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

Citation: *M. A. v Canada Employment Insurance Commission*, 2019 SST 1239

Tribunal File Number: AD-19-623

BETWEEN:

M. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 25, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. A. (Claimant), failed to report that she was working while she was collecting Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission) determined that she knowingly made false statements when she completed her claim reports, and it assessed a penalty and issued a notice of violation. It also declared an overpayment and asked her to repay benefits to which she was not entitled.

[3] The Claimant asked the Commission to reconsider but it maintained its original decision. The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed her appeal. She now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success on appeal. She has not pointed to any evidence that was overlooked or misunderstood and I have been unable to identify an arguable case that the General Division based its decision on an erroneous finding of fact.

PRELIMINARY MATTERS

[5] Some of the evidence submitted by the Claimant with her submissions was not before the General Division and I cannot consider it.[1] This includes Figures 1 and 3 of her submissions (AD1), and any explanation or elaboration of the Claimant's circumstances that goes beyond what she told or sent the Commission or the General Division.

ISSUE

[6] Is there an arguable case that the General Division made an error when it found as fact that the Claimant knew she was working at the time that she completed her claim reports?

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[1] *Mette v. Canada (Attorney General)*, 2016 FCA 276.

ANALYSIS

General Principles

[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[2].

Issue: Is there an arguable case that the General Division made an error when it found as fact that the Claimant knew she was working at the time that she completed her claim reports?

[10] The Commission determined the Claimant's overpayment based on earnings that she did not receive until December 2017 but which were paid to her for the work she performed throughout her claim period. At the General Division, the Claimant did not dispute the amount of the overpayment and her submissions to the Appeal Division accepted that she should have to pay back the overpayment of benefits. The Claimant made no submissions as to the amount of the penalty or the notice of violation, but she disputed the General Division's decision that she had knowingly made false statements and that she should have been penalized her at all.

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

[11] The Claimant argued that the General Division did not understand that she had not been certain whether she would be paid or for what work, and she highlighted evidence from the file that supported her assertion that her employment status and her remuneration were uncertain.

[12] However, the General Division did not find that the Claimant knowingly misrepresented her *earnings* but rather that she knowingly misrepresented that she was working between the week beginning September 17, 2017, and the week ending November 25, 2017. Its finding that what she was doing was work, and that she knew it was work, did not rely on evidence related to her expectation of earnings. It was based on the evidence of her work activities during the time that she he was filling out her weekly claim reports.

[13] In her submissions to the Appeal Division, the Claimant acknowledged that she worked during the time she was claiming benefits. She said that, "by the time [she] was paid [she] had forgotten that this work had overlapped with EI benefits [she] had received."[3] A large part of her explanation for why she had not considered herself to be working was that she associated work with earnings and she could not be certain of her earnings at the time.[4] However, the claim report question of whether she was working, to which she repeatedly answered in the negative, explicitly stated that the Commission considers unpaid work to be work, at least for the purpose of the question. The question in the claim reports is whether claimants worked *or* received earnings, and the question explains that "work includes work for which [a claimant] will be paid later, *unpaid work,* or self-employment."

[14] The Claimant could possibly have understood her circumstances in one of the following ways:

1) that she was employed or under contract at the time and was being paid for some or all of her work;
2) that she was not formally employed or under contract but would be paid for some or all of her work at a later date;
3) that she would never be paid for the work she was doing on behalf of her employer or client, **or**;

[3] AD1-11
[4] AD1

4) that she was not working at all.

If she held any of the first three understandings, it would not matter what the Claimant believed about her pay. She would have known that she was working for her employer, sometime employer, client, or prospective employer. Even if the Claimant did not know which if any of her hours of work would be paid, and even if she had not eventually been paid for any of the work, she was still working.

[15] The factual issue that the General Division needed to sort out was whether the Claimant's understanding was that she was not working at all. The Claimant said that the purpose of the work-related activities in which she was engaged during her claim was to secure work projects for her employer. According to the Claimant, these activities were meant to improve the prospect that the employer would later offer her work, but she did not consider these activities to actually be work.

[16] The General Division did not accept the Claimant's assertion that she did not understand her activities were work. It found that she knew she was making a false statement based on the plain wording of the question in the claim declaration that included unpaid work as work, and on the Claimant's own evidence that she had logged her hours, used her employer's email, and obtained business cards to present herself as an agent of her employer. As additional support for its finding, the General Division noted that the Claimant had worked for the employer in the past without any certainty that she would be paid, and that she informed the employer on November 22, 2017, of the number of hours she has worked since September 16, 2017.[5]

[17] The Claimant says that the General Division made a mistake where it stated that she had been "logging hours"[6], explaining that she kept only "a general idea" of her unpaid hours to use as leverage to, for example, show that she actually worked more hours than she was paid for and that she should therefore be given a raise.[7] The Claimant also says that the General Division misunderstood her use of her employer's email and the fact that she was ordering business cards (which used the employer's template and logo[8]). She says that her employer expected her to

[5] General Division decision, para. 27
[6] *Ibid.*
[7] AD1-11
[8] GD3-90

work unpaid hours and to be available for work and that she would not have been able to get future work with her employer without doing these things.

[18] I do not see that anything turns on the fact that the General Division described the manner in which the Claimant kept track of her hours as "logging". There was evidence before the General Division that the Claimant told the employer she worked 191.75 hours since September 16, 2017[9] (although she states in her current submissions that the final or actual figure is 228.75 hours between September 16 and November 9, which she says was "broken down by work task"[10]). Whichever is correct, the Claimant has tabulated a precise number of hours, which means that the Claimant had more than "a general idea" of her unpaid hours. In any event, the Claimant did not dispute that she was keeping track of her working hours in some fashion, with a view to seeking payment or obtaining some other benefit from her employer. She also did not dispute that she was engaged in activities for the benefit of her employer, even using the employer's resources to do so.

[19] In my view, the Claimant has not pointed to any evidence that was ignored or misunderstood. Rather, the Claimant disagrees with the General Division's assessment of the evidence including the inferences that the General Division drew from the evidence.

[20] The General Division found as fact that the Claimant knew she was working when she completed the declarations saying she was not. It is not my role to reweigh or reassess the evidence that was before the General Division.[11] I could not interfere in the decision even if I would have found the facts differently or reached a different conclusion, unless I could first find that the General Division made an error under one of the grounds of appeal in section 58(1) of the DESD Act. The Claimant's effort to argue that particular pieces of evidence should be interpreted differently than they were interpreted by the General Division does not make out an arguable case that the General Division erred under section 58(1)(c) of the DESD Act.

[21] I have searched the record for any other significant evidence that the General Division might have ignored or overlooked but that the Claimant did not identify, in accordance with the

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[9] GD3-97
[10] AD1-11
[11] *Bergeron v. Canada (Attorney General), 2016 FC 220; Hideq v. Canada* (*Attorney General*), *2017 FC 439*

direction of higher court decisions, such as *Karadeolian v. Canada (Attorney General)*.[12] I was unable to discover an arguable case that the General Division overlooked or misunderstood any evidence that was relevant to a finding of fact on which the decision was based, including the finding that the Claimant knew that she was working when she completed the declarations on her weekly claim reports.

[22] There is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act by basing its decision on an erroneous finding of fact that was made in a perverse or capricious manner or without regard for the material before it.

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

CONCLUSION

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

[25] As noted by the General Division in closing, it remains open to the Claimant to request that the Commission write off the amount of her penalty and interest.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	M. A., Self-represented

[12] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615