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

Citation : *D. R. v Canada Employment Insurance Commission*, 2019 SST 605

Tribunal File Number: AD-19-419

BETWEEN:

D. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: June 24, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, D. R. (Claimant), voluntarily left her employment after the employer reduced her shifts and then failed to respond when the Claimant asked for an explanation. The Claimant applied for Employment Insurance benefits but the Canada Employment Insurance Commission (Commission), denied her claim. The Commission found that the Claimant did not have just cause for leaving her employment. The Claimant asked the Commission to reconsider, arguing that she had left because her hours had been reduced significantly and that this was the result of racial discrimination. She also claimed that she had already lined up another job at the time she left her employment.

[3] The Commission maintained its original decision, and the Claimant appealed to the General Division of the Social Security Tribunal. The General Division dismissed her appeal. The Claimant now applies for leave to appeal to the Appeal Division.

[4] The application for leave to appeal is denied. There is no arguable case that the Claimant would have had a reasonable apprehension of bias based on the manner in which the General Division member conducted the hearing. Furthermore, there is no arguable case that the General Division interfered with the Claimant's right to be heard, or that it overlooked or misunderstood any evidence.

ISSUE

[5] Is there an arguable case that the Claimant may have had a reasonable apprehension of bias based on the conduct of the General Division member?

[6] Is there an arguable case that the General Division interfered with the Claimant's right to be heard?

[7] 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 material before it?

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) 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]

Issue 1: Is there an arguable case that the Claimant may have had a reasonable apprehension of bias based on the conduct of the General Division member?

[11] The only ground of appeal that the Claimant selected in completing her application for leave to appeal is the ground of appeal concerned with natural justice and jurisdiction. "Natural justice" is a term that refers to the procedural protections that ensure that parties to a proceeding are treated fairly. One of those natural justice protections is the right to an unbiased decision-maker.

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

[12] In the Claimant's application, she explains that the Tribunal member would "over talk" her, and that she was condescending and aggressive at the close of the hearing. In effect, the Claimant is arguing that the General Division member was biased against her.

[13] The Supreme Court of Canada has stated that, "an apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question." The Court continued: "The test is what an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude [about whether the decision—maker would decide the matter fairly]".[2]

[14] I have listened to the audio recording of the General Division hearing, and I cannot conclude that there is an arguable case that a reasonable person, carefully considering what an informed person would think about the General Division member's conduct, could conclude that the General Division member was biased.

[15] Throughout the one hour and forty-five minutes of the in-person hearing, the member appeared to have been careful and respectful of the Claimant. Her questions were generally open-ended and where they were not, it appeared that the member was attempting to prompt the Claimant to clarify her evidence or provide additional details. The member made an effort to ensure that the Claimant had the opportunity to respond to any apparent contradiction or other difficulty that arose out of the information in the appeal file. The Claimant may have found some of these questions to be challenging, but I would not describe the General Division member's questioning style as aggressive, or say that it was characterized by interruptions, or by the member talking over the Claimant.

[16] The Claimant's objections appear to centre around the closing minutes of the hearing, particularly that period after the General Division member had warned the Claimant that the room was only booked for another five minutes. By that time, the General Division member had already asked if the Claimant had anything to add and if the Claimant had any questions. The Claimant had apparently been satisfied that she had said everything she needed to say and the member had concluded the proceedings. However, in the closing minutes, the Claimant repeatedly asked what the General Division's decision would be or which way she was leaning, and the General Division

---

[2] *R. v S. (R.D.)*, [1997] 3 SCR 484.

repeatedly explained that she could not make up her mind until she had reviewed the law and all the evidence. When the Claimant attempted to reargue certain points, the General Division member properly insisted that the hearing had concluded. While the General Division member was firm, it is not apparent from the recording that she was condescending or aggressive as described by the Claimant.

[17] Furthermore, the Claimant did not make any objection during the hearing, or in her post-hearing submissions, that the member may have been biased or come to the hearing with a closed mind, or that anything in the member's conduct during the hearing caused her to doubt the fairness of the process. According to the Federal Court of Appeal *in Bassila v. Canada (Attorney General)*,[3] "A party who believes that the presiding judge has created a reasonable apprehension of bias must make that position known at the first opportunity. One cannot secretly nurse a reasonable apprehension of bias for the purpose of raising it in the event of an adverse result."

[18] There is no arguable case that the General Division failed to observe a principle of natural justice under section 58(1) (a) of the DESD Act by conduct that might give rise to a reasonable apprehension of bias.

Issue 2: Is there an arguable case that the General Division interfered with the Claimant's right to be heard?

[19] Another natural justice protection is the right of a party to be heard and to know the case against him or her. The Claimant noted her objection to proceed on the date of the hearing because she had requested an alternate date, which suggests that she does not believe she was able to be fully heard.

[20] On April 26, 2019, the Claimant informed the Tribunal that her witness would be unable to attend the April 29. 2019 hearing, and she asked for an adjournment. The Tribunal told the Claimant that the hearing would go ahead as scheduled but that she could explain to the General Division member why she wanted the adjournment.

