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

Citation: *M. S. v Canada Employment Insurance Commission*, 2019 SST 1272

Tribunal File Number: AD-19-641

BETWEEN:

M. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 24, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. S. (Claimant), is seeking leave to appeal the General Division's decision dated September 17, 2019. Leave to appeal means that an applicant has to get permission from the Appeal Division before they can move on to the next stage of the appeal process.

[3] The General Division determined that the Claimant did not have enough insurable hours to qualify for Employment Insurance regular or for sickness benefits, even if it were to antedate his claim for Employment Insurance benefits. The Claimant argues that there should be an exception in his case because he has had significant health problems and has had to undergo multiple surgeries, and was short only 18 hours to qualify for benefits.

[4] I have to be satisfied that the appeal has a reasonable chance of success before granting leave to appeal. I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing the application for leave to appeal.

ISSUE

[5] Are there any grounds of appeal?

ANALYSIS

[6] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the three grounds of appeal listed in subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA). The appeal also has to have a reasonable chance of success.

[7] The only three grounds of appeal under subsection 58(1) of the DESDA are:

(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.

[8] A reasonable chance of success is the same thing as an arguable case at law.[1] This is a relatively low bar because claimants do not have to prove their case; they simply have to show that there is an arguable case. At the actual appeal, the bar is much higher.

[9] I asked the Claimant to identify any grounds of appeal. He argues that he should receive Employment Insurance benefits because he has serious ongoing medical issues and that he was short only 18 hours to qualify for Employment Insurance benefits. He worked throughout his life and contributed to the country. These reasons however do not disclose a ground of appeal under subsection 58(1) of the DESDA.

[10] The Claimant also argues that the *Employment Insurance Act* and the *Employment Insurance Regulations* are discriminatory against seniors because they require claimants to have a minimum number of hours of insurable employment to qualify for benefits. He suggests that seniors are more prone to being unwell and are likely to be less available for work. As such, seniors are less able to meet the minimum hourly requirements to qualify for benefits. Essentially, the Claimant is arguing that he should not have to meet the rigid rules under the *Employment Insurance Act* to qualify for benefits because they are discriminatory under the *Canadian Charter of Rights and Freedoms*.

[11] This is the first time that the Claimant has raised this argument. Generally, an applicant should not raise any *Charter* issues for the first time on an appeal. But, there is some discretion to hear *Charter* issues that an applicant raises for the first time on an appeal, taking into account

[1] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

all the circumstances. These include "the state of the record, fairness to all parties, the importance of having the issue resolved …, its suitability for decision and the broader interests of the administration of justice."[2]

[12] Taking these factors into consideration, it would be inappropriate to determine the constitutional issue. There is little to no evidence on the issue and the General Division did not make any findings of fact on the issue. The Commission would likely face some prejudice if the appeal were to proceed on the constitutional issue at this point. I note also that the Claimant has not fulfilled the notice requirements under subsection 20(1)(a) of the *Social Security Tribunal Regulations*, although the notice requirement alone would not have been determinative of whether to consider the constitutional question.

[13] Apart from the Claimant's argument that there has been discrimination against him, the Claimant does not otherwise suggest that the General Division failed to give him a fair hearing, that it erred in law, or that it made any factual errors upon which it based its decision. I have reviewed the underlying record. I do not see that the General Division erred in law, whether or not the error appears on the record, or that it failed to properly account for any of the key evidence before it.

[14] The General Division considered all of the evidence, including when the Claimant worked and the number of hours he had accumulated within his qualifying period. The General Division member's summary of the facts is consistent with the evidentiary record and his analysis is sound. The member correctly set out the law and applied the law to the facts. Unfortunately, for the Claimant, his medical issues cannot be used to reduce the amount of the hours he needs to qualify for either regular or sickness benefits, or to relieve him from having to meet the strict requirements of the *Employment Insurance Act*. For these reasons, I am not satisfied that the appeal has a reasonable chance of success.

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[2] This is what the Supreme Court of Canada set out in *Guindon v. Canada*, 2015 SCC 41 at para. 20.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	M. S., Self-represented