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

Citation: *C. M. v Canada Employment Insurance Commission*, 2019 SST 517

Tribunal File Number: AD-19-331

BETWEEN:

C. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 28, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, C. M. (Claimant), applied for and received 26 weeks of Employment Insurance compassionate care benefits, from April 1, 2018 to October 6, 2018. Her cousin with whom she had been very close and for whom she had been caring for passed away in August 2018.[1] The Claimant intended on returning to the workforce, but in a letter dated October 29, 2018, her physician expressed the opinion that she was unable to work. She remained off work because she was unwell. On October 30, 2018, the Claimant sought Employment Insurance sickness benefits. Her letter to the Respondent, the Canada Employment Insurance Commission (Commission) also indicated that her cousin had passed away.

[3] The Commission determined that the Claimant was not entitled to receive compassionate care benefits after August 12, 2018, when her cousin had passed away. Effectively, this resulted in an overpayment of compassionate care benefits. Shortly after this determination, the Commission approved the Claimant's claim for Employment Insurance sickness benefits from October 28, 2018 to December 29, 2018, which it applied towards offsetting the overpayment of compassionate care benefits. The Claimant produced additional notes from her physician that showed she had been unable to work after August 14, 2018. The Commission adjusted her compassionate care to sickness benefits, starting the week of August 12, 2018. In other words, the Commission paid sickness benefits from the weeks of August 12, 2018 to December 23, 2018. However, an overpayment remained.

[4] The Claimant suggested that the Commission should waive any overpayment and that it should provide her extended sickness benefits beyond the maximum allotment of 15 weeks

[1] The hearing file at GD3 suggests that the Claimant's cousin passed away in August 2018. The General Division also found that the Claimant's cousin passed away at that time. However, the Claimant's application to the Appeal Division indicates that the death certificate was dated July 10, 2018. The Claimant also testified during the General Division hearing that her cousin passed away in July 2018. The Claimant testified that she had been unaware that she should have notified the Commission that her cousin had passed away, and was unaware that any delay in notifying the Commission would result in an overpayment of compassionate care benefits.

because she was unable to work after 15 weeks.[2] In its reconsideration decision, the Commission maintained that it had already paid her the maximum amount of sickness benefits.[3] The Claimant appealed the Commission's reconsideration decision to the General Division. She claimed that the Commission had led her to believe that she was entitled to receive sickness benefits up to March 2019 if she continued to file reports. She also claimed that the Commission should have stopped paying her any sickness benefits once she had received the maximum allotment.[4] The General Division examined whether the Claimant was entitled to any additional weeks of sickness benefits and whether it had any authority to write off the amount of the overpayment. The General Division dismissed the Claimant's appeal.

[5] 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, I am refusing leave to appeal.

ISSUES

[6] The issues are as follows:

Issue 1: Is there an arguable case that the General Division member was biased?

Issue 2: Is there an arguable case that the General Division refused to exercise its jurisdiction in considering the issue of the overpayment?

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 to the material before it when it found that the Claimant had only informed the Commission of her cousin's death in October 2018?

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[2] Request for reconsideration, at GD3-45.
[3] Commission's letter dated February 26, 2019, at GD3-51 to 52.
[4] An overpayment of sickness benefits arose after the Claimant submitted her physician's letter in January 2019 to the Commission. Her physician stated that the Claimant had been unable to work in August 2018. The Commission converted the compassionate care benefits to sickness benefits from August 2018, so the sickness benefits started in August 2018, rather than from October 28, 2018. By January 2019, however, the Commission had already paid the maximum allotment of 15 weeks of sickness benefits.

Issue 4: Is there an arguable case that the General Division erred in law by overlooking any issues?

ANALYSIS

General Principles

[7] 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 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.

[8] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[5] 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 reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.[6]

Issue 1: Is there an arguable case that the General Division member was biased?

[9] The Claimant submits that the General Division member was biased. This became readily apparent to her when she received the General Division's decision within 12 hours after the hearing, although the member had stated during the proceedings that it would take up to 30 days

[5] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[6] *Joseph v Canada (Attorney General)*, 2017 FC 391.

before she would be able to issue a decision. The Claimant argues that this shows that the member had already decided the outcome of the appeal.