[21] At the hearing, the General Division member heard the Claimant's request for an adjournment and the reasons in support of that request. The only reason the Claimant gave for her adjournment request was that her witness was unable to attend on the scheduled date. The reason the

[3] *Bassila v. Canada (Attorney General),* 2013 FCA 276

witness could not attend was because the witness had learned a few days earlier that she would have to work on the hearing day. After questioning the Claimant, the General Division member was not satisfied that the witness had relevant evidence about the disputed facts or issues or that the witness was crucial. However, she did allow the Claimant to submit post-hearing evidence in the form of a written statement from the witness that the Claimant had intended to call, and also allowed a second witness to also submit a statement. The member agreed to consider these statements. In addition, the member allowed the Claimant to submit an additional document but reserved on whether she would admit that document. Of this additional evidence, only the statement from the original witness was submitted.

[22] In refusing the adjournment, the General Division was exercising its discretion. The record does not suggest that the General Division refused the adjournment based on irrelevant considerations or that it failed to take any relevant consideration into account. Furthermore, the General Division moderated the effect of her refusal by allowing the Claimant to submit additional evidence after the hearing. I do not find that the Claimant has made out an arguable case that the General Division member's decision to proceed without the witness was unfair to the Claimant or that it failed to observe the Claimant's natural justice right to be heard.

[23] Therefore, there is no arguable case that the General Division failed to observe a principle of natural justice under section 58(1)(a) of the DESD Act by interfering with the Claimant's right to be heard.

Issue 3: 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 material before it?

[24] In the Claimant's application for leave to appeal, she did not select the ground of appeal that identifies an "erroneous finding of fact". However, she has argued that the General Division mistakenly wrote that she voluntarily left her employment due to personal reasons, which suggests that the Claimant believes the General Division made a mistake of fact.

[25] The Claimant also argued in her leave to appeal that the General Division, "came up with a lot of unsubstantiated probabilities on behalf of the employer" and that the General Division member "cannot assume the anticipated responses from the employer." The Claimant raised the same issue to

the General Division in her unsolicited post-hearing submissions.[4] This seems to be a suggestion that the General Division misunderstood the evidence or made a finding that did not follow from the evidence.

[26] In response to the first point, the General Division decision states that the Claimant said that, "it was a personal choice to leave".[5] This is found at approximately 01:11:50 (one hour, eleven minutes and fifty seconds on the audio record) into the hearing where the Claimant clearly agreed that it was a personal choice to leave. There is no arguable case that the General Division made an error of fact.

[27] It is difficult to be certain what the Claimant means by unsubstantiated probabilities in her second point. However, I can make two observations. First: The Claimant raised this question as part of her discussion of the two different explanations given by the employer for why another guard was assigned to the condominium where the Claimant worked. The employer had said that the other guard came to work with the Claimant (and took half of the Claimant's shifts according to the Claimant) because the other guard was returning from vacation, but the employer also said it was because the condominium client had requested the other guard. Second: The General Division member asked a question of the Claimant during the hearing. She asked if it was possible that the other security guard (that was given half of the Claimant's shifts, according to the Claimant) could have been returning from vacation and have also been requested by the condominium to return as a security guard. I will assume that this question is the "unsubstantiated probability" to which the Claimant has referred.

[28] The General Division did not act improperly by asking the Claimant if both of the employer's explanations might be true at the same time. The General Division member was trying to determine if the explanations were necessarily contradictory: If the Claimant could have shown how they could not have both been true, that might have been of some assistance to the member is assessing the employer's credibility.

[29] The General Division was required to review the evidence before her, and to determine which evidence it found credible and what weight to give to what evidence. In the end, the General Division preferred the employer's explanation that the condominium client had specifically requested

---

[4] GD9-2
[5] General Division decision, para. 39

the other security guard over the Claimant's belief that she was being discriminated against. It is not the role of the Appeal Division to interfere in the General Division's assessment or the weighing of evidence.[6]

[30] There is no arguable case that the General Division's finding that the employer did not discriminate against the Claimant was made in a perverse or capricious manner or without regard for the evidence before it.

[31] In accordance with the direction of the Federal Court in *Karadeolian v Canada (Attorney General)*[7], I have reviewed the record for any other evidence that might have been ignored or overlooked and that may, therefore, raise an arguable case.

[32] I did not discover any significant evidence that could have been relevant to the General Division's decision but that was arguably ignored or misunderstood. The General Division's conclusions appear to be rationally connected to the evidence, and there is no arguable case that they are either perverse or capricious.

[33] There is no arguable case that the General Division based its decision on an erroneous finding of fact that it made in a perverse of capricious manner or without regard to the material before it under section 58(1)(c) of the DESD Act.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	D. R., Self-represented

[6] *Tracey v Canada (Attorney General)*, 2015 FC 1300; *Griffin v Canada (Attorney General)*, 2016 FC 874
[7] *Karadeolian v Canada (Attorney General)*, 2016 FC 615