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

Citation: *K. D. v Canada Employment Insurance Commission*, 2019 SST 982

Tribunal File Number: AD-19-569

BETWEEN:

K. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 11, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, K. D. (Claimant), took a leave of absence from his employment and applied for Employment Insurance sickness benefits, establishing a benefit period. When his sickness benefits ran out, he was still not medically capable of returning to work. By the time he was ready to return to work, the employer decided to offer him a settlement including severance pay and vacation pay (the Settlement), rather than have him return to his job. The Claimant accepted the Settlement, and the Respondent, the Canada Employment Insurance Commission (Commission) determined that the Settlement payment was earnings and should be allocated. The Claimant requested a reconsideration and the Commission maintained the allocation. However, the Commission determined that the Claimant's benefit period should be extended because of the allocation.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which found that his benefit period could not be extended more than 104 weeks and dismissed his appeal. The Claimant further appealed to the Appeal Division. The Appeal Division decided that the General Division had not determined whether and how his Settlement should be allocated, and it returned the matter to the General Division. The General Division held a new hearing but dismissed the appeal again, this time confirming that the Settlement was earnings and had been correctly allocated. The General Division dismissed the Claimant's appeal, and the Claiamnt now seeks leave to appeal to the Appeal Division.

[4] There is no reasonable chance of success. The claimant has not satisfied me that the General Division failed to observe a principle of natural justice, made an error of jurisdiction or made any other error of law.

ISSUES

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

[6] Is there an arguable case that the General Division erred in law?

ANALYSIS

[7] The Appeal Division may intervene in a decision of the General Division, only if it can 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).

[8] 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.

[9] 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].

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

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

[10] One of the grounds of appeal selected by the Claimant in his application for leave to appeal is the ground of appeal concerned with natural justice and jurisdiction.

[11] Natural justice refers to fairness of process and includes 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. 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.

[12] Turning to jurisdiction; there were three issues that had been before the General Division at the Claimant's first General Division hearing. The first issue concerned the extension of the benefit period to 104 weeks which the General Division confirmed. The second and third issues were concerned with whether the Claimant's settlement was earnings and whether it was properly allocated. The General Division did not accept jurisdiction over the second and third issues. On appeal to the Appeal Division, I upheld the General Division decision that the maximum benefit period was 104 weeks but I found that the General Division had refused to exercise its jurisdiction to consider the other two issues. I returned the matter to the General Division for a decision on earnings and allocation.

[13] The recent General Division decision, now on appeal, determined that the settlement payment was earnings and determined that it was properly allocated beginning with the week of separation. The Claimant did not suggest that the General Division failed to consider these issues or that it considered issues that it should not have considered, nor did he identify any other jurisdictional error in the second decision of the General Division. Therefore, there is no

arguable case that the General Division erred under s. 58(1)(a) of the DESD Act by refusing to exercise its jurisdiction or by acting beyond its jurisdiction.

Issue 2: Is there an arguable case that the General Division erred in law?

[14] According to section 10(1) of the *Employment Insurance Act* (EI Act), the benefit period is ordinarily 52 weeks. As I previously confirmed, the benefit period may be extended, as it was in this case. However, section 10(14) states that it cannot be extended so that it is greater than 104 weeks.

[15] The weeks in the benefit period are **not** weeks of benefits to which a claimant is entitled. The benefit period is only that period in which it is possible for a claimant to receive benefits. If a claimant would otherwise have been entitled to weeks of benefits, but those weeks fall outside the benefit period, those benefits cannot be paid.

[16] The benefit period begins with the Sunday of the week in which a claimant experiences an "interruption of earnings" (section 10(1) of the EI Act). The Claimant's benefit period began on May 1, 2016, because he had an interruption of earnings when he took a sick leave beginning May 5, 2016. The benefit period ordinarily runs for 52 weeks (section 10(2) of the EI Act) but it can be extended under section 10(b) of the EI Act by a period that is equal to the period over which a payment received (because of a severance of the employment relationship) has been allocated. In the Claimant's case, his Settlement was allocated over 53 weeks. If his benefit period had been extended by 53 weeks than he would have had 105 weeks in his benefit period. However, section 10(14) limited the total number of weeks in his benefit period to 104 weeks. The Claimant's benefit period began on May 1, 2016 and ran for 104 weeks to end on April 28, 2018. According to the EI Act, he could not collect benefits after April 28, 2018.

[17] The Claimant argued that the General Division erred in law by counting the unpaid weeks in the benefit period and by counting his sickness benefits in his benefit period. However, the benefit period is a period that is continuous from the week of interruption of earnings until it expires. In this case, it ran for 104 weeks, which is the maximum benefit period permitted under the EI Act. The benefit period is not suspended during periods in which a claimant is on sickness benefits or not entitled to benefits. There is no arguable case that the General Division erred in law by "counting" the unpaid weeks and the sickness benefit weeks in the benefit period.

[18] The Claimant also argued that the General Division erred in law by allocating his Settlement payment and his sickness benefit against the regular benefit. As noted by the General Division the Settlement was allocated to 53 weeks beginning with the week of separation from employment (the Claimant left his employment on December 22, 2016), until December 23, 2017, as it was required to do by section 36(9) of the *Employment Insurance Regulations* (Regulations). It was because the Settlement was allocated that the Claimant's benefit period was extended from 52 weeks to the maximum of 104 weeks. There is no arguable case that this was an error of law.

[19] Neither the Claimant's Settlement nor his sickness benefits were allocated "against" his regular benefits: All of the benefits paid to the Claimant, whether sickness or regular, were paid within the single extended benefit period established following his initial interruption of earnings. He was paid the maximum of 15 weeks of sickness benefits (section 12(3)(c) of the EI Act) and then was disentitled to benefits because he was not capable of work as required by section 18(1)(a) of the EI Act. After his final separation from the employer, the Claimant was disentitled to benefits because his Settlement was allocated as earnings for the next 53 weeks. He received regular benefits after that but could not collect benefits beyond April 28, 2018, the last day of his benefit period.

[20] The Claimant also argued that he did not consent to the allocation of his Settlement, or to switch from sickness to regular benefits. As the General Division rightly noted, his consent is not required. The allocation of earnings is required by operation of the Regulations. As noted, the EI Act also limits sickness benefits to 15 weeks, and stipulates that regular benefits can only be paid when a claimant is capable and available for work (and when an allocation of his earnings would not offset the benefit).

[21] The Claimant has not shown how the General Division erred in law in upholding this allocation, and no error is apparent to me. The Claimant has not raised an arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

[22] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	K. D., Self-represented