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

Citation: *N. M. v Canada Employment Insurance Commission*, 2020 SST 644

Tribunal File Number: AD-20-705

BETWEEN:

N. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: July 23, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Applicant, N. M. (Claimant), is seeking leave to appeal the General Division's decision. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division calculated that the Claimant was entitled to 36 weeks of Employment Insurance regular benefit. The General Division determined that the Claimant was actually renewing an earlier claim. So, the General Division based its calculation on when the Claimant first applied for benefits. She first applied for benefits in November 2019.

[4] The Claimant argues that the General Division made an error of law. In particular, she argues that the General Division should have based its calculation on the more recent date of her application in April 2020. If the General Division had done so, she argues that she would have been entitled to more weeks of benefits.

[5] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

ISSUE

[6] The issues are as follows:

> Issue 1: Is there an arguable case that the Claimant did not get a fair hearing at the General Division?

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

Issue 2: Is there an arguable case that the General Division used the wrong date to calculate the weeks of benefits to which the Claimant is entitled?

ANALYSIS

[7] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that his reasons for appeal fall into at least one of the types of errors listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) Did not hold a fair hearing or the process was unfair;

(b) Did not decide an issue that it should have decided, or it decided something that it did not have the power to decide;

(c) Made an error of law when making a decision; or

(d) Based its decision on an important error of fact.[2]

[8] The appeal also has to have a reasonable chance of success. This is a relatively low bar because applicants do not have to prove their case at this stage of the appeal process. As long as I am satisfied that there is an arguable case, it is sufficient to grant leave to appeal.

Issue 1: Is there an arguable case that the Claimant did not get a fair hearing at the General Division?

[9] No. I find that the Claimant does not have an arguable case that she did not get a fair hearing at the General Division.

[10] The Claimant argues that she did not get a fair hearing because the General Division issued its decision two days after the hearing. From this, I understand that the Claimant is essentially saying that the General Division did not fully consider or address her appeal.

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[2] Under subsection 58(1)(c) of the DESDA, there is a ground of appeal if 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.

[11] I do not see anything inherently unfair arising out of the fact that the General Division issued its decision soon after the hearing.

[12] There was relatively little evidence before the General Division. The hearing file consisted of the Claimant's notice of appeal, the Commission's submissions, and a 38-page reconsideration file. The reconsideration file included the Claimant's applications and the Commission's correspondence with the Claimant. The hearing was relatively short. It lasted about 18 minutes. It included opening and closing remarks by the member. The General Division gave the Claimant a chance to present her case.

[13] There were just two matters at issue: (1) where the Claimant was ordinarily resident, and (2) whether the Commission had correctly determined the number of weeks of benefits to which the Claimant was entitled to receive during her benefit period. The General Division gave the Claimant a chance to address both issues. The General Division considered both issues.

[14] The Claimant does not suggest that she did not get a chance to fully present her case. She also does not suggest that the General Division overlooked any of the evidence or issues. From what I can determine, he General Division member addressed both issues and considered the evidence before him.

[15] I am not satisfied that the Claimant did not get a fair hearing before the General Division.

Issue 2: Is there an arguable case that the General Division used the wrong date to calculate the weeks of benefits to which the Claimant is entitled?

[16] No. I find that the Claimant does not have an arguable case that the General Division used the wrong date to calculate how many weeks of benefits she could get.

Background

[17] The Claimant applied for Employment Insurance benefits in November 2019. The Claimant received earnings after separation. The Respondent, the Canada Employment Insurance Commission (Commission) allocated these earnings. That means it applied these earnings against

the Claimant's claim from November 24, 2019, to April 11, 2020.[3] Because of the allocation, the Claimant did not receive any benefits during this time.

[18] The Commission suggested that unless the Claimant wanted to continue filing weekly Employment Insurance reports, she could renew her claim for benefits after the allocation ended. The Commission invited the Claimant to re-apply for benefits in the week of April 12, 2020.

[19] The Claimant resubmitted her claim for benefits in April 2020. The Commission calculated that she was entitled to receive 36 weeks of Employment Insurance benefits.

[20] The Claimant argues that she should get more weeks of benefits. The number of weeks of benefits is based on the unemployment rate. The higher the unemployment rate, generally, the higher the number of benefits. The Claimant claimed that the unemployment rate in April 2020 was higher than it had been in November 2019.

