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

Citation: *J. B. v Canada Employment Insurance Commission*, 2019 SST 592

Tribunal File Number: AD-19-417

BETWEEN:

J. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: June 21, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. B. (Claimant) was on sick leave from his employer when he went to the United States (U.S.) in November 2017 to visit his mother who had Alzheimer's disease. He returned for a second visit in January 2018. In November 2018, the Claimant applied for Employment Insurance sickness benefits, requesting that his benefits be antedated to December 17, 2017. The Claimant made this request so that he could obtain benefits in the gap between the end of his sick benefits from employment and the beginning of his long-term disability payments in April 2018.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) antedated his claim as requested but it refused to pay benefits during the Claimant's second visit to the U.S. from January 29, 2018, to February 8, 2018, because he could not prove his availability for work while he was out of Canada. The Claimant requested a reconsideration and the Commission modified its decision. It found that the Claimant was not disentitled during seven days of his absence from Canada because he was visiting an ill family member. However, at the same time, the Commission maintained that the Claimant was still not entitled to sickness benefits for any part of his absence from Canada because he could not show that he would have been otherwise available for work if he had not been ill or injured.

[4] The Claimant appealed to the General Division of the Social Security Tribunal but the General Division dismissed his claim. He now seeks leave to appeal to the Appeal Division,

[5] The Claimant has no reasonable chance of success on appeal. There is no arguable case that the General Division based its decision on an erroneous finding of fact, or that it erred in law.

ISSUE(S)

[6] 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 for the evidence before it?

[7] Is there an arguable case that the General Division erred in law?

ANALYSIS

[8] 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 section 58(1) of the *Department of Employment and Social Development Ac*t (DESD Act).

[9] The grounds of appeal under section 58(1) of the DESD Act are as follows:

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.

[10] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

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

Issue 1: 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 for the evidence before it?

[11] Under section 37(b) of the *Employment Insurance Act* (EI Act), a claimant is not entitled to benefits for any period in which the Claimant is outside of Canada. Exceptions to this disentitlement are outlined in section 55 of the *Employment Insurance Regulations* (Regulations). The exception that applies to the Claimant's situation is section 55(1)(d). This section states that a claimant may still be able to collect up to seven days of benefits while outside of Canada, if the claimant is visiting a member of his or her immediate family who is seriously ill or injured.

[12] However, section 55(1) of the Regulations is stated to be "subject to section 18 of the [EI] Act", which means that the Claimant must also meet the requirements of section 18 of the EI Act even if the section 55 exception applies. Under section 18(1)(b) a claimant is only entitled to benefits for those days that he can prove two things. First, a claimant must prove that he is seriously ill or injured. Second, a claimant must be able to prove that he or she would have been able to work if not for the illness or injury.

[13] The Claimant has always said that he is unable to work due to his condition and that this remained true during his absence from Canada. The Commission did not dispute this. That is why he applied for sickness benefits and not regular benefits. I accept that the Claimant had established that he was seriously ill or injured at the time he was outside of Canada.

[14] The Claimant did not argue that the General Division made any error when it found that the Claimant was in the United States from January 28, 2018, to February 8, 2018, or when it found that he went to the United States to look after his mother who has Alzheimer's disease.

[15] However, the Claimant has argued that the General Division failed to take into account the fact that he could not have known the requirements of Employment Insurance because he did not even apply for benefits until after he returned to Canada. The Claimant also argued that the General Division ignored or misunderstood that he would not have been able to work because of his condition regardless of whether or not he was in Canada.

[16] The courts have said many times that a claimant's ignorance of the law is not a good enough reason for a claimant's delay in applying for benefits.[2] These court decisions relate to appeals of Commission decisions that refused to antedate a claim to an earlier date. In this case, the Commission did not refuse to antedate, but the Claimant asserts that he did not know that he would lose his entitlement to benefits while he was outside Canada. By the time he looked into it, and applied for benefits, he had already been out of Canada.

[17] In my view, the same reasoning that the courts have used to say that "ignorance of the law" is not a good reason for a Claimant to delay an application for benefits in an antedate application, would also apply here. Just because the Claimant did not know he would not be entitled to benefits outside of Canada, does not mean that he can be exempted from the legal requirement that he "otherwise be available for work".

