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

Citation: *J. L. v Canada Employment Insurance Commission*, 2019 SST 1026

Tribunal File Number: AD-19-677

BETWEEN:

J. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 11, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, J. L. (Claimant), was working in Canada on a work permit when his employer laid off him. He applied for Employment Insurance Benefits but the Respondent, the Canada Employment Insurance Commission (Commission), determined that it could not pay him benefits because he was not available for work under the terms of his work permit. The Claimant asked the Commission to reconsider, arguing that his work permit had not expired. The Commission refused to change its decision.

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

[4] The Claimant has no reasonable chance of success. He has not raised an arguable case that the General Division failed to observe a principle of natural justice and I have not discovered an argument that the General Division may have missed or misunderstood any of the evidence, and made any erroneous finding of fact as a result.

ISSUE

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

ANALYSIS

General principles

[6] 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 section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[7] To grant this application for leave and to allow the appeal process to move forward, I must first find that there is a reasonable chance of success on one or more of the grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

[8] The grounds of appeal under section 58(1) of the DESD Act are as follows:

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.

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

[9] The only ground of appeal that the Claimant selected in completing his application for leave to appeal is the ground of appeal concerned with natural justice and jurisdiction.

[10] I understand that the Claimant may disagree with the General Division's decision or feel that it is unfair, but the ground of appeal related to "natural justice" refers only to the fairness of the General Division process. Natural justice 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 suggested that the General Division member was biased or that the member had prejudged the matter.

[11] I note that the General Division decided the appeal despite the fact that the Claimant did not attend the hearing. The General Division member stated that she was satisfied that the Claimant received the notice of hearing. The Claimant authorized the Tribunal to correspond with him by email when he filed his appeal to the General Division,[2] and the Notice of Hearing was therefore sent to the Claimant by email. The General Division noted that there was no

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[1] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41*; Ingram v. Canada (Attorney General)*, 2017 FC 259.
[2] GD2-4

indication that the email communication failed. While the Tribunal could only presume that the Claimant received the emailed Notice of Hearing, the Claimant has not provided any evidence or representation to the contrary. He has not suggested that he did not receive the notice or that he had any concern with the adequacy of notice. In addition, the Claimant did not offer any explanation for his failure to participate in the hearing. He has not stated any objection to the General Division proceeding in his absence, and he has not claimed any concern with how the General Division conducted the hearing, with the pre-hearing exchange or disclosure of documents, or with any other action or procedure that could have affected his right to be heard or to answer the case.

[12] I find that 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.

[13] Turning to jurisdiction, the only question that the General Division needed to decide was whether he was available for work within the meaning of section 18(1) of the *Employment Insurance Act* (EI Act). The reconsideration decision before the General Division found the Claimant to have been unavailable for work because his work permit did not allow him to work for any employer other than the employer that had permanently laid him off.

[14] The Claimant did not suggest that the General Division failed to consider this issue or that it considered issues that it should not have considered, nor did he identify any other jurisdictional error. 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 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?

[15] Although the only ground of appeal selected by the Claimant involves his assertion of a natural justice error, the Federal Court has directed the Appeal Division to look beyond the stated grounds of appeal. In *Karadeolian v. Canada (Attorney General)*[3], the Court stated as follows: "[T]he Tribunal must be wary of mechanistically applying the language of section 58 of the

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

[DESD] Act when it performs its gatekeeping function. It should not be trapped by the precise grounds for appeal advanced by a self-represented party like [the Applicant in that case]."

[16] The Claimant did not identify any evidence that the General Division ignored or misunderstood when it reached its conclusions but, in accordance with the direction of *Karadeolian*, I have reviewed the record for any other significant evidence that the General Division might have ignored or overlooked and that may, therefore, raise an arguable case.

[17] In finding that the Claimant was not capable and available for work, the General Division considered the fact that the Claimant was not legally permitted to work without a valid work permit. However, it also considered whether the Claimant had made efforts to obtain another job offer or to investigate obtaining an alternate work permit.

[18] If the Claimant could have obtained a replacement work permit quickly and easily, it is possible that the invalidity of his existing work permit would not necessarily mean that the Claimant was not "capable and available for work". However, there was no evidence before the General Division on this point. Furthermore, the General Division found as fact that the Claimant had not made any effort to amend or replace his work permit, or to seek alternate work. This was based on the Claimant's own statements and testimony.

[19] On review of the record, I was unable to discover an arguable case that the General Division overlooked or misunderstood evidence relevant to its finding that the Claimant was not "capable of and available for work and unable to find suitable employment" under section 18(1)(a) of the EI Act.

[20] There is no arguable case that the General Division based its decision on any erroneous finding of fact that could be said to have been made in a perverse or capricious manner or without regard for the material before it. The General Division did not err under section 58(1)(c) of the DESD Act.

[21] I completely understand the Claimant's position. He obtained a work authorization that was valid until February 22, 2020, but which restricted him to work only for one particular employer. When his employer laid him off, he had no legal authorization to work. This left the

Claimant with no earnings income in Canada, no Employment Insurance benefits, and no money to send home to his family. None of this was his fault.

[22] However, section 18(1)(a) of the EI Act states that claimants are disentitled from receiving Employment Insurance benefits during any week in which they are not "capable of and available for work and unable to find suitable employment". As the Federal Court of Appeal stated in *Vezina v. Canada (Attorney General*:

> The question of availability is an objective one–whether a claimant is sufficiently available for suitable employment to be entitled to unemployment [now employment] insurance benefits–and it cannot depend on the particular reasons for the restrictions on availability however these may evoke sympathetic concern. If the contrary were true, availability would be a completely varying requirement depending on the view taken of the particular reasons in each case for the relative lack of it.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

SUBMISSIONS:	J. L., Self-represented