The *Employment Insurance Act*

[21] Section 12(2) of the *Employment Insurance Act* (Act) sets out the maximum number of weeks for which benefits may be paid. One calculates the maximum number of weeks by using Schedule I. One refers to the regional rate of unemployment that applies to a claimant and the number of hours of insurable employment of that claimant in their qualifying period.

[22] There is an increasing scale. Increases in either or both the number of hours of insurable employment (capped to a maximum of 1,820 hours) and in the regional rate of unemployment can result in more weeks of benefits, up to a maximum of 45 weeks of benefits.

[23] In the Claimant's case, she had 2,019 hours of insurable employment in her qualifying period from November 25, 2018 to November 24, 2019.

[24] At the time, the regional rate of unemployment was 5.7%. For a regional rate of unemployment of 6% and under, a claimant with more than 1,820 hours of insurable employment is entitled to 36 weeks of benefits.

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[3] See Commission's letter dated December 11, 2019, at AD1-1 and GD3-20 to GD3-21.

General Division's calculation

[25] The General Division decided that the applicable regional rate of unemployment for the Claimant was the date when she initially applied for benefits in November 2019. The Claimant resided in the Montreal region. It had a 5.7% unemployment rate at that time. The General Division calculated that the Claimant therefore was entitled to 36 weeks of benefits.

[26] The Claimant argued that the applicable regional rate of unemployment should be when she reapplied for benefits in April 2020. The regional rate of unemployment was much higher at that time because of the impacts of covid-19. The Claimant argued that, with a higher regional rate of unemployment, she would be eligible to a greater number of weeks of benefits.

[27] The General Division rejected this argument. The General Division found that the Claimant was renewing her claim of November 25, 2019. She was not submitting a new claim. Therefore, she had to rely on the regional rate of unemployment that existed in November 2019 to calculate the number of weeks of benefits to which she was entitled. She could not rely on the unemployment rates in April 2020.

Claimant's argument

[28] The Claimant notes that the Commission's letter dated December 11, 2019, did not state how many weeks of benefits she would be receiving. The letter also invited her to re-apply for benefits in the week of April 12, 2020.

[29] The Claimant argues that because the Commission initially did not calculate how many weeks of benefits she would get, the General Division would calculate this when she re-applied in April 2020. For this reason, she argues that the applicable rate of unemployment that should apply is the rate that existed in April 2020 when she re-applied for benefits.

Which regional rate of unemployment applies?

[30] Section 17(1) of the *Employment Insurance Regulations* (Regulations) establishes which regional rate of unemployment applies. The General Division reproduced part of the section. It says that the regional rate that applies is the "average of the seasonally adjusted monthly rates of unemployment for the last three-month period for which statistics were produced by Statistics

Canada that **precedes the week referred to in subsection 10(1) of the [*Employment Insurance*] Act** …" (my emphasis).

[31] In short, the rate that applies is an average of rates **before** the week referred to in section 10(1) of the Act. This requires us to look at what section 10(1) of the Act says.

[32] Section 10(1) of the Act defines what a benefit period is. A benefit period begins on the later of (a) the Sunday of the week in which the interruption of earnings occurs, and (b) the Sunday of the week in which the initial claim for benefits is made.

[33] For the purposes of section 17(1) of the Regulations, the week referred to in subsection 10(1) of the Act is the week in which the benefit period begins.

[34] Under subsection 10(1)(a) of the Regulations, the Claimant last worked on November 20, 2019. So, the Sunday of the week in which the interruption of earnings took place was on November 17, 2019.

[35] Under subsection 10(1)(b) of the Regulations, the Claimant made a claim for benefits on November 25, 2019. The Sunday of the week in which the initial claim for benefits was made is November 24, 2019.

[36] The later of these two dates between (a) and (b) is November 24, 2019.

[37] In the Claimant's case, under section 10(1) of the Act, her benefit period began on Sunday, November 24, 2019. Therefore, under section 17(1) of the Regulations, this is the date for calculating the regional rate of unemployment. And, according to the 3-month seasonally adjusted unemployment rates, the regional rate of unemployment that applies to the Claimant is 5.7.[4]

[38] It is clear that the General Division calculated the applicable regional rate of unemployment with consideration for section 10(1) of the Act and section 17(1) of the Regulations. I am not satisfied that there is an arguable case that the General Division used the wrong date to calculate the number of weeks of benefits to which the Claimant is entitled.