[10] The General Division hearing took place on April 23, 2019, and the member rendered her decision on April 24, 2019. Although the Claimant argues that the member had to have pre-determined the outcome because she rendered her decision so soon after the hearing, she does not otherwise suggest that the member might have overlooked any of her testimony or documentary evidence or given short shrift to any of the pertinent issues. Indeed, the member specifically referred to the Claimant's testimony and although the decision is relatively brief, the member examined all of the relevant facts and issues. Because of this, I am not satisfied that there is an arguable case that the member was biased because she issued her decision soon after the hearing.

[11] The Claimant also argues that the member was clearly irritated that she had been inconvenienced and had to "come all the way to London," for an in-person hearing when the member might have preferred a teleconference or videoconference hearing. I have listened to the audio recording of the General Division hearing. At the outset, the member noted that the Claimant had arrived early and that she agreed to an earlier start. Instead of starting at 12 noon, the hearing started at 11:20 a.m. The hearing had been scheduled for 90 minutes and it lasted approximately 1 hour and 20 minutes. The Claimant did not refer me to and I see no evidence that suggests that the member was irritated that she had to travel to attend an in-person hearing, or that she was anxious to conclude the proceedings. Indeed, during the proceedings, the member encouraged the Claimant "to take her time"[7] and on three separate occasions, the member asked the Claimant whether there were any other matters that she wanted to raise.[8]

[12] The member noted that the Claimant had requested an in-person hearing. The following exchange took place:

> Claimant: I want this to end. I want it behind me. I want it over. And it was difficult for me to even come here today and I am …

[7] At approximately 47:05 and 50:17 of the audio recording of the General Division hearing.
[8] *Ibid*, at approximately 57:29, 1:04:58, and 1:12:31.

Member: And you requested an in-person hearing. I know the Tribunal offered you a telephone hearing as well but …

Claimant: … because I've never done that before and I'm not comfortable with .

Member: That's ok. That's no a problem at all. We're just letting you …

Claimant: I'm sorry now that I didn't …

Member: … know that we did our best to accommodate you by giving you an in-person hearing.

Claimant: Yes, you did. You've been very kind and I appreciate it. No, no. This has nothing to do with you personally.[9]

[13] Given the audio recording evidence, I am not satisfied that there is an arguable case that the General Division member was irritated or that she exhibited any hostility or bias against the Claimant because an in-person hearing took place instead of a teleconference hearing.

Issue 2: Is there an arguable case that the General Division erred in law when it found that it did not have any jurisdiction to order a write-off of any overpayment?

[14] The Claimant submits 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 found that the Commission had not made a decision on writing off the overpayment, and that she had not requested a write-off. The Claimant suggests that because of this erroneous finding, the General Division refused to exercise its jurisdiction and consider whether she was entitled to an overpayment. The Claimant argues that the whole basis of her appeal to the General Division concerned the overpayment.

[15] I do not see any formal request for a write-off of any overpayment from the Claimant, nor do I see any indication that the Commission might have considered any requests to write off the overpayment. I note also that the General Division specifically asked the Claimant whether she had requested a write-off of the overpayment. The Claimant responded that she had not sought

[9] *Ibid*, at approximately 1:16:25 to 1:17:00.

one because she was unaware of this option. She noted that, at one point, she received a "zero balance." She also noted that she did not know that the Commission had overpaid her.[10]

[16] While the issue of the Claimant's entitlement to either compassionate care or sickness benefits would affect the amount of any overpayment (and possibly whether an overpayment would be owing at all), that is a distinct issue altogether from a request for a write-off of an overpayment.

[17] Either way, I am not satisfied that there is an arguable case under this ground because the General Division did not base its decision on whether the Claimant had requested a write-off of the overpayment and largely because the General Division in any event examined whether it had any discretion or authority to write off the overpayment. Ultimately, it determined that the *Employment Insurance Act* did not confer any jurisdiction on it to write off the overpayment, despite the Claimant's difficult circumstances.

[18] As an aside, I note that the General Division relied on *Canada (Attorney General) v. Lévesque*.[11] With respect, I find *Lévesque* of little relevance or applicability to the Claimant's case. That decision dealt with whether there was any discretion afforded under subsection 7(2) of the *Employment Insurance Act* to waive the required number of hours that a claimant had to accumulate to be eligible for employment insurance benefits. The discretion under consideration in that case was specific to subsection 7(2) of the *Employment Insurance Act* and did not deal with overpayments. Although the General Division erred in relying on this particular decision, ultimately it did not err when it concluded that the legislation (i.e. the *Employment Insurance Act* and the Regulations) did not confer any jurisdiction on it to write off the overpayment. The jurisdiction to do so resides exclusively with the Commission. The Social Security Tribunal has no power to compel the Commission to write-off any overpayments.

