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

Citation: *B. M. v Canada Employment Insurance Commission*, 2019 SST 1293

Tribunal File Number: AD-19-693

BETWEEN:

B. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 29, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, B. M. (Claimant), is seeking leave to appeal the General Division's decision. 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 found that the Claimant quit both of her jobs, one with a X and the other, a X. The General Division also found that the Claimant did not show that she had just cause for leaving both jobs and that she had reasonable alternatives to leaving. As a result, the General Division decided that the Claimant was disqualified from receiving any Employment Insurance benefits.

[4] The Claimant denied that she quit either job. She claims that her employers laid her off because they did not have enough work for her. She argues that she is therefore entitled to receive benefits. She argues that the General Division failed to observe a principle of natural justice and that it based its decision on an erroneous finding of fact that it made without regard for the material before it. I have to decide whether the appeal has a reasonable chance of success.

[5] For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success and I am therefore refusing leave to appeal.

ISSUES

[6] The issues are as follows:

> Issue 1: Is there an arguable case that the General Division failed to give the Claimant a fair hearing?

Issue 2: Is there an arguable case that the General Division made a factual error about (a) whether the Claimant would lose money if she dropped her schooling, or (b) whether she was available for work?

ANALYSIS

[7] 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.

[8] 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.

[9] 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.

Is there an arguable case that the General Division failed to give the Claimant a fair hearing?

(a) Getting an amended record of employment

[10] The Claimant argues that the General Division failed to give her a fair hearing because it did not give her a chance to properly and fully present her case. In particular, she claims that she wanted to file an amended record of employment from one of her employers, but the General

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

Division went ahead and made its decision, without waiting for her to file a copy of an amended record of employment. She says that an amended record of employment was important to her case because it would have proven that she did not quit her job.

[11] The existing record of employment on file with the General Division does not indicate why the Claimant left her employment.[2] The employer left Box 16, "Reason for Issuing this ROE," blank.

[12] The Claimant argues that because the employer left Box 16 blank, the General Division concluded that the Claimant must have quit her employment. She maintains that she did not quit and that an amended record of employment would have shown that her employer laid her off because of a shortage of work.

[13] This raises three considerations:

i. Apart from the Claimant's own evidence, was there any independent evidence to suggest either that her employer laid her off or that she voluntarily left her job?

ii. Was there any evidence that the Claimant tried to get an amended record of employment?

iii. Was the General Division aware that the Claimant wanted to file an amended record of employment that she claims would show that her employer laid her off from her job?

[14] The Claimant's job with the X ended in February 2015. The Commission contacted the Claimant in July 2015, asking her to complete a questionnaire. The Claimant responded, saying that her employer had laid her off because it was unable to provide her with hours to accommodate her schedule.[3] The Commission denied the Claimant's claim for Employment Insurance benefits.

[15] In April 2019, the Claimant wrote to the Commission, advising that she was unaware that the record of employment showed that she quit her job.[4] She advised that since she had become

[2] See Record of Employment dated February 16, 2015, at GD3A-12.
[3] See Quit (Voluntary separation from employment), dated July 29, 2015, at GD3A-17 to GD3A-21.
[4] Claimant's Request for Reconsideration, dated April 16, 2019, at GD3A-27.

aware of this situation, she had contacted her former employer for an amended record of employment. She said that her employer would amend the record of employment with the correct information.[5] She had been planning on going to school while working. Her school hours were from 8 to 10:30 and did not require her to quit her job. The Claimant again stated that her record of employment "[wa]s being amended as of 04/16/19."[6]

[16] In July 2019, the Commission wrote to the Claimant. The Commission maintained its decision to deny her Employment Insurance benefits on reconsideration.

[17] The Claimant appealed the Commission's reconsideration decision to the General Division. In her Notice of Appeal to the General Division filed on August 13, 2019, the Claimant wrote:

> When I sent in my reconsideration, I attached a copy of my ROE showing my reason for leaving being left blank. I got in to contact with my previous employer who said they would ammend [*sic*] it to laid off. The person whom I was supposed to contact to clarify details of my claim with was not in his office any of the four times I called. So, I did not have a fair chance to clarify any information.

[18] The General Division issued a Notice of Hearing on August 29, 2019. The hearing was by written questions and answers. The General Division asked the Claimant several questions, including why she left both jobs. It asked her, "What makes you say you were laid off from your employment at [X] …"[7]

[19] The Claimant responded on September 5, 2019 that her employer verbally told her that it was laying her off from her job. Even if she had not returned to school, she claims that her employer would have been unable to keep her, because January and February were typically slow months. The Claimant confirmed that she did not have any documentation to prove that her employer laid her off from her job, and that it would look as if she had quit her job.[8]

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[5] Claimant's Request for Reconsideration, dated April 16, 2019, at GD3A-28.
[6] Claimant's correspondence dated April 16, 2019, at GD3A-30.
[7] See Notice of Hearing dated August 29, 2019, at GD1A-2.
[8] See Claimant's responses to General Division, dated September 5, 2019, at GD8.

[20] There is nowhere in the Claimant's responses to the General Division that she was going to follow up with her former employer for an amended record of employment or that she was still expecting to receive an amended record of employment.

