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

Citation: *G. S. v Canada Employment Insurance Commission*, 2019 SST 914

Tribunal File Number: AD-19-463

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 May 2019 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.

[3] 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. The Applicant requested reconsideration. The Commission maintained its initial decision.

[4] The General Division found that the settlement payment was earnings under the *Employment Insurance 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 to rescind or amend the General Division decision and submitted a letter from her former employer and email correspondence between the Applicant and her Association counsel. The General Division rendered a decision after conducting a written question and answer hearing and considering the Applicant's new documents and submissions filed by the parties. The General Division concluded that the new information did not disclose new material facts. The General Division did not amend or rescind its August 31, 2018 decision.

[6] The Applicant filed an application for leave to appeal the General Division decision of May 31, 2019, which dismissed her application to rescind or amend its August 2018 decision.

[7] I find that the appeal does not have a reasonable chance of success because the application for leave to appeal 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?

ANALYSIS

[10] 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]

[11] 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]

[12] 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.

[13] The Applicant's new evidence at the General Division included a letter from her former employer that characterized the settlement payment as for the Applicant's agreement to relinquish her right of reinstatement and her comprehensive collective rights and email correspondence with her Association counsel. The Applicant submits that the General Division based its decision "on assumptions formed without any valid evidence, but on preconceived

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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).

notions."[5] She argues that the General Division was reluctant to give her extensions of time when she requested them and that the impact of the process on her and her ailing mother was not considered. She also submits that government institutions should provide guidance on EI claims and surrounding circumstances.

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

[14] 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.

[15] "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]

[16] The Applicant points to the General Division's reluctance to grant extensions of time. However, I note that the General Division did give the Applicant additional time to provide further documents and submissions, in each of the General Division proceedings.[7]

[17] The Applicant argues that the impact of the process on her and her mother (for whom she provides care) was not considered by the General Division and that government institutions should provide guidance to EI claimants. However, "natural justice" relates to fairness of process and not "fairness" in its dictionary meaning or as the Applicant may feel is fair.

[18] The Applicant alleges that the General Division based its decision on assumptions formed without valid evidence.[8] However, she does not provide any evidence that her right to be heard was interfered with, that the hearing by written questions and answers was conducted in an unfair manner, or that the General Division member was biased. The Applicant's allegations are not evidence.

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[5] ADN1: Application for leave to appeal at pages AD1-4.
[6] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 22.
[7] Tribunal file numbers GE-19-1282 and GE-18-640.
[8] *Supra.* note 5

[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."[9]

[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 Applicant's argument that the General Division based its decision on assumptions without basis in the evidence. 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's new information meets the legal test for "new facts" as established by binding Federal Court of Appeal jurisprudence. In order for facts to be considered "new facts", they must have happened after the decision was rendered or happened prior to the decision being rendered but could not have been discovered by the appellant acting diligently.[10] Additionally, the new facts must be decisive of the issue.[11]

[24] In its findings of facts, the General Division considered the documentary evidence on file as well as the parties' written submissions. The General Division found that the settlement occurred prior to its August 2018 decision, on or about September 20, 2017, and the new documents reference the settlement.[12] It also concluded that the Applicant acting diligently could have discovered the employer's letter and the email correspondence from the Association's counsel prior to the initial General Division hearing in July 2018.[13] The General Division further

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[9] *Arthur v Canada (A.G.)*, 2001 FCA 223.
[10] *Canada (A.G.) v Chan*, [1994] F.C.J. No. 1916 (A-185-94); *Blais v Canada (A.G.)*, 2011 FCA 320.
[11] *Ibid.*
[12] General Division decision at paras 17-21.
[13] General Division decision at paras 22-33.

found that it did not make its initial decision based on a mistake of a material fact in the evidence.[14]

[25] The application for leave to appeal does not state what finding of fact the Applicant alleges was erroneous and made in a perverse or capricious manner. The application states that the decision was based on assumptions but does not detail what those assumptions were or how the General Division is alleged to have based its decision on a serious error in fact-finding.

[26] A simple repetition by the Applicant that the General Division's decisions and the Commission's decisions before that were wrong falls short of disclosing a ground of appeal that is based on a reviewable error.

[27] 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. There is no evidence that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction and no argument that it erred in law in coming to its decision.

[28] There appears to be a typographical error in the General Division decision. In noting that the Applicant "was unavailable from August 28, 2019 to May 5, 2019", the General Division made a minor error.[15] The remainder of the paragraph makes it clear that the correct date was April (not August) 28, 2019. The General Division did not base its decision on the August date.

[29] The appeal does not have a reasonable chance of success based on a serious error in the findings of fact.

[30] Although the Applicant did not argue that the General Division erred in law in making its decision, I did consider whether a possible error of law appears on the face of the record. There is no error of law apparent on the face of the record.

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[14] *Ibid.* at paras 34-57.
[15] *Ibid.* at para 7.

CONCLUSION

[31] 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