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

Citation: *B. K. v Canada Employment Insurance Commission*, 2019 SST 782

Tribunal File Number: AD-19-498

BETWEEN:

**B. K.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 19, 2019

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, B. K. (Claimant) was unable to work for medical reasons, so she applied for Employment Insurance sickness benefits, but the Respondent, the Canada Employment Insurance Commission (Commission) turned down her application. The Commission told her that she needed to have worked more hours of insurable employment between April 8, 2018 and April 6, 2019 (her qualifying period) to qualify for benefits. She had 485 hours when she needed 600 hours for sickness benefits.[1] (For regular benefits, she would have needed 630 hours.[2])

[3] The Claimant asked for a reconsideration of the Commission's decision, saying it was unfair because she had relied on the Commission's advice before she went on a medical leave of absence. She understood from the Commission that she would qualify for benefits as long as she had 600 hours since her last Employment Insurance claim.[3] She calculated that she had worked 659 hours since her last claim. However, it was only later that she learned that the Commission counted just the hours that she had accumulated in the past 12 months, which meant that she did not have enough hours. But, by then, she had already gone on a medical leave of absence. She claims that she would have continued working to accumulate sufficient hours if she knew that she did not have enough hours to qualify for benefits. She argued the Commission should make an exception in her case because it gave her misleading or incomplete information. The Commission did not change its mind on reconsideration.[4]

[4] The Claimant appealed the reconsideration decision to the General Division, but it dismissed her appeal. The Claimant is now seeking leave to appeal the General Division's

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[1] See Commission's letter dated May 1, 2019, at GD3-20 to GD3-21.
[2] See Schedule I of the *Employment Insurance Act*.
[3] See Request for Reconsideration, at GD3-22 to GD3-23.
[4] See Commission's reconsideration letter dated June 4, 2019, at GD3-27 to GD3-28.

decision. This means that she has to get permission from the Appeal Division before she can move on to the next stage of his appeal.

[5] The Social Security Tribunal sent a letter to the Claimant, asking the Claimant to explain why she was appealing the General Division's decision,[5] but despite this, the Claimant did not identify any grounds of appeal. 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.

**ISSUE**

[6] Is there an arguable case that the General Division made any errors under subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA)?

**ANALYSIS**

[7] 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 DESDA. The appeal also has to have a reasonable chance of success. 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;

(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.

[5] See Social Security Tribunal's letter dated July25, 2019.

[8] A reasonable chance of success is the same thing as an arguable case at law.[6] 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.

[9] The Claimant has not identified any errors in the General Division's decision or identified any grounds of appeal that fall into subsection 58(1) of the DESDA. There is no suggestion that the General Division failed to observe a principle of natural justice, erred in law, or based its decision on any erroneous findings of fact.

[10] Instead, the Claimant argues that the General Division told her that her qualifying period could be extended beyond 52 weeks, for exceptional reasons.[7] She argues that she has approximately 660 hours, but some of those hours are outside her 52-week qualifying period, so she wants me to extend the qualifying period to 100 weeks so that she has enough hours to qualify for Employment Insurance benefits. She asks me to consider hers a "special case" and accept her hours outside the qualifying period. She needs benefits from Employment Insurance because she cannot return to work and her husband is unable to find another job and does not earn much. Unfortunately for the Claimant, these arguments do not constitute grounds of appeal under the DESDA. They do not identify any of the types of errors listed in subsection 58(1) of the DESDA.

[11] I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it overlooked or misconstrued any important evidence.

[12] The General Division correctly determined that the Claimant required 630 hours of insurable employment within her qualifying period to qualify for regular benefits, and 600 hours of insurable employment within her qualifying period to qualify for sickness benefits.[8]

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[6] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[7] Subsection 8(1) of the *Employment Insurance Act* defines the qualifying period of an insured person as the shorter of (a) the 52-week period immediately before the beginning of a benefit period under subsection 10(1) and (b) the period that begins on the first day of an immediately preceding benefit period and ends with the end of the week before the beginning of a benefit period under subsection 10(1).
[8] See section 93 of the *Employment Insurance Regulations* and Schedule I of the *Employment Insurance Act*.

[13] The General Division also correctly noted that the there were limited exceptions under subsection 8(2) of the *Employment Insurance Act* that would allow it to extend the qualifying period beyond the maximum of 52 weeks. The General Division examined whether the Claimant's circumstances allowed her to benefit from any of the exceptions.

[14] Subsection 8(2)(a) allows for an extension of the qualifying period where a person is incapable of work because of illness or injury, but the person has to prove that they were not employed because they were incapable of work because of a prescribed illness **throughout the week**.

[15] The Claimant allegedly became ill on March 31, 2019, which fell on a Sunday. It is debatable whether she was off work throughout the week from Sunday, March 31, 2019 to Saturday, April 6, 2019, because the Record of Employment suggests that her last day of work for which she was paid was April 1, 2019.[9] If she had indeed continued to work up to April 1, 2019, then she would not be considered incapable of work because of a prescribed illness throughout the week because she worked part of that week. She would have been unable to rely on this week for the purposes of extending her qualifying period.

[16] On top of that, although the Claimant alleged that she was ill and unable to work from March 31, 2019 to April 19, 2019,[10] the General Division was unable to find any supporting evidence to show that the Claimant was ill and unable to work during this timeframe.

[17] The General Division could have rejected the information on the Record of Employment and could have accepted the Claimant's allegations that she was incapable of work because of a prescribed illness throughout the week from March 31, 2019 to April 6, 2019. But, even if the General Division was satisfied that there was supporting medical evidence, at most, the Claimant would have received only a short extension of the qualifying period. The General Division estimated that the Claimant might have seen an extension of 7 to 8 days to the qualifying period, if that. A short extension to the qualifying period still would not have helped the Claimant get the required number of hours.

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[9] See Record of Employment, at GD3-18.
[10] See General Division decision at paras. 10 and 12. The General Division referred to page GD3-19, but this was a typographical error, because the correct page reference is GD3-9

[18] By expressing any extensions of the qualifying period in "days," the General Division erred because any extensions are in weeks. Subsection 8(2) of the *Employment Insurance Act* states that any extensions are "by the aggregate of any weeks." There is no reference in the subsection to any extensions by "days." This error however did not have any impact on the outcome; as I noted above, the Claimant still would not have gotten enough hours even if the qualifying period got extended by a week.

[19] The General Division also made another minor error, but it too did not have any impact on the outcome. The General Division said that the Claimant's benefit period started on Monday, April 8, 2019, but a benefit period can only begin on a Sunday.[11]

[20] Because there are no grounds of appeal under subsection 58(1) of the DESDA, I am not satisfied that the appeal has a reasonable chance of success.

**CONCLUSION**

[21] For the above reasons, the application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

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| APPLICANT: | B. K., Self-represented |

[11] Subsection 10(1) of the *Employment Insurance Act* begins on the later of (a) the Sunday of the week in which the interruption of earnings occurs and (b) the Sunday of the week in which the initial claim for benefits is made.