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

Citation: *G. S. v Canada Employment Insurance Commission*, 2019 SST 913

Tribunal File Number: AD-18-671

BETWEEN:

G. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: August 28, 2019

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal the August 2018 General Division decision is refused.

OVERVIEW

[2] The Applicant, G. S., applied for Employment Insurance (EI) regular benefits in November 2016 and sought an antedating of her claim. Her claim for benefits was approved by the Respondent, the Canada Employment Insurance Commission (Commission), and started from September 4, 2016. In September 2017, her former employer in a negotiated settlement paid the Applicant $34,000. The Commission determined that the payment was earnings and allocated the sum to the Applicant's EI claim period. This resulted in an overpayment that the Applicant was required to repay.

[3] The Applicant requested reconsideration. The Commission maintained its initial decision. The Applicant appealed to the General Division of the Social Security Tribunal of Canada.

[4] The General Division found that the settlement payment was earnings under the *Employment Insurance Regulations* (EI Regulations), was subject to allocation, and was properly allocated by the Commission. The General Division also found that the Tribunal does not have jurisdiction to review the Commission's decision refusing to write off the overpayment.

[5] The Applicant filed an application for leave to appeal with the Appeal Division and submitted that the General Division did not properly evaluate her case. She argues that the General Division failed to observe a principle of natural justice and based its decision on serious errors in fact finding. She also submits new evidence.

[6] The Applicant also filed an application to rescind or amend the General Division decision with the General Division. The General Division rendered a decision after considering the new documents filed by the Applicant and concluded that they did not disclose new material facts. The General Division did not amend or rescind its August 31, 2018 decision, which is the subject of this application for leave to appeal.

[7] I find that the appeal does not have a reasonable chance of success, because the application for leave to appeal simply repeats arguments the Applicant made to the General Division and does not disclose any reviewable errors.

ISSUES

[8] Is there an arguable case that the General Division failed to observe a principle of natural justice?

[9] Is there an arguable case that the General Division based its decision on a serious error in its findings of fact?

[10] Is the Applicant's new evidence admissible at the Appeal Division?

ANALYSIS

[11] An applicant must seek leave to appeal in order to appeal a General Division decision. The Appeal Division must either grant or refuse leave to appeal, and an appeal can proceed only if leave to appeal is granted.[1]

[12] Before I can grant leave to appeal, I must decide whether the appeal has a reasonable chance of success. In other words, is there an arguable ground upon which the proposed appeal might succeed?[2]

[13] Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success[3] based on a reviewable error.[4] The only reviewable errors are the following: the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; erred in law in making its decision, whether or not the error appears on the face of the record; or 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.

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[1] *Department of Employment and Social Development Act* (DESD Act) at ss. 56(1) and 58(3).
[2] *Osaj v Canada (Attorney General)*, 2016 FC 115, at para 12; *Murphy v Canada (Attorney General)*, 2016 FC 1208, at para 36; *Glover v Canada (Attorney General)*, 2017 FC 363, at para 22.
[3] DESD Act at s. 58(2).
[4] *Ibid.* at s. 58(1).

[14] The Applicant submits that the General Division "shows a lack of objectivity."[5] She argues that the General Division minimized the behaviour she was subjected to in the workplace and failed to consider that she was racially discriminated against. She also argues that the General Division made errors in its fact-finding.

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

[15] I find that there is no arguable case that the General Division failed to observe a principle of natural justice or refused to exercise its jurisdiction.

[16] "Natural justice" refers to fairness of process and includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against them. It is settled law that an applicant has the right to expect a fair hearing with a full opportunity to present their case before an impartial decision-maker.[6]

[17] The Applicant argues that the General Division lacked objectivity, because it did not find that the Applicant was subjected to racial discrimination in the workplace and its decision noted that the Applicant "herself seemed uncertain … whether she was being targeted due to her race or whether it was just overall workplace harassment that was going on."[7]

[18] Although the Applicant expresses disappointment with the General Division hearing, she does not provide any evidence that her right to be heard was interfered with, that the hearing itself was conducted in an unfair manner, or that the General Division member was biased.

[19] An allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that "derogates from the standard."[8]

[20] The application for leave to appeal did not explain how the General Division failed to observe a principle of natural justice, and there was no material evidence supporting the

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[5] AD1: Application for leave to appeal at pages AD1-3 and AD1-6.
[6] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 22.
[7] General Division decision, at para 37.
[8] *Arthur v Canada (A.G.)*, 2001 FCA 223.

