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

Citation: *H. M. v Canada Employment Insurance Commission*, 2019 SST 319

Tribunal File Number: AD-19-476

BETWEEN:

H. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: July 15, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, H. M. (Claimant) applied for and received benefits over a period in which he was also instructing part-time at a university. The Respondent, the Canada Employment Insurance Commission (Commission) later investigated his claim and determined that he had not fully reported his earnings. The Commission reallocated his earnings over a period that included weeks in which the Claimant was working and weeks in which he was not working. At the reconsideration stage, the Commission removed his penalty and overturned the notice of violation but it maintained the portion of the overpayment that related to the Claimant's mistake of reporting net earnings rather than gross earnings.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, arguing that he believed the earnings found by the Commission included his earnings from a research fellowship. He also argued that that none of his earnings should have been allocated to weeks in which he was not teaching. This included the weeks of August 30, 2015, December 20, 2015, December 27, 2015, and January 3, 2016. The General Division dismissed his appeal and the Claimant now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. There is no arguable case that the General Division erred by failing to observe a principle of natural justice, by basing its decision on an erroneous finding of fact, or by erring in law.

PRELIMINARY MATTERS

[5] At the General Division, the appeal was heard together with the related file indexed under file GE-19-1554 because the two appeals had similar facts and involved common issues of earnings and allocation of those earnings. However, the General Division issued a separate decision for each appeal because of factual differences in the sums received and the periods in question.

[6] I have likewise considered the appeals of the two General Division decisions together and have issued separate decisions. This decision relates to the appeal of GE-19-1553, filed at the Appeal Division under AD-19-476.

ISSUES

[7] Is there an arguable case that the General Division failed to observe a principle of natural justice by failing to consider that the Commission did not fully advise the Claimant?

[8] Is there an arguable case that the General Division dismissed the appeal completely, based on an erroneous finding of fact that was made without regard to the evidence that the Claimant was not fully advised by the Commission?

[9] Is there an arguable case that the General Division erred in law by relying on case law that is distinguishable on the facts or by failing to follow case law provided by the Claimant?

ANALYSIS

[10] To intervene in a decision of the General Division, the Appeal Division must find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the *Department of Employment and Social Development* Act (DESD Act).

[11] The only grounds of appeal are described below:

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.

[12] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more 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 General Division failed to observe a principle of natural justice by failing to consider that the Commission did not fully advise the Claimant?

[13] The Claimant explained that he believed the General Division failed to observe a principle of natural justice because the Commission agent had not properly advised him on how he might manage his claim to maximize his benefit entitlement. He submits that the Commission decision was unjust, and that it was an error of natural justice for the General Division to have failed to consider the fact that he was not properly advised by the Commission.

[14] Natural justice involves procedural protections such as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Claimant has not raised a concern with the adequacy of the notice of the General Division hearing, with the pre-hearing exchange or disclosure of documents, with the manner in which the General Division hearing was conducted or the Claimant's understanding of the process, or with any other action or procedure that could have affected his right to be heard or to answer the case. Nor has he suggested that the General Division member was biased or that the member had prejudged the matter.

[15] Therefore, there is no arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by failing to observe a principle of natural justice.

Issue 2: Is there an arguable case that the General Division dismissed the appeal completely, based on an erroneous finding of fact that was made without regard to the evidence that the Claimant was not fully advised by the Commission?

[16] There were two issues before the General Division. The first issue was whether the commission had correctly determined the amounts received to be earnings. The Claimant had suggested that part of his fellowship was improperly included as earnings but agreed at the General Division hearing that the fellowship had been paid in a period in which there was no

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

overpayment. The General Division found that the fellowship monies were not included in the earnings determined by the Commission and that the sums paid by the employer between August 30, 2015, and April 23, 2016, were earnings. The Claimant did not argue to the Appeal Division that the General Division made any factual error related to the fellowship payments.

[17] The second issue was whether the amounts were allocated in accordance with the *Employment Insurance Act* and *Regulations*. At the General Division, the Claimant argued that he should be considered unemployed and entitled to benefits during the weeks in which he was under contract but not actually teaching. However, the Claimant also presented the alternative argument that the Commission failed to advise him to pause his benefits. He believes that he could have paused his benefits for those periods in which he was under contract but not actually working and that, by following such a strategy, he might have later reactivated his claim to obtain full benefits without deduction of any earnings. He submits that the General Division erred by failing to consider his evidence that he was not properly advised and that the General Division did not consider whether to provide a remedy for this circumstance.

[18] Regardless of whether such a strategy would have been workable or would have had the desired effect in the Claimant's particular circumstances, the advice that the Commission provided, or failed to provide, to the Claimant by the Commission agent was not relevant to the issue before the General Division. The General Division's jurisdiction was limited to the consideration of the issues described by the reconsideration decision. The General Division was not authorized to supervise generally the quality of service given by Commission agents, or to ensure that the Claimant has been directed by the Commission to maximize his benefits.

