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

Citation: *S. A. v Canada Employment Insurance Commission*, 2020 SST 18

Tribunal File Number: AD-19-683

BETWEEN:

S. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: January 15, 2020

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. A. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal is the first step of the appeals process. It means that an applicant has to get permission from the Appeal Division before they can move on to the next and final stage of the appeals process.

[3] The General Division found that the Claimant did not have good cause for being late when he applied for Employment Insurance benefits.

[4] The Claimant was late when he applied for Employment Insurance regular benefits, so he asked the Respondent, the Canada Employment Insurance Commission (Commission) to backdate his application, as if he had filed his claim on an earlier date. However, the General Division found that he did not have good reason for being late when he applied for Employment Insurance benefits. The Claimant maintains that he had good cause.

[5] At this stage of the appeal, I have to decide whether the appeal has a reasonable chance of success. This is the same thing as an arguable case at law.[1] The Claimant argues that the General Division member was biased. He also argues that the member made legal and factual errors.

[6] 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

[7] The following issues are before me:

---

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

(a) Is there an arguable case that the General Division member was biased or unqualified?

(b) Is there an arguable case that the General Division ignored why the Claimant was late when he applied for Employment Insurance benefits?

(c) Is there an arguable case that the General Division based its decision on any factual errors?

(d) Is the Claimant entitled to any costs?

ANALYSIS

[8] 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 types of errors 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. The types of errors are whether:

1. The General Division process was unfair.

2. The General Division did not decide an issue that it should have decided. Or, it decided something that it did not have the power to decide.

3. The General Division made a legal error.

4. The General Division based its decision on a factual error.

[9] At the leave to appeal stage, claimants do not have to prove their case. They simply have to show that there is an arguable case.

(a) Is there an arguable case that the General Division member was biased or unqualified?

[10] The Claimant argues that the General Division member was biased because she once worked for the Commission, according to her online biography. At the same time, the Claimant notes that the biography also indicates that the member holds a general arts degree and once

worked for another government agency. He questions whether her background qualifies her to make Employment Insurance-related decisions.

[11] On the one hand, the Claimant argues that the General Division should have only members who have some experience and familiarity with Employment Insurance issues. Yet, on the other hand, he argues that those same members should not serve on the Social Security Tribunal because they cannot be impartial if they had a prior relationship with one of the parties to an appeal.

[12] As with all members, the General Division member underwent a rigorous screening process to ensure that she was qualified to serve. And, on top of that, she went through training and continues to receive professional development on an ongoing basis. She also has access to innumerable resources to complement her experience and training.

[13] In my view, the focus should be on whether the member properly interpreted the law and applied the law to the facts, taking into account all of the evidence before her. It is equally important that the process was fair and that the member was unbiased and impartial.

[14] The Supreme Court of Canada set out the test for a reasonable apprehension of bias.[2] It referred to Grandpré J.'s dissenting opinion in *Committee for Justice and Liberty v. National Energy Board*:

> [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[15] In *Arthur v. Canada (Attorney General)*,[3] the Federal Court of Appeal held that because allegations of bias challenge the integrity of the tribunal and its members who participate in the impugned decision, they cannot be made lightly. Such allegations cannot rest on an applicant's

[2] Dissenting opinion of Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, 1976 CanLii 2 (SCC), [1978] 1 SCR 369, at p. 394. This test has been adopted and applied since then, e.g. *Arthur v. Canada (Attorney General)*, 2001 FCA 223.
[3] *Arthur v. Canada* (*Attorney General*), 2001 FCA 223.

mere suspicious, conjecture, insinuations, or mere impressions. An applicant has to support their allegations with supporting evidence demonstrating conduct that deviates from the standard.

