for reimbursement of his job search expenses?

[22] The Claimant is requesting reimbursement of his travel expenses to the U.S. when he sought work. He argues that Service Canada should reimburse him because he sought a job "without condition."

[23] It is irrelevant whether the Claimant in this case sought a job "without condition." Neither the *Employment Insurance Act* nor the Regulations provide for reimbursement of claimants' travel expenses when they look for work. Furthermore, both the General Division and the Appeal Division do not have any authority to grant any requests for reimbursement of travel expenses. As such, I am not satisfied that there is an arguable case on this basis.

CONCLUSION

[24] The application for leave to appeal refused.

Janet Lew
Member, Appeal Division

APPLICANT:	R. T., Self-represented