[19] The Claimant has not identified any erroneous finding of fact, or described how any such finding may have been perverse or capricious, or how it ignored or misunderstood relevant evidence. In accordance with the Federal Court's direction in cases such as *Karadeolian v. Canada (Attorney General),*[2] I have also reviewed the record for any other significant evidence that might have been ignored or overlooked. However, I have not identified any instance that might raise an arguable case.

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[2] *Karadeolian v Canada (Attorney General)*, 2016 FC 615

[20] Therefore, I find that there is no arguable case that the General Division erred under section 58(1)(c) by dismissing the appeal completely based on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it.

Issue 3: Is there an arguable case that the General Division erred in law by relying on case law that is distinguishable on the facts or by failing to follow case law provided by the Claimant?

[21] The General Division relied on the Federal Court of Appeal decision in *Canada (Attorney General) v Frenette*[3] as well as *Bruneau v. Commission, Deputy Attorney General of Canada*.[4] These cases support the principle that the earnings of an employee, under a contract of service which includes periods in which the employee did not perform services, should be allocated to the period for which his or her remuneration was payable and not only to the period in which the employee performed his or her duties. The application of *Frenette* and *Bruneau* to the facts in the Claimant's case would require that the Claimant's earnings be allocated from the week of August 30, 2015, to December 19, 2015, inclusive, and from December 20, 2015, to April 23, 2016, inclusive.

[22] The Claimant argued at the General Division that *Frenette* should be distinguished. He notes that the teaching period in *Frenette* was non-continuous and periodic with extended lags in between each teaching session, whereas his own academic semesters were not periodic and were without extended lags.

[23] The General Division did not accept that this distinction was relevant. It stated that the decision in *Frenette* was based on the fact that the appellant in that case received pay in equal installments over a period in which he was teaching for some periods and not for others. This was also true of the Claimant's circumstances regardless of whether his teaching periods were more continuous than was the case in *Frenette*.

[24] The Claimant has not suggested how the General Division's analysis of *Frenette* was in error and no error is apparent on the face of the record, or otherwise.

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[3] *Canada (Attorney General) v Frenette*, A-951-90
[4] *Bruneau v. Commission, Deputy Attorney General of Canada*, A-113- 98

[25] The Claimant has also argued that the General Division disregarded the case law he presented, namely; Canadian Umpire Benefit (CUB) decision 20249, a decision of the Umpire under a previous appeal process, and CUB 14461.

[26] CUB 14461 was appealed to the Federal Court of Appeal and considered in *Canada (Attorney General) v John Morgan*, A-1200-87.[5] The General Division reviewed *Morgan* in some detail but distinguished it on the basis that the appellant in *Morgan* was not paid a salary prior to the date that he actually commenced work. Conversely, the Claimant received periodic payments over the entire period of the contract including those periods in which he was not working. The General Division considered this difference significant.

[27] CUB decisions are not binding authority on the Social Security Tribunal, and the General Division would not err in law by failing to follow a CUB decision. Regardless, the General Division referred to the CUB 20249 decision cited by the Claimant—which it then distinguished on essentially the same basis as it had distinguished *Morgan*. Unlike the Claimant in this appeal, the appellant in CUB 20249 performed no services (in the initial period of the contract), and received no salary in respect of that period.

[28] Beyond the Claimant's assertion that the fact situation in Morgan and in CUB 20249 more closely matched the facts of his own case, he has not explained why he believes the General Division erred by not following *Morgan* and finding that it was bound to follow *Frenette* and *Bruneau*. Furthermore, the Claimant has not offered any challenge to the General Division's analysis in which it understood one particular circumstance to be key: The Claimant received pay in equal instalments over a period in which the claimant was actually working for some periods but not for others. This was also true of the appellant's circumstances in *Frenette*, and the General Division considered it to be important to the applicability of *Frenette*. The General Division distinguished *Morgan* because, as the Court in M*organ* stated, there was no evidence that the appellant (in *Morgan),* "was paid salary in respect of any period prior to the date he actually commenced work".

[5] *Canada (Attorney General) v John Morgan*, A-1200-87

[29] I do not accept that there is an arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act under section 58(1)(b) of the DESD Act by following *Frenette* (and *Bruneau*) and distinguishing *Morgan*. The Claimant has not explained how this might be an error of law. While an arguable case does not require that I be satisfied on a balance of probabilities, it does require something more than the Claimant's bare assertion that the General Division should have done one thing and not done the other.

[30] There is no reasonable chance of success.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	H. M., Self-represented