[16] The Claimant argues that the General Division member must have been biased because she once worked for the Commission. This mere allegation, on its own, is not enough. But, the Claimant says that the member showed bias as follows:

- At paragraph 10, finding that he could have accepted a job.
- At paragraph 10, finding that he did not have to travel to care for his mother-in-law.
- At paragraph 12, in writing that he had been working for "many years" instead of writing that he had worked at his past job for 19 years. He argues that the General Division intended to undermine his case.
- At paragraph 12, in finding that he had not proven that his stress and anxiety did not prevent him from looking for more information about Employment Insurance benefits.
- As set out in paragraph 13, requiring him to learn about his entitlements under the *Employment Insurance Act*. The member outlined some of the things that she felt the Claimant could have done to learn about the benefits.
- At paragraphs 14 and 15, in finding that he did not act quickly enough to find out information about his rights, and in concluding that he did not act like a reasonable person.

Paragraphs 10 and 12

[17] I have listened to the audio recording of the General Division hearing. The Claimant testified that he conducted an extensive job search but no one offered him anything. The General Division wrote that said that he could have accepted a job. He testified that he hoped and wished that he would get a job. He testified that if he got a job, he might not need Employment

Insurance benefits.[4] The General Division member set out the Claimant's testimony that he was prepared to accept work, if someone had offered him a job. I do not see any bias in this.

[18] The General Division member asked the Claimant how his mother-in-law's health affected his ability to apply for Employment Insurance benefits. The Claimant testified that his mother-in law needed a lot of help. She was sick. He had to "do shopping for her, take her to clinic, go to E.R.[5] The member then asked the Claimant whether he had to travel with her or spend time away from home while he cared for her. He replied that he had to "sleep over, watch her, go to E.R…."[6]

[19] It is clear that the Claimant had to leave his home to care for his mother-in-law at her own home, and that he also had to go to the emergency department at the hospital.

[20] At paragraph 10, the General Division wrote that the Claimant did not have to travel to care for his mother-in-law or his brother. His brother lived overseas. There is no dispute that the Claimant did not travel overseas to help his brother. It is clear though that the Claimant has gone to great lengths to help his brother by trying to get what limited medical help he can for him. This includes obtaining prescriptions and sending him medications.

[21] The evidence does not indicate how far the Claimant lived from his mother-in-law or how long it took him to travel to see her. But, the evidence shows that the Claimant's mother-in-law lived in another city. He had to travel to see her. It is clear the member was mistaken when she wrote that the Claimant did not have to travel to care for his mother-in-law.

[22] However, I am not satisfied that the issue of whether the Claimant had to travel or not shows any bias, because the issue does not reflect on the Claimant himself, nor was the statement intended to disparage him. Even though the member erred in finding that the Claimant did not have to travel to care for his mother-in law, she accepted the fact that the Claimant cared for his family and that he had family responsibilities. The member's focus was on whether, despite his

[4] See, for instance, at approximately 16:37 to 17:23 of the audio recording of the General Division hearing.
[5] At approximately 30:47 of the audio recording of the General Division hearing.
[6] At approximately 32:01 of the audio recording of the General Division hearing.

family responsibilities, the Claimant continued looking for work. There was no dispute that he had been looking for work.

[23] The issue of whether the Claimant looked for work was important because it showed that if he was able to look for work, then he would have been able to also apply for employment Insurance benefits, even if he did have family responsibilities and was caring for his brother and mother-in-law.

[24] The Claimant argues that the member undermined his case by writing that he had worked for "many years" rather than saying that he had worked at his past employer for 19 years.

[25] Although the General Division member did not specify the number of years that the Claimant had worked at his last job, it would not have affected the outcome. What was relevant was how the Claimant's departure from his last job affected him. Having other evidence to support his claim about how his job loss affected him was also important. As such, I do not see that there was a reasonable apprehension of bias from the member's description of how long he worked at his last job.

[26] The Claimant argues that the member suggested that he could not have been stressed or feeling any anxiety. He argues that the member acted beyond her authority by giving a medical opinion when she is unqualified to offer one. He claims that this shows clear bias. The General Division wrote, "… the Claimant has not proven that his stress and anxiety about losing his job prevented him from looking for more information about employment insurance benefits."