Applicant's argument that the General Division member "lacked objectivity". There is no error relating to natural justice that is apparent on the face of the record, either.

[21] The appeal does not have a reasonable chance of success based on this ground.

Issue 2: Is there an arguable case that the General Division based its decision on a serious error in its findings of fact?

[22] I find that there is no 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.

[23] This appeal turns on whether the Applicant demonstrated that the settlement payment from her employer was exempted from allocation under section 35(7) of the EI Regulations or that it did not arise from employment.[9] In its findings of facts, the General Division considered the documentation on file about the settlement as well as the Applicant's testimony about the circumstances and her intentions relating to the settlement.

[24] The General Division considered whether the settlement or any part it represented compensation for human rights damages.[10] It its analysis on this point, the General Division noted that no human rights complaint was ever filed. The Applicant takes issue with this statement.

[25] However, the finding of fact that the Applicant did not file a human rights complaint was not erroneous. Therefore, this finding cannot be an erroneous finding of fact made in a perverse or capricious manner.

[26] The Applicant also takes issue with the General Division's finding that she "did not dispute the calculation of her average weekly earnings." In the application for leave to appeal, the Applicant states that she contacted the Commission when she was advised of an overpayment and she expressed concerns about the decision and the amount of the overpayment. Having

[9] General Division decision, at para. 19.
[10] *Ibid.* at para. 37.

objected to the Commission's decision, the Applicant argues that it was evident that "there are concerns with how the calculation was made."[11]

[27] It is clear that the Applicant disputed the Commission's decision to allocate the settlement payment and the amount of the EI overpayment. However, the General Division did not base its decision - about whether the Commission correctly allocated the settlement payment as earnings - on the Applicant having not disputed the calculation of her average weekly earnings. The General Division reviewed the evidence about the Applicant's EI benefits and her average weekly earnings in arriving at its conclusion that the Commission had correctly allocated the settlement payment.

[28] The General Division considered the Applicant's arguments and the evidence on file. It considered her testimony and each of the reasons she gave to explain her position that the settlement payment should not have been allocated. The General Division decision includes an analysis of the Applicant's arguments. The General Division did not err by failing to consider the Applicant's relevant arguments and did not base its decision on any erroneous findings of fact.

[29] A simple repetition of the Applicant's arguments falls short of disclosing a ground of appeal that is based on a reviewable error. I have read and considered the General Division decision and the documentary record. I find that the General Division did not overlook or misconstrue any important evidence.

[30] The appeal does not have a reasonable chance of success based on this ground.

Issue 3: Is the Applicant's new evidence admissible at the Appeal Division?

[31] The Applicant's new evidence is not admissible at the Appeal Division.

[32] The application for leave to appeal included a letter from the Applicant's former employer, dated October 17, 2018. The Applicant submits this document to show that the settlement payment "was paid in resect of her agreement to relinquish her right of reinstatement and her comprehensive collective agreement rights."

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[11] AD1-7: Application for leave to appeal, attachment, second to last paragraph.

[33] The Tribunal wrote to the Applicant to explain that the Appeal Division cannot consider new evidence, except in limited situations. It noted that another option was for the Applicant to make an application to rescind or amend a General Division decision based on new evidence. As a result, the Applicant filed an application with the General Division to rescind or amend her General Division decision.[12]

[34] The General Division issued a decision on the Applicant's application to rescind or amend, on May 31, 2019, and dismissed the application. The Applicant has filed an application for leave to appeal that decision, which is the subject of a separate Appeal Division decision.[13]

[35] New evidence is not a ground of appeal under section 58 of the DESD Act. It was incumbent upon the Applicant to present any evidence she had to the Commission and to the General Division before or at the hearing. The Applicant obtained new evidence after the General Division rendered its decision. She filed an application to rescind or amend the General Division decision based on this evidence, but the new evidence is not admissible at the Appeal Division on this application for leave to appeal.

[36] The new evidence was not in the record before the General Division prior to its decision of August 31, 2018. Therefore, it cannot form the basis of an argument that the General Division made a reviewable error by not considering the information the evidence allegedly contains.

[37] The appeal does not have a reasonable chance of success based on the new evidence.

CONCLUSION

[38] I am satisfied that the appeal has no reasonable chance of success, so the application for leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division

REPRESENTATIVE:	G. S., self-represented

[12] Tribunal file number: GE-19-1282.
[13] Tribunal file number: AD-19-463.