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[4] See 3-month seasonally adjusted unemployment rates, at GD3-32.

Could the Claimant extend the qualifying period?

[39] Although the Claimant did not raise this, I have also considered whether the Claimant could have relied on an allocation of severance payments to extend the qualifying period under section 8(3) of the Act. The General Division did not address this issue.

[40] If the Claimant is able to extend the qualifying period, this could change the number of weeks of benefits. (This would firstly require a consideration of the number of hours of insurable employment in the qualifying period to ensure the Claimant qualifies for benefits in the first place.)

[41] Section 8(3) of the Act provides for an extension of the qualifying period under certain conditions. One of these conditions is that the allocation prevents a claimant from establishing an interruption of earnings. If there is an interruption of earnings, then the Claimant does not qualify for an extension of the qualifying period.

[42] Section 14(1) of the Regulations describes when an interruption of earnings takes place. It says that an interruption of earnings occurs when an insured person is separated from their employment and has a period of seven or more consecutive days during which they do not perform work for their employer, and there are no earnings from that employment.

[43] The Claimant had earnings from separation. But these earnings from separation cannot be taken into account when deciding whether there is an interruption of earnings. Section 35(6) of the Regulations states that the earnings referred to in section 36(9) of the Regulations **may not be considered** when determining whether there is an interruption of earnings. Section 36(9) of the Regulations refers to the earnings paid because of separation.

[44] The Claimant's severance payments were not earnings for the purposes of section 14(1) of the Regulations.

[45] Because of section 35(6) of the Regulations, there was an interruption of earnings when the Claimant was separated from her employment in November 2019. The Claimant did not meet all of the conditions under section 8(3) of the Act. Therefore, she does not qualify for an extension of the qualifying period under section 8(3) of the Act.

[46] I am not satisfied that there is an arguable case that the General Division made a legal error by failing to apply section 8(3) of the Act. The Claimant could not avail herself of the extension because she did not meet all of the conditions set out in section 8(3) of the Act.

The regional rate of unemployment in April 2020

[47] Even if the Claimant had never applied for benefits in November 2019 and first applied for benefits in April 2020, it is unlikely that this would have resulted in more weeks of benefits. It is more likely that she would have actually received fewer weeks of benefits.

[48] Under section 10(1) of the Act, the Claimant's benefit period would have started the Sunday of the week in which the initial claim for benefits was made. This was later than the Sunday of the week in which the interruption of earnings occurred.

[49] The Claimant applied for benefits on April 8, 2020. The Sunday of that week is April 5, 2020.

[50] Under section 17(1) of the Regulations, the average rate that precedes this week is used to determine the regional rate of unemployment. According to the 3-month seasonally adjusted unemployment rates, the regional rate of unemployment that applies to the Claimant is 5.6.[5]

[51] The qualifying period is the 52-week period that ended on April 4, 2020. I do not know how many hours of insurable hours the Claimant had within her qualifying period, but she stopped working on November 20, 2019. Therefore, she had about 7.5 months of insurable earnings. This would be far less than the number of insurable hours she had when she worked throughout from November 2018 to November 2019, and had 2,019 insurable hours.

[52] The Claimant had far less than 1,820 insurable hours from April 2019 to April 2020. Based on Schedule I and a regional rate of unemployment of 5.6%, the Claimant could have received the following number of weeks of benefits, depending upon the hours of insurable employment she had from April 7, 2019 to April 4, 2020.

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[5] See https://srv129.services.gc.ca/ei_regions/eng/rates.aspx?id=2020#da

Number of hours of insurable employment in qualifying period with regional rate of unemployment of 5.6%	**Weeks of Employment Insurance benefits**
1,200	21
1,300	22
1,400	24
1,500	26
1,600	29
1,700	32
1,820+	36

[53] In short, the Claimant would have received fewer weeks of benefits if she wanted to rely on her April 2020 application, than if she used the November 2019 date. This was because the regional rate of unemployment actually declined for the Montreal region in that particular timeframe and because she had fewer hours of insurable employment.

CONCLUSION

[54] I find that the appeal does not have a reasonable chance of success. Therefore, I am refusing the application for leave to appeal.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	P. W., for the Applicant