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

Citation: *R. S. v Canada Employment Insurance Commission*, 2019 SST 794

Tribunal File Number: AD-19-372

BETWEEN:

R. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 23, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] This is an application for leave to appeal the General Division's decision dated May 6, 2019.[1] This means that the Applicant, R. S. (Claimant), has to get permission from the Appeal Division before she can move on to the next stage of the appeal.

[3] The Claimant worked as a postal clerk until September 2013, when she was injured in a car accident. She applied for Employment Insurance sickness benefits. The Respondent, the Canada Employment Insurance Commission (Commission), accepted her claim and paid her 15 weeks of sickness benefits from December 29, 2013 to April 26, 2014. The Commission later learned that the Claimant had received payments from her employer between January 2014 and April 2014. It adjusted her earnings, which meant that she had to pay back any Employment Insurance benefits that she would not have otherwise received. The Commission also issued a penalty and notice of violation, so she would have to work more hours to qualify for Employment Insurance benefits in future.

[4] The Claimant previously appealed this matter. I granted the Claimant's appeal and returned the matter to the General Division for a rehearing. The Commission obtained additional information from the employer. Regrettably for the Claimant, that information proved to be unfavourable to her claim over the long run because it ended up increasing the amount of the overpayment.

[5] Following a second hearing before the General Division, the member there determined that the Claimant received supplementary monies from her employer at the same that she was getting Employment Insurance sickness benefits. The General Division also determined that

[1] This is the second application for leave to appeal that the Claimant has made before me. The General Division briefly set out the history of proceedings in its decision dated May 6, 2019.

these supplementary monies were earnings that had to be allocated. The allocation led to an overpayment of benefits that the Claimant has to repay.

[6] The Claimant argues that she did not have a fair hearing before the General Division because she was unfit to give evidence. She also argues that the General Division based its decision on an erroneous finding of fact. She asks that I waive the overpayment and any penalties or that I postpone the appeal until she recovers from her injuries and is fit to give evidence. I have to decide whether the appeal has a reasonable chance of success.

[7] I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

ISSUES

[8] The issues before me are as follows:

> **Issue 1:** Is there an arguable case that the Claimant did not get a fair hearing?
>
> **Issue 2:** 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, on the issue of whether the Claimant worked again after her car accident?

ANALYSIS

[9] Before the Claimant can move on to the next stage of the 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.

[10] 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.

[11] A reasonable chance of success is the same thing as an arguable case at law.[2] 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.

Issue 1: Is there an arguable case that the Claimant did not get a fair hearing?

[12] The Claimant argues that the General Division failed to observe a principle of natural justice because it did not give her a fair hearing on April 15, 2019. She claims that she was unfit to give evidence at the General Division hearing because she was undergoing treatment and was on medication.[3] She suggests that the General Division member should have adjourned the hearing until after she recovers from injuries that she sustained in a car accident on September 28, 2013. However, the Claimant did not request an adjournment of the proceedings, nor alert the General Division member that she was allegedly unable to give evidence.

[13] The Claimant did not return to work after her car accident because of ongoing symptoms from her various physical and mental injuries. She claims that she continues to have memory loss and is unable to focus on anything. While I am prepared to accept that the Claimant has pain and psychological issues, including stress, anxiety, and depression,[4] she has not provided any supporting medical opinions to indicate that her health at the time of the hearing impaired her memory and her ability to focus to such an extent that she was unfit to give evidence at the hearing.

[14] The Claimant has produced two medical notes and the first page of a three-page letter dated May 8, 2019, from her insurer. The Claimant claims that her insurer has approved payment

[2] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[3] See Claimant's letter signed on June 19, 2019, at ADN1B.
[4] See Claimant's letter dated July 10, 2018, at AD1A.

for psychological assessment and treatment in connection with her injuries from the car accident. The letter indicates that a psychologist recommended psychological assessment and that the insurer approved payment for the assessment. It is unclear whether the insurer also approved actual treatment beyond an assessment.[5] It would be reasonable however for the psychologist to assess the Claimant before recommending any ongoing treatment plan.

