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

Citation: *M. H. v Canada Employment Insurance Commission*, 2019 SST 1280

Tribunal File Number: AD-19-610

BETWEEN:

M. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 2, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. H. (Claimant), was unable to get approval from his employer to take time off to visit his home country with his wife, so he booked the trip and left without approval. The employer provided a Record of Employment indicating that the Claimant quit and the Claimant confirmed that he quit in his application for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, finding that the Claimant had voluntarily left his employment without just cause. The Commission maintained this decision when the Claimant asked it to reconsider.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, but his appeal was dismissed. He now seeks leave to appeal to the General Division.

[4] The Claimant has no reasonable chance of success. The Claimant has not made out an arguable case that the General Division failed to observe a principle of natural justice or pointed to any other error, and I have not discovered any evidence that was overlooked or misunderstood.

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 based its decision on an erroneous finding of fact?

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[1].

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

[10] The Claimant did not select any ground of appeal in his application for leave to appeal. In the section of the application in which he is asked to explain in detail how he thinks the General Division may have erred, he states that he wants to review certain documents or evidence, and asks that the Appeal Division require the employer to appear and produce documents.

[11] I wrote to the Claimant on September 13, 2019, to explain the grounds of appeal and to request again that he identify in what manner he believes the General Division to have erred. The Claimant responded on September 19, 2019. He stated that he was not satisfied with the

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

General Division hearing because it was a videoconference hearing and not an in-person hearing and that both "sides" did not appear.

[12] Reading the Claimant's application for leave to appeal together with this additional information, it is my understanding that the Claimant's chief or only concern is that the videoconference hearing did not give him the opportunity to challenge the employer on the information he provided to the Commission. I will presume that he is arguing that the General Division breached his natural justice right to be heard, which would be an error under section 58(1)(a) of the DESD Act.

[13] The Claimant requested an in-person hearing at the General Division, but the General Division proceeded by videoconference. Section 21 of the *Social Security Tribunal Regulations* (SST Regulations) gives the Tribunal the discretion to determine whether to grant an in-person hearing, to proceed by telephone or videoconference, or to make its decision based on written questions and answers.

[14] Since the SST Regulations approve videoconference hearings as a method of hearing, they may be presumed generally to afford the parties an effective opportunity to be heard. The Claimant did not explain how his circumstances were exceptional such that it would have been unfair to him or breach his natural justice right to be heard if the General Division held the hearing by videoconference, rather than in-person.

[15] There is no arguable case that the General Division breached the employer's natural justice right to be heard under section 58(1)(a) of the DESD Act by holding the hearing by videoconference.

[16] The Claimant seemed to be concerned that he was not given the opportunity to challenge the employer's evidence. Regardless of whether the employer might have been able to produce other relevant evidence that was not in the materials before the General Division, the General Division does not have the power to subpoena witnesses, or to order production of documents from third parties such as the employer. The General Division disclosed to the Claimant the full file and all the evidence on which it relied before the hearing. The Claimant had the ability to dispute the truth of any of the information contained in that file at the hearing.

[17] There is no arguable case that the General Division failed to observe a principle of natural justice under section 58(1)(a) of the DESD Act on the basis that the Claimant was unable to cross-examine the employer or obtain additional documents from the employer.

Issue 2: Is there an arguable case that the General Division based its decision on an erroneous finding of fact?

[18] The Claimant did not point to any particular evidence that was ignored or that he feels was misunderstood. However, the Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal.[2] Therefore, I reviewed the file to determine if significant evidence might have been ignored or overlooked that might raise an arguable case that the General Division based its decision on an erroneous finding of fact.

[19] As I noted above, the Claimant had been concerned that he could not test the employer's evidence. However, the only evidence from the employer is found in the notes of a conversation with "S.", an agent of the employer.[3] S. stated that the employer's "normal process" involves a request to take vacation 30 days in advance. She said that the entitlement to vacation is two weeks, and that she did not recall getting emails from the Claimant. S. stated that the Claimant resigned when he was told that the employer does not grant vacation for over a month.

[20] The Claimant had told the Commission that he booked a trip February 26, 2019, left on March 28, 2019, and returned on April 25, 2019. He said that he had emailed S., but that she did not reply. He did not deny that he booked the trip without approval but stated that he had asked to take time off for vacation in the past with only a week's notice and that it had not been an issue before.[4] The Claimant gave the Commission copies of three emails directed to S., dated March 20, March 25 and April 26. In the first two, he asks for a leave so that he may take his trip. In the final one, he asks to be allowed to return to work.[5] In his testimony, the Claimant denied that he ever resigned.

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[2] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[3] GD3-25
[4] GD3-26
[5] GD3-28-30

[21] Having reviewed the record, I have been unable to discover an arguable case that any of the General division findings were perverse or capricious, or that the findings ignored or mistook any relevant evidence.

[22] The Claimant did not agree with all of the employer's evidence but the General Division did not rely on any area of disagreement. The employer had said that the Claimant had not emailed asking for leave and the General Division agreed that the email evidence provided by the Claimant supports his position that he requested the time off. However, the General Division found that the employer had not approved the Claimant's time off. The Claimant had not disputed this.

[23] The Claimant did dispute the employer's evidence that the Claimant resigned when he learned the employer could not grant him as much as a month off. Again; the General Division did not rely on this evidence to find that the Claimant had quit. Instead, it found that the Claimant abandoned his position by leaving for almost a month without approval.

[24] The General Division then found that the Claimant did not have just cause for leaving because he did not exhaust all reasonable alternatives prior to leaving. The General Division noted that there was no medical evidence that the Claimant's wife was ill or that he needed to accompany her back to her home country.[6] It determined that reasonable alternatives to taking time off without approval from his employer would have included obtaining approval prior to booking his flight, requesting and taking the two weeks off to which he was entitled, or just continuing to work.

[25] I appreciate that the Claimant disagrees with the General Division's decision and that he may also disagree with the manner in which the General Division weighed and analyzed the evidence and with its findings. However, he cannot establish a ground of appeal under s. 58(1) of the DESD Act by simply disagreeing with the findings.[7] There is no arguable case that the General Division based its decision on an erroneous finding of fact under s. 58(1)(c) of the DESD Act.

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[6] See GD3-31
[7] *Griffin v. Canada (Attorney General)*, 2016 FC 874

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	M. H., Self-represented