[27] I do not find that the General Division member was offering a medical opinion, either about the Claimant's mental health or his fitness to look for information about the Employment Insurance process. The member however clearly required some medical records or a report, if the Claimant wanted to establish that medical issues were interfering with his ability to apply for or seek more information about the Employment Insurance process.

[28] I do not see how the General Division's requirement that the Claimant provide evidence about any stress or anxiety shows bias. The Claimant had testified throughout the General Division hearing that he was traumatized after losing the job that he had held for close to 20 years. The General Division wanted to see some supporting evidence that the trauma he

endured affected him to the point that it made him unable to apply for Employment Insurance benefits. Without some other records, the member was unable to determine the extent to which the Claimant's job loss impacted his ability to pursue Employment Insurance benefits.

[29] I am not satisfied that there is an arguable case based on any findings that the General Division made at paragraphs 10 and 12.

Paragraphs 13 to 15

[30] The Claimant argues that the General Division was unnecessarily insulting and belittling towards him by describing him as someone who did not act like a reasonable person. Yet, the legal test to determine whether someone has good cause for delay uses this language. The General Division's use of this language was entirely appropriate. The law demands a claimant to do what a reasonable person would have done to satisfy themselves of their rights and obligations. In *Sherwood v. Canada (Attorney General)*,[7] the Federal Court of Appeal cited *Kangar v. Canada (Attorney General)*,[8] where the Court of Appeal noted that:

> [1] . . . The jurisprudence of this Court is settled that to establish good cause for delay a claimant must demonstrate that she did what a reasonable person in her situation would have done to satisfy herself as to her rights and obligations under the Act. See, for example, *Canada (Attorney General) v. Albrecht*, [1985] 1 F.C. 710.
>
> [2] Put another way, a reasonable person is expected to take reasonably prompt steps to determine her entitlement to benefits, and ignorance of the law and good faith have been held not to amount to good cause (*Canada (Attorney General) v. Carry*, 2005 FCA 367 (CanLII), 344 N.R. 142). [Court's emphasis]

[31] The General Division member used the same language that the courts use over and over again. As such, I am not satisfied that there is an arguable case that the General Division member was biased when she used this language.

[32] The Claimant has not referred me to any other statements that could show bias. I have reviewed the audio record and find no evidence of any comment or direction from the member that could cause a reasonable person, viewing the matter realistically and practically, and having

---

[7] See *Sherwood v. Canada (Attorney General)*, 2019 FCA 166.
[8] See *Kangar v. Canada (Attorney General)*, 2013 FCA 157.

thought the matter through, to conclude or apprehend that the member was biased or was acting against his interests. I see no evidence demonstrating any conduct that derogates from the standard. As such, I am not satisfied that there is an arguable case on this ground.

(b) Is there an arguable case that the General Division ignored why the Claimant was late when he applied for Employment Insurance benefits?

[33] The Claimant argues that the General Division member ignored why he was late when he filed his claim for Employment Insurance benefits.

[34] The Claimant says he had a lot of reasons to explain his delay. He says that his circumstances are exceptional. The Claimant did not know about the Employment Insurance process. He was in shock. The Claimant says that he had a repetitive injury in both shoulders, bilateral carpal tunnel syndrome, back injuries, and hearing loss. He explained that he was, "scapegoated, ostracized and pushed to the edge by the cliques from top down, so he left [his] job of 19 years."[9] He lost his self-esteem and was depressed.

[35] The Claimant also cared for his mother-in-law and brother who had heart surgery, and he had to assist his daughter with her school issues. He also had to deal with the provincial workers' compensation board about his claim. Also, the Claimant was looking for work, but no one offered him anything.[10]

[36] In fact, the General Division considered most of these reasons. At paragraph 8, the General Division member noted that the Claimant's mother-in-law is ill and that he had to care for her, that he helped his brother who needed medical treatment, that he was depressed because he was no longer working, that he was not experienced with the employment insurance scheme, and that he had been looking for work.