[15] The Claimant's family physician prepared a note dated May 27, 2019. The doctor wrote, "Patient suffers with anxiety, pain in left knee, left leg and left side of body. Patient is currently taking medication, attends physiotherapy, Pain clinic and psychotherapy."[6]

[16] The Claimant's chiropractor also prepared a note, dated May 24, 2019. He wrote that the Claimant "has not returned to work since the time of the accident due to her ongoing orthopaedic injuries."[7]

[17] However, neither of the two medical notes or the fact that the Claimant will be undergoing a psychological assessment shows that the Claimant was unfit to testify at the General Division hearing.

[18] If, as the Claimant alleges, she was unfit for the General Division hearing, she should have brought this to the attention of the Social Security Tribunal or to the General Division member either before or at the hearing. At the conclusion of the General Division hearing, the Claimant's representative noted that the Claimant had not worked since her accident. He stated that, "her legs are swollen up, her body is all messed up a bit"[8] but he did not specifically mention any memory, focus, or mental fitness issues.

[19] The Claimant's representative did not mention that the Claimant had any medical issues that affected her ability to testify. The Claimant also did not raise any issues about her ability to give evidence or her ability to understand the proceedings or any questions. The General Division member asked both the Claimant and her representative whether they had any problems

[5] See insurer's letter dated May 8, 2019, at ADN1D-6.
[6] See family physician's medical note dated May 27, 2019, at ADN1D-3.
[7] See chiropractor's note dated May 24, 2019, at ADN1D-5.
[8] At approximately 29:40 of the General Division hearing.

with giving evidence. Both the Claimant and her representative indicated that they did not have any problems giving evidence.[9]

[20] I have carefully listened to the audio recording of the General Division decision. I accept the Claimant's assertions that she felt stressed, but there is nothing to suggest that the Claimant was confused or was suffering from memory loss and was therefore unfit to give evidence. I find that she was coherent, organized in her thoughts, and able to respond to questions, which suggests that she understood the questions that the General Division member posed to her. Admittedly, the Claimant was unable to respond to some of the questions, but this was in part because neither she nor her representative had the file materials with them at the hearing. I see no basis that should have caused the General Division member to question the Claimant's fitness to give evidence.

[21] If anything, the Claimant was unable to give evidence about any payments that her employer directly deposited into her bank account simply because she did not monitor her bank account, leaving this for her spouse. She testified that she did not know anything about any payments from either her employer or the Employment Insurance Commission between January and April 2014 because any payments were made directly to her bank account and her spouse looked after her banking. He did not tell her about any payments during this time. She was focussed on her injuries, rather than any payments that might have been made to her account. In fact, the Claimant testified that did not learn about the payments from her employer until 2017, when she requested copies of her banking statements.[10]

[22] The Claimant does not dispute any of the evidence that she gave at the General Division hearing. She challenges the accuracy of one of the two records of employment, but this issue did not arise during the General Division hearing and she did not give any evidence about the record of employment. More importantly, the General Division did not base its decision on the record of employment.

[23] In submissions dated June 19, 2019, the Claimant says that she did not work again after September 28, 2013, but this is consistent with the evidence that she gave at the General Division

[9] At approximately 8:35 of the General Division hearing.
[10] At approximately 18:37 to 19:26 to of the General Division hearing.

hearing. The employer also confirmed that the Claimant did not work. The General Division accepted this evidence.

[24] The General Division had to decide the nature of the employer's payments between January and April 2014. The Claimant testified that she asked her employer to clarify what the payments were for, but she never received a response. The Claimant did not have any supporting evidence to explain why the employer made these payments. The only definitive information about these payments came from the employer. Some of that evidence conflicted, but the General Division explained why it preferred the employer's information that it gave to the Commission on April 12, 2019.[11] I note that the Claimant does not suggest that she has any other information or evidence about these payments to counter the employer's information.

