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

Citation: *M. R. v Canada Employment Insurance Commission*, 2019 SST 1288

Tribunal File Number: AD-19-674

BETWEEN:

M. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 28, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. R. (Claimant), is seeking leave to appeal the General Division's decision dated August 30, 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 decided that the Claimant was disentitled to receive Employment Insurance regular benefits because he had not shown that he was available for work. In particular, the General Division member found that the Claimant did not make enough efforts to find a suitable job and that he set personal conditions that might have limited his chances of returning to the labour market. The Claimant argues that the General Division made several errors.

[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.

ISSUES

[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] The Claimant argues that the General Division erred under each of these subsections. He argued that he was ready, willing and able to resume driving after February 2017. He received a job offer in July 2017. He provided a copy of his family physician's medical fitness report dated June 20, 2019, as well as a provincial abstract of driving record dated August 6, 2019.[2]

[10] I asked the Claimant to describe how the General Division erred.[3] He again noted that he had been ready, willing and able to resume driving after February 20, 2017 and that he had a job offer in July 2017.[4]

[11] The Claimant seems to be relying on his driving abstract and medical fitness report to show that he was medically fit to drive. Generally, the Appeal Division does not consider new evidence. However, there are exceptions to this general rule. If I should find that the new evidence relates to one of the grounds of appeal under subsection 58(1) of the DESDA, then I may consider that evidence. That is not the case here. The Claimant does not seem to rely on this

[1] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.
[2] See Claimant's Application to the Appeal Division – Employment Insurance, at AD1.
[3] See Tribunal's letter dated October 9, 2019.
[4] See Claimant's Application to the Appeal Division – Employment Insurance, at AD1B.

new information to show that the General Division either failed to observe a principle of natural justice, that it erred in law or that it made a factual error.

[12] Even so, I find that the Claimant did not have to provide this information because the General Division accepted the fact that the Claimant was capable of working as of February 20, 2017. The General Division noted that the Claimant was recovered from his injury within two weeks and able to return to work. The General Division noted the Claimant's oral evidence in this regard, as well as the medical noted that stated that the Claimant would be off work for up to two weeks to allow for recovery.

[13] The Claimant has not pointed to any evidence nor suggested that the General Division member failed to provide him with adequate notice, that it might have deprived him of an opportunity to fully present his case, or that it might have exhibited or appeared to exhibit any bias against him. For this reason, I am not satisfied that there is an arguable case that the General Division failed to observe a principle of natural justice.

[14] The Claimant does not question the General Division's interpretation of subsection 18(1)(a) of the *Employment Insurance Act* or section 9.001 of the *Employment Insurance Regulations* that deal with availability. The General Division cited the applicable law and properly applied the law to the facts. For this reason, I am not satisfied that there is an arguable case that the General Division erred in law.

[15] The Claimant argues 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. He did not identify the General Division's alleged erroneous finding of fact, but the Claimant claims that he:

> was ready, willing and able to perform class one licence driving position after February 20, 2017 that was not dangerous to [his] health or safety. [K.T.] job offer in July 2017 involved consent for 49 CFR 391, 23(d), (e), (i), (1), (2) for safety review and the drive test with … which required [him] to be insured was approved by K.T. insurance and there is record.

[16] In fact, the General Division accepted that the Claimant looked for work with his former employment. The General Division found that the Claimant had resumed working for six days

with his former employer in March 2017 and that he then returned to this employment again in August 2017.

[17] The General Division member found that the Claimant's job search efforts were insufficient. The member found that the Claimant failed to meet the requirements of the *Employment Insurance Act* when he limited his job search to just his former employer. The General Division wrote:

> The Claimant said at the hearing that he did not apply for any other jobs during his period of unemployment between March and August, because he preferred too return to his employer due to the high quality and cleanliness of their equipment … the only company he contacted was his former employer, who he contacted near the end of February 2017.[5]

[18] The Claimant does not dispute any of this evidence or these findings. I am not satisfied 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.

[19] If anything, the Claimant disagrees with the General Division's assessment that his job search efforts were insufficient because, after all, they did result in work for him. Essentially, the Claimant is asking me to reconsider the General Division's decision and to give a different decision that is favourable to him. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter.

[20] I have reviewed the underlying record, to ensure that the General Division neither erred in law nor overlooked or misconstrued any important evidence or arguments. The General Division member's summary of the facts is consistent with the evidentiary record and her analysis is consistent with the law.

[21] I do note however that the General Division member made typographical errors at paragraphs 11, 17, and 20, when she referred to February 2016, instead of February 2017. The member found that the Claimant had recovered from his injury and was able to return to work by February 20. I considered whether the appeal might have a reasonable chance of success based on these typographical errors. But, it is obvious that the member was referring to February 2017,

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[5] See General Division decision, at para. 8.

because she was aware that the Claimant had been working up to October 2016 and because the General Division did not examine whether the Claimant had been looking for work before October 2016.

[22] I also note that there is another typographical error at paragraph 23. The last sentence is incomplete. The General Division member attempted to explain why the Claimant's job search efforts were not enough. While the member did not finish the sentence, it is clear from reading the whole decision why she considered the Claimant's job search efforts insufficient. She referred to the reasons she had set out earlier in her decision, under the heading *Reasonable and Customary efforts to find a job*.

[23] Despite the typographical errors, I am not satisfied that the appeal has a reasonable chance of success. The General Division considered the evidence before it and properly applied the facts to the law.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	M. R., Self-represented