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

Citation: *M. C. v Canada Employment Insurance Commission*, 2019 SST 660

Tribunal File Number: AD-19-444

BETWEEN:

M. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 10, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. C., Claimant), worked as a substitute teacher. He applied for and received Employment Insurance regular benefits for the summers of 2016 and 2017 and breaks in March 2017 and 2018. However, the Canada Employment Insurance Commission (Commission) later learned that the Claimant had been self-employed throughout these periods. Because of this, it decided that he was disentitled to benefits.[1] The Commission also decided that he was disentitled to benefits because he did not provide proof that he had been looking for work.[2] The Commission did not change its decision on reconsideration.[3] The Claimant appealed to the General Division, which allowed the appeal in part.

[3] The General Division accepted the Claimant's arguments that he had not been self-employed, but it found that he had not proven that he was available for work anyway. As a result, the General Division determined that he was not entitled to any benefits from June 19 to September 24, 2016, from March 5 to 18, 2017, from June 18 to September 23, 2017, and from March 11 to 24, 2018. This resulted in an overpayment of benefits.

[4] The Claimant is now seeking leave to appeal the General Division's decision on only the issue of availability. Seeking leave to appeal means that the Claimant has to get permission from the Appeal Division before he can move on to the next stage of his appeal. He is not contesting the General Division's findings on the issue of whether he was self-employed. The Claimant argues that the General Division breached a principle of natural justice and made erroneous findings of fact. I have to decide whether the appeal has a reasonable chance of success. For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

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[1] See Commission's letter dated December 13, 2018, at GD3-234 to GD3-235.
[2] See Commission's letter dated December 13, 2018, at GD3-236 to GD3-237.
[3] See Commission's reconsideration decision dated February 1, 2019, at GD3-247 to GD3-248.

ISSUES

[5] The issues are:

> Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice?
>
> Issue 2: Is there an arguable case that the General Division based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it when it decided that the Claimant had not proven that he was available for work?

ANALYSIS

[6] Before the Claimant can move on to the next stage of his appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal also has to have a reasonable chance of success.

[7] The only three grounds of appeal under subsection 58(1) of the DESDA are:

> (a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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] A reasonable chance of success is the same thing as an arguable case at law.[4] This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher. The courts have said

[4] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

that the Appeal Division should follow this approach when deciding applications for leave to appeal.[5]

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

[9] The Claimant argues that there is a reasonable chance of success because the outcome is unfair. He was not working and he claims that he was looking for work at the time. However, the fact that the Claimant regards the outcome as unfair is not a ground of appeal under subsection 58(1) of the DESDA. The principle of natural justice referred to in the subsection refers to the fundamental rules of procedure that must apply in proceedings before the Social Security Tribunal.

[10] As a general matter, the principle exists to ensure that all parties are treated fairly, in the sense that they receive adequate notice of any proceedings, that they have a full opportunity to present their case, and that any proceedings are fair and free of bias or the reasonable apprehension of bias. It relates to issues of procedural fairness, rather than the impact a decision might have on a party.

[11] Here, the Claimant has not pointed to any evidence 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 or appeared to exhibit any bias against him. For this reason, I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

Issue 2: Is there an arguable case that the General Division based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it when it decided that the Claimant had not proven that he was available for work?

[12] The Claimant also argues that the General Division made several erroneous findings of fact regarding his availability.

a. The Claimant claims that he was actively looking for work. He says that the General Division wrongly assumed that the only way one can look for work is by sending out

[5] This is what the Federal Court said in *Joseph v. Canada (Attorney General)*, 2017 FC 391.

resumes. He says that times have changed and nowadays, people can look for work by networking and building a base of contacts. In his case, he organized conferences, workshops, and networking events, where he could demonstrate what he had to offer to prospective employers who attended these events. Indeed, he says that people who attended "showed an interest [in hiring him]."[6]

b. The Claimant says that the General Division wrongly concluded that he did not demonstrate or have any desire to return to work because it failed to consider the fact that he in fact returned to work as soon as the school year resumed. He argues that the fact that he returned to work as soon as the school year resumed should be sufficient proof of reasonable and customary efforts to find suitable employment.

c. The Claimant says that the General Division also wrongly concluded that he set personal conditions on his job search that unduly limited his chances of returning to the labour market. He denies that he set any conditions.

d. The Claimant says that the General Division erred in finding that he gave contradictory evidence about actively seeking work during school breaks. While he may not have applied for work, he organized and attended conferences, workshops, and networking events. He argues that making contacts at these events could have led to employment outside teaching.

[13] The Claimant also argues that the General Division placed too much weight on the fact that he did not apply for work during summers and March school breaks. He says that he can hardly be blamed for not looking for work because he remained "active in the professional world."[7]

[14] The General Division was mindful of the Claimant's evidence that he hoped networking would eventually lead to employment opportunities. The General Division also noted that the Claimant acknowledged that he did not formally apply for any work during teaching breaks. The

[6] See Request for Leave to Appeal, at AD1-7.
[7] Request for leave to appeal, at AD1-9.

General Division considered this evidence when it examined whether the Claimant was available for work during the summer and March breaks.

[15] Essentially, the Claimant is re-arguing his case before me, and asking me to reassess the claim and decide the case in his favour. However, as the Federal Court of Appeal has said, an appeal cannot succeed where an applicant simply disagrees with the application of settled law to the facts of a particular case.[8] And, as the Court also said, such a disagreement does not constitute an error of law, nor does it involve a factual finding that was made in a perverse or capricious manner or without regard to the evidence.[9]

[16] The Claimant disagrees with the General Division's findings that he did not demonstrate a desire to return to work, saying that he immediately returned to work once the September school session resumed, but the General Division's findings were restricted to the summer and March breaks. The General Division examined whether the Claimant had shown any desire to return to work during these shorter periods.

[17] While the Claimant says that he used networking opportunities to build contacts for potential employment, there is no suggestion by him that he pursued these prospective employers for any work during the summer and March breaks. The issue is not whether the Claimant would have accepted any work if an employer had offered work to him, but whether the Claimant made efforts to find suitable employment. The General Division rightly noted that there is an expectation that a claimant will be more pro-active in any job search efforts,[10] so "networking alone … is not a reasonable job search effort."

[18] As for the issue of the weight that the General Division placed on some of the evidence, as the trier of fact, the General Division is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign.[11] Furthermore, the issue of the weight

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[8] See *Quadir v. Canada (Attorney General)*, 2018 FCA 21 at para. 9 and *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at para. 7.
[9] Ibid, and see *Berger v. Canada (Attorney General)*, 2019 FC 780.
[10] See para. 18 of the General Division decision , which also cites *Canada (Attorney General) v. Whiffen*, 1994 CanLII 10954 (FCA).
[11] See *Hussein v. Canada (Attorney General)*, 2016 FC 1417 and *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

to place on the evidence does not fall within any of the listed grounds of appeal under subsection 58(1) of the DESDA.

[19] I am not satisfied that there is an arguable case that the General Division based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, when it assessed whether the Claimant had proven that he was available for work.

[20] Finally, I have reviewed the underlying record, to ensure that the General Division neither erred in law nor overlooked or misconstrue any important evidence or arguments. The General Division member's summary of the facts is consistent with the evidentiary record and her analysis is sound and comprehensive. As such, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Janet Lew
Member, Appeal Division

APPLICANT:	M. C., Self-represented