[21] Indeed, there is nothing before me to suggest that the Claimant has since secured an amended record of employment or that an amended record is forthcoming. Close to four years have passed since the Claimant last worked at the X. The passage of time will likely make it more difficult for the Claimant to secure an amended record of employment.

[22] The Claimant did not ask the General Division for an extension of time so she could try to secure an amended record of employment, so the General Division could not have been aware that the Claimant was still trying to get an amended record of employment. For this reason, I am not satisfied that the General Division breached a principle of natural justice by making a decision without waiting for an amended record of employment.

[23] Even so, an amended record of employment is not necessarily the final word or conclusive proof as to why a claimant leaves their employment. Even if the Claimant had produced an amended record of employment, the General Division would not have been bound by it. The General Division would have still been required to consider and assess all of the evidence before it. Even with an amended record of employment, the same analysis would have led to the same outcome.

[24] The General Division was clearly mindful of the Claimant's claims that she did not quit her job and that her employer laid her off. The General Division examined the evidence on this issue. It noted the Claimant's evidence that her employer stated that it would put "laid-off" on her record of employment, that it could no longer accommodate her, and that the store was not busy enough to keep her. It also noted the Claimant's evidence that she never resigned from her job and that she felt that her employer laid her off because it was a slow time of year in retail.[9] The General Division then analyzed and explained why it concluded that the Claimant had voluntarily left her employment. These reasons had nothing to do with the record of employment.

[9] See General Division decision, at paras. 8 to 11.

[25] The Claimant claims that the General Division interpreted the "blank" Box 16 on the record of employment as saying that she quit her employment. In fact, the General Division did not rely on the record of employment at all, other than noting the Commission's arguments about it.[10]

(b) Contacting her former employer

[26] The Claimant suggests that the General Division should have contacted her former employer to verify that it had laid her off from her job before deciding that she left her job.

[27] The General Division does not have any investigative role to play on behalf of any of the parties. Indeed, it would be abandoning its duty to serve as a fully independent and impartial decision-maker if it were to begin interviewing witnesses on behalf of a party. If a party intends to rely on any witnesses' evidence, it is the responsibility of that party to call those witnesses. The General Division makes its decision based on the evidence that it has before it.

(c) Form of hearing

[28] The Claimant also argues that the General Division made assumptions without contacting her to verify her answers. She suggests that there should have been some personal contact.

[29] However, the Claimant indicated that she wanted either an in-person hearing or "written questions and answers."[11] She explained that she felt "more comfortable speaking face to face, or by written correspondence." The General Division clearly considered the Claimant's preferences when it decided to issue questions to her.[12] The General Division gave the Claimant a chance to respond and the Claimant provided written responses on September 5, 2019.

[30] I am not satisfied that there is an arguable case that there was a breach of the principles of natural justice because there was no in-person hearing. The General Division gave the Claimant a chance to choose what type of hearing she wanted and it accepted one of her choices. It also gave her a chance to present her case by way of written questions and answers.

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[10] See General Division decision, at para. 1.
[11] See Notice of Appeal – Employment Insurance – General Division, filed August 13, 2019, at GD2-3, at Box 3.
[12] See Notice of Hearing – Questions, dated August 29, 2019, at GD1A.

Is there an arguable case that the General Division made a factual error about (a) whether she would lose money if she dropped her schooling, or (b) whether she was available for work?

[31] The Claimant argues that there are "huge discrepancies from the information [she] provided and [the General Division decision]." In particular, she says that the General Division erred in finding that it would have cost her money to opt out of schooling and in finding that she had restricted her availability for work. The Claimant claims that she had just applied for school and had not paid for her schooling. She also claims that her school and work hours did not overlap and that she was available to work while attending school.

[32] In fact, I see that the Claimant wrote to the General Division on August 22, 2018, saying that her only reasonable alternative would have been "to quit school and lose the money [she had] paid."[13] The Claimant's email directly contradicts the Claimant's allegations that she would not have lost any money. I find that the General Division's findings accurately reflected the evidence on this point.

[33] As for the issue of availability, while it may be that the Claimant's hours of schooling and work did not overlap, there was evidence that the Claimant restricted her availability. After all, her employer had to accommodate the Claimant. Accommodate means to adjust to someone else's needs. The Claimant wrote in the questionnaire that her employer laid her off from work because it was unable to provide her with hours "for [her] schedule."[14] The Claimant also wrote that "[her employer] would have to lay [her] off because [it could not] accommodate [her] anymore."[15]

[34] The Claimant's schooling took place before her employer opened its store each day. The Claimant wrote that she set her hours and availability based on her school schedule and travel

[13] See Claimant's email dated August 22, 2019, at GD5-1.
[14] See Quit (Voluntary separation from employment) questionnaire, at GD3A-17.
[15] See Claimant's email of August 22, 2019.

time to work.[16] It is clear that the General Division understood from this that the Claimant limited her availability.

[35] While the General Division could have interpreted the evidence differently, it was entitled to make findings as long as the findings were consistent with the evidence before it, which I find to have been the case. As such, I am not satisfied that there is an arguable case that the General Division based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

[36] I am refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	B. M., Self-represented

[16] See Claimant's responses, at GD8-1.