Citation: *D. R. v. Minister of Employment and Social Development,* 2015 SSTAD 245

Appeal No: AD-15-53

BETWEEN:

D. R.

Applicant

and

Minister of Employment and Social Development
(formerly known as Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet Lew

DATE OF DECISION: February 23, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated December 11, 2014 (the "Leave Application"). The General Division dismissed his application for disability benefits, as it found that he did not suffer from a "severe disability" for the purposes of the *Canada Pension Plan*, by his minimum qualifying period of December 31, 