[37] The member did not mention the fact that the Claimant had to assist his daughter with her school issues or that he had to deal with the provincial workers' compensation board about a claim. However, these two reasons were somewhat similar in nature to the Claimant's other reasons. The General Division member considered most of the Claimant's reasons in assessing

[9] Claimant's email of October 9, 2019, with reasons for appeal, at AD1A-5.
[10] See Claimant's summary of reasons, at AD1A-5.

whether he had good cause. Ultimately, the member examined whether, in spite of all of these factors, the Claimant had the ability to apply for Employment Insurance benefits.

[38] Because the member did in fact consider these factors, I am not satisfied that there is an arguable case that the member ignored the reasons why he was late when he applied for Employment Insurance benefits.

(c) Is there an arguable case that the General Division based its decision on any factual errors?

[39] The Claimant argues that the General Division based its decision on several factual errors in paragraphs 8 and 11, as follows:

- his brother has heart disease, when he had testified that his brother had heart surgery.
- he was depressed because he had lost his job. Instead, he recalls that he testified that "it was hard to be pushed to the edge to leave your 19-year job and hand over your hours to your supervisor's relative …"[11]
- he hoped that he would not need employment insurance benefits. The Claimant suggests that he never gave this evidence.
- He did not have to travel to care for his mother-in-law. The Claimant says that travel was involved in caring for his mother-in-law.
- His "whole focus" was on getting a job and forgetting about Employment Insurance benefits. He also denies this.

[40] I have already addressed the General Division's findings regarding the issue of travelling to see the Claimant's mother-in-law. As I noted, I do not see that anything turns on this point.

[41] The Claimant testified that his brother had heart surgery. From this, the General Division inferred that his brother has heart disease. This was not unreasonable because heart disease encompasses a range of conditions that affect the heart that can lead to surgery. Besides, I do not

[11] See AD1A-7.

find that anything turns on whether the Claimant's brother had heart surgery or heart disease because the General Division member did not base her decision on the Claimant's brother's medical condition. The Claimant's brother's specific medical condition itself was irrelevant. What was important for the General Division member was how the Claimant's brother's condition affected the Claimant's ability to file Employment Insurance benefits. The member noted that the Claimant sought out medical advice and that he obtained medication for his brother.

[42] The Claimant denies that he specifically said that he was depressed. I have listened to the audio recording. I agree with the Claimant that he did not use this word. He indeed had testified that "they push you to the edge to quit." He also testified that the trauma of losing a job is not easy.[12] From this, however, it was not unreasonable for the General Division member to infer that the Claimant was depressed. In any event, if the Claimant was not depressed, that would have been less helpful to his case. If, on the other hand, he was found to be severely depressed, and if there was supporting medical evidence, that may have helped establish good cause.

[43] The Claimant denies that he testified that he hoped that he would not need employment insurance. He did not specifically state this. However, he testified that he was not interested in going on either welfare or receiving Employment Insurance benefits.[13] He preferred to be able to find work. I find the two statements similar.

[44] The Claimant denies that his primary focus was on getting a job. In fact, he testified that "Focus, main focus was getting job and forgetting about EI."[14]

[45] Given these considerations, I am not satisfied that the General Division based its decision on factual errors.

[12] At approximately 8:35 of the audio recording of the General Division hearing.
[13] At approximately 17:23 of the audio recording of the General Division hearing.
[14] At approximately 23:28 of the audio recording of the General Division hearing.

(d) Is the Claimant entitled to any costs?

[46] Finally, the Claimant is asking for the costs of his time. He went through 1,000 emails and compiled them. He also spent a day driving to Vancouver where he attended the General Division hearing. He is also asking to be reimbursed his expenses.

[47] I do not have any authority to order any costs under any circumstances. But, under subsection 63(1) of the DESDA, the Clamant can seek reimbursement for travel or living expenses, or be paid any allowance, up to certain amounts or rates, if the Chairperson of the Tribunal "for special reasons considers it warranted."

CONCLUSION

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

Janet Lew
Member, Appeal Division

APPLICANT:	S. A., Self-represented