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 to the material before it when it fond that the Claimant had only informed the Commission of her cousin's death in October 2018?

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[10] *Ibid*, at approximately 57:55 to 58:02 and 59:26.
[11] *Canada (Attorney General) v. Lévesque*, 2001 FCA 304.

[19] The Claimant notes that she had submitted her cousin's death certificate dated July X, 2018 to Service Canada immediately after her cousin had passed away.[12] The Claimant asserts 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 found that she had only informed the Commission of her cousin's death much later, in October 2018.

[20] However, the General Division did not base its decision on when the Claimant might have informed Service Canada of her cousin's death. The General Division was concerned with determining how many weeks of sickness benefits the Claimant received and determining whether it could write off any overpayment. Because the General Division did not base its decision on the date when the Claimant's cousin passed away, this argument does not fall within one of the allowed grounds of appeal under subsection 58(1) of the DESDA. Therefore, I am not satisfied that there is an arguable case on this issue.

Issue 4: Is there an arguable case that the General Division erred in law by overlooking any issues?

[21] The Claimant did not explicitly argue that the General Division erred in law, but in her request for a reconsideration to the Commission, the Claimant listed three issues for which she was seeking a reconsideration: record of employment, sickness benefits, and compassionate care benefits. However, she did not fully articulate what she was disputing, other than to state that she was missing hours on her record of employment.[13] In its reconsideration decision, the Commission addressed whether it had paid the maximum weeks of sickness benefits.[14]

[22] In her Notice of Appeal of the Commission's reconsideration decision, the Claimant wrote that her employer lied on her record of employment about her insurable hours and about the circumstances under which she left that employment. The Claimant contends that her employer unjustly dismissed her from her employment.

[23] The Claimant enclosed several attachments to her notice of appeal, including the Commission's reconsideration decision, as well as copies of correspondence addressed to the

[12] Application to the Appeal Division, at AD1-2.
[13] Request for reconsideration, at GD3-45 to 46.
[14] Reconsideration decision, at GD3-51 to 52.

provincial employment standards branch and an insurability ruling from the Canada Revenue Agency. She advised the provincial employment standards branch that she disagreed with the hours on her Record of Employment and with the dismissal from her employment. She wanted the branch to investigate the matter on her behalf. The Canada Revenue Agency ruled that she had 603 insurable hours from her employment between October 23, 2017 and February 25, 2018. Canada Revenue Agency also advised the Claimant of her appeal rights.

[24] From the enclosures to her notice of appeal, one can infer that the Claimant was appealing the fact that the Commission denied her application for Employment Insurance regular benefits in connection with her employment and that she was appealing the number of hours on her record of employment. However, she did not fully articulate what she was appealing and, as a consequence, the General Division did not address these two issues. While that may be so, the General Division did not have the jurisdiction to overturn the Canada Revenue Agency's ruling on the number of insurable hours from the Claimant's employment. As the Canada Revenue Agency indicated in its correspondence, the Claimant's recourse rights laid elsewhere.

[25] The hearing file does not include a copy of the record of employment or the Commission's decision relating to the Claimant's application for regular benefits. However, it seems from the Claimant's notice of appeal documents that the Commission denied her claim for benefits because she did not have the required number of insurable hours in order to fulfil the conditions required by the *Employment Insurance Act* to be eligible for regular benefits. *Lévesque* would be applicable in these circumstances.

[26] While the General Division did not address all of the issues that the Claimant potentially raised in her notice of appeal, they would not have been properly before the General Division in any event because the issues arose out of another decision that the Commission made. Properly, the Claimant should have sought a reconsideration or appealed the Commission's decision that it made regarding her application for Employment Insurance regular benefits.

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

CONCLUSION

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

[29] Finally, I see that the Claimant notes that the Canada Revenue Agency directed her to contact the Social Security Tribunal to request a waiver of the overpayment. The Claimant should instead direct her request for a write-off of any overpayments to the Commission.

Janet Lew
Member, Appeal Division

APPLICANT:	C. M., Self-represented