[25] If a rehearing were held at sometime in the future-, the Claimant's evidence would be more aged and likely less reliable and probably given less weight simply because of the lengthy passage of time. In any event, the Claimant was not mindful of any payments to her account in early 2014, and does not have any other information to give about the payments. Any evidence she might give about the nature of the payments between January and April 2014 would be of limited assistance.

[26] Given these considerations, I am not satisfied that there is an arguable case on the ground that the Claimant did not receive a fair hearing because she was allegedly unfit to give evidence.

Issue 2: 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, on the issue of whether the Claimant worked again after her car accident?

[27] The Claimant argues 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, on the issue of whether the Claimant worked again after her car accident. The Claimant points to paragraph 35 of the General Division's decision, where it wrote,

> The Commission determined the Claimant had "full working weeks" in certain weeks of the benefit period, which resulted in undeclared earnings and an

[11] See Supplementary Record of Claim dated April 11, 2019, at RGD4-7 to RGD4-8.

> overpayment. A Record of Employment shows that the Claimant attempted to return to work in January 2014. The Claimant was unsuccessful in this return, but a separate Record of Employment shows she again attempted to return to work in April 2014. Again, the Claimant was unsuccessful and left her employment due to illness.

[28] However, according to the employer, the Claimant did not work between January 5, 2014 and April 26, 2014.[12] In other words, the Claimant did not receive any employment earnings within this period for the simple reason that she did not work. However, the Claimant still received payments from the employer. The Commission determined from the employer that these payments were for short-term disability benefits and a supplemental unemployment benefit or top-up for sick leave.[13]

[29] The General Division indicated that it accepted the Commission's position, so it found that any payments the Claimant received were short-term disability benefits and a supplemental unemployment benefit. In other words, it accepted that the Claimant did not work again between January 5, 2014 and April 26, 2014.

[30] I am not satisfied that there is an arguable case that the General Division based its decision on an erroneous finding of fact that the Claimant worked again after her car accident, because it did not make such a finding.

[31] The Claimant argues that it is unfair that the employer produced two records of employment. While that may be so, apart from the fact that the General Division did not base its decision on any of the records of employment, at the same time, the General Division was entitled to refer to and rely on the evidence before it, provided that it explained why it preferred any evidence over others. In this case, it noted that the employer had produced conflicting information. The General Division preferred the April 11, 2019 statement[14] because it was

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[12] See paragraph 41 of the General Division decision.
[13] *Ibid*.
[14] See Supplementary Record of Claim dated April 11, 2019, at RGD4-6 to RGD4-7.

"thorough and explains the bank statements, which include the net amounts that the Claimant was paid by the employer during her EI benefit period."[15]

[32] 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.

[33] I have reviewed the underlying record, to ensure that the General Division neither erred in law nor overlooked or misconstrued 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.

[34] I note that the Claimant is asking me to waive the overpayment, along with any penalties, that she is required to pay. I do not have any authority to write-off any of the overpayment or penalty. Her recourse, if any, lies elsewhere. At the same time, I noted that the Commission is encouraging the Claimant to provide it with a valid medical certificate to prove that she was sick and unable to work from April 27, 2014, onwards.[16] This way, the Commission might be able to see if it can apply any unused entitlement for the purpose of lowering the amount of the overpayment. The Claimant would also need to verify that she has not received any other monies (such as long-term disability benefits) from her employer, or any income loss award from her car accident claim. The Claimant may well wish to explore the Commission's offer in this regard.

CONCLUSION

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

Janet Lew
Member, Appeal Division

[15] See paragraph 49 of the General Division decision.
[16] See Commission's Supplementary Representations to the Social Security Tribunal – Employment Insurance section, dated April 12, 2019, at RGD4-4.

REPRESENTATIVES:	R. S., Applicant S. S., Representative for the Applicant