[18] The General Division did not refer to the Claimant's evidence or argument that he was unaware of the Employment Insurance rules, but the Claimant's knowledge could not have made a difference in any event. On the facts before it, the General Division could not have found that the Claimant was otherwise available for work while he was out of Canada, even if it had accepted that the Claimant did not know the rules around sick benefits and benefits outside of Canada.

[19] There is no arguable case that the General Division made an error under section 58(1)(c) of the DESD Act when it found that the Claimant was not entitled to benefits because he had not shown that he would "otherwise be available for work". This finding was not perverse or capricious or made without regard for the evidence before the General Division.

Issue 2: Is there an arguable case that the General Division erred in law?

[20] The Claimant also argued that the General Division ignored or misunderstood that he would not have been able to work even if he had been in Canada. He argued that this meant the General Division had based its decision on an erroneous finding of fact. However, the Claimant

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[2] *Canada (Attorney General v. Somwaru* 2010 FCA 336; *Canada (Attorney General v. Innes* 2010 FCA 341; *Canada (Attorney General v. Sherwood* 2019 FCA 166

did not disagree with any of the facts in paragraphs 13 and 14 above. These were all the facts that the General Division needed in order to apply the EI Act and Regulations.

[21] I think that the Claimant's argument is really about whether the General Division made an error of law. Basically, the Claimant argued that he should have been entitled to be paid sick benefits because he could not work, and that he was entitled to certain of those benefits even while he was outside Canada because of section 55(1) of the Regulations. It makes no sense to the Claimant that he should be denied sickness benefits while outside Canada for the reason that he would not have been available for work that he could not do because of his illness or injury. In other words, the Claimant is arguing that the General Division misinterpreted the law or that the law is wrong.

[22] Parliament had its reasons for drafting the EI Act and its Regulations in the way that it did, and it is the law, like it or not. I do not have the authority to amend the law and I cannot refuse to apply the law. I cannot help the Claimant just because he disagrees with the law.

[23] If I found an error in how the General Division interpreted the law, then that would be different. However, I did not find such an error. Section 55(1)(d) allows for up to seven days of benefits when a claimant is outside of Canada to visit an immediate family member with a serious illness or injury. This is an exception to the general rule under section 37 of the EI Act, which says that a claimant cannot receive benefits for any period that the claimant is outside of Canada. However, section 55(1) does not grant an exception to section 18 of the EI Act. In fact, section 55(1) is made *subject to*, or subordinate to, the requirements of section 18.

[24] Section 18(1)(a) states that an applicant must be capable of and available for work. Thus, the Federal Court of Appeal in *Canada (Attorney General) v. Elyoumni*[3] found that a claimant who fell within one of the section 55(1) exceptions would still need to prove his availability for work. According to the reasoning in *Elyoumni*, the exceptions in section 55(1) of the Regulations cannot be applied without taking into account the requirements of section 18 of the EI Act.

[25] A claimant who is unable to work due to illness or injury, like the Claimant in this case, would still have to prove under section 18(1)(b) of the EI Act that he or she would have been

[3] *Canada (Attorney General) v. Elyoumni* 2013 FCA 151

available for *work if it had not been for the illness or injury*. In *Elyoumni*, the Court said that the claimant in that case (who was outside Canada) should have at least arranged to be reached if he was offered a job. There was no evidence before the General Division that the Claimant had arranged to be contacted in the event of an offer of employment, or that he took any steps to ensure that he would have been available for work.

[26] I understand the Claimant's position. A sick or injured person who is on Employment Insurance sick benefits would generally not be able to work and would therefore not accept work. It is highly unlikely that such a person would make arrangements to be contacted if some job prospect arises while he or she is out of Canada. A sick or injured person who leaves Canada without having even applied for benefits, like the Claimant, would be even less likely to make that sort of arrangement.

[27] In other words, the legislation allows a claimant on regular benefits to obtain limited benefits in the circumstances described in section 55(1) of the Regulations, but a claimant who is receiving or seeking Employment Insurance sickness benefits would almost never be entitled to benefits while outside of Canada.

[28] This may seem unfair, but the General Division was required to apply the law as it is written, and so am I. There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

[29] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	J. B., Self-represented