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

Citation: *C. R. v Canada Employment Insurance Commission*, 2019 SST 1271

Tribunal File Number: AD-19-708

BETWEEN:

**C. R.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division

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Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 24, 2019

Canada

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, C. R. (Claimant), applied for Employment Insurance benefits on January 3, 2019. The Respondent, the Canada Employment Insurance Commission (Commission), refused to establish a benefit period because it found that the Claimant did not have the required number of hours of insurable employment to qualify for benefits. The Claimant had 978 hours of insurable employment within his qualifying period, but he had received two serious violations and one subsequent violation within the previous five years. The effect of the violations was to increase to 1330 hours the number of insurable hours of employment he needed to qualify. The Commission maintained its initial decision when the Claimant asked it to reconsider. The Commission also refused to reconsider its earlier violation decisions because the Claimant was out of time when he made his requests for reconsideration of those decisions.

[3] The Claimant appealed the reconsideration decision, as well as the other refusals to reconsider the violation decisions, to the General Division of the Social Security Tribunal. The General Division upheld the Commission's refusal to reconsider the violation decisions, but that is not the subject of this decision. The General Division dismissed the Claimant's appeal of the decision that he did not qualify for benefits. Now, the Claimant is seeking leave to appeal to the Appeal Division to challenge the General Division decision that he did not qualify for benefits.

[4] There is no reasonable chance of success. The Claimant has not made out an arguable case that the General Division decision was based on any incorrect finding of fact, or that the General Division erred in law.

### ISSUE

[5] Is there an arguable case that the General Division failed to consider evidence of the January 15, 2017, claim and renewal claims?

[6] Is there an arguable case that the General Division erred in law by not finding the January 15, 2017, initial claim or the renewal claims to be initial claims for the purpose of the limitation in section 7.1(3) of the *Employment Insurance Act* (the Act)?

**ANALYSIS**

[7] The Appeal Division's task is more restricted than that of the General Division. When the General Division makes a decision, it is required to consider and weigh the evidence that is before it and to make findings of fact. In doing so, the General Division applies the law to the facts and reaches conclusions on the legal or factual issues raised by the appeal. However, the Appeal Division is only authorized to only consider whether 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).

[8] The 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 move the appeal process forward to some form of hearing, I would need to first find that there is a reasonable chance that the Claimant would succeed in establishing that the General Division made one of the above errors. 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 consider evidence of the January 15, 2017, claim and renewal claims?**

[10] As noted by the General Division, section 7.1(1) of the EI Act includes a chart that relates the number of hours of insurable employment that a claimant requires to qualify for benefits to the nature of the claimant's violation and to the rate of unemployment in the claimant's region. In this case, the Claimant had what is called a "subsequent" violation and the regional rate of unemployment that applied to the Claimant was between 6% and 7%. According to the chart, he would have required 1330 hours of insurable employment to qualify.

[11] The Claimant is appealing because he does not agree that the Commission should be using his violations to increase to 1330 the number of hours he required to qualify. He argues that he should have benefited from the limitation that is described in section 7.1(3) of the EI Act.

[12] Section 7.1(3) limits the circumstances in which a violation will increase the number of hours a claimant requires to qualify. It states that a claimant's violation will not be used to increase the required number of hours on the third occasion (after the violation) that the claimant makes a claim for benefits and qualifies.

[13] In his leave to appeal application, the Claimant selected the ground of appeal that is described in the application form as "an important error regarding the facts in the appeal file". This is the error that corresponds to the ground of appeal in section 58(1)(c) of the DESD Act.

[14] The Claimant argued that the General Division erred by failing to consider all of the claims that he made since his violation. This could make a difference in whether the section 7.1(3) limitation would apply to him. The General Division accepted that the Claimant established one initial claim on January 28, 2018, but the Claimant argued that he had four claims since his first violation; not one. He said that he also established a claim on January 15, 2017, and that he renewed that claim on November 18, 2017. He also renewed the January 28, 2018, claim on October 21, 2018. In the Claimant's view, he

[15] The Claimant told the General Division about these concerns and the General Division referred to this testimony when it requested that the Commission provide details of the

Claimant's claim history after his violations.[2] When the Commission responded, the General Division forwarded the Commission's response to the Claimant to give him an opportunity to reply. The Claimant did not reply. The General Division outlined the Commission's explanation of the claim decision history and the Commission's position on the January 15, 2017, claim and the renewals. It then found that the January 28, 2018, initial claim was the only claim that could be counted.

[16] There is no arguable case that the General Division's finding ignored or misunderstood the Claimant's evidence of the other initial claim or the renewal claims. There is also no arguable case that it was perverse or capricious for the General Division to find from the evidence that the section 7.1(3) limitation did not apply. Therefore, there is no arguable case that the General Division based its decision on an erroneous finding of fact under section 58(1)(c) of the DESD Act.

**Issue 1: Is there an arguable case that the General Division erred in law by not finding the January 15, 2017, initial claim or the renewal claims to be initial claims for the purpose of the limitation in section 7.1(3) of the EI Act?**

[17] The Claimant did not explicitly frame his argument in terms of "error of law". However, the Claimant has argued that the General Division should have considered his January 15, 2017, claim and the two renewals as "initial claims" for the purpose of section 7.1(3) of the EI Act. In my view, the Claimant has raised an issue with the General Division's interpretation and application of section 7.1(3). Therefore, I will also consider whether there is an arguable case that the General Division made an error of law.

[18] The section 7.1(3) limitation states that a claimant's violation will not be taken into account under section 7.1(1), where there have been more than two **initial** claims (since the violation) and where the claimant qualified for benefits under those claims, **taking into account subsection (1)**.

[19] An initial claim is defined under section 6(1) of the EI Act as "a claim made for the purpose of establishing a claimant's benefit period". A renewal claim does not require requalification based on insurable hours accumulated before the renewal date, and does not

[2] GD6

establish a benefit period. That means that renewal claims are not initial claims. The renewals of November 18, 2017, and October 21, 2018, do not count.

[20] The Claimant would still have had two initial claims in the period between his first violation and his January 2019 application, if the General Division had counted both the January 28, 2018, claim and the January 15, 2017, claim. However, the Commission only established a benefit period for the January 2017 claim because it had mistakenly failed to input the Claimant's violation into its computer system. The Commission informed the General Division that the Claimant would not have been able to establish the January 2017 claim if the violation had been inputted to the system.[3] The Commission stated that the Claimant had 935 hours in the qualifying period for that claim, but that he would have required 945 hours if the Commission had inputted the violation as it was supposed to have done.[4] Therefore, the Claimant did not qualify for the January 2017 initial claim **taking into account subsection (1)**, as required by the limitation in section 7.1(3). The Claimant had only qualified in January 2017 because the Commission did not consider his violation and it did not take subsection (1) of section 7.1 into account.

[21] There is no arguable case that the General Division misapplied the law to find that the section 7.1(3) limitation did not apply, and no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act. For the purpose of section 7.1(3), the Claimant had only the one initial claim with a benefit period established January 28, 2018, and therefore the section 7.1(3) limitation could not assist him.

[22] Like the General Division, I have some sympathy for the Claimant's situation. He did not challenge the various violations when he could still have done so, and it appears that he has sometimes missed meeting the increased number of hours to qualify by a small margin. Unfortunately, I am unable to find an arguable case that the General Division made an erroneous finding of fact or misapplied the law.

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

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[3] GD7-3
[4] GD7-2

**CONCLUSION**

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

Stephen Bergen
Member, Appeal Division

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| REPRESENTATIVES: | K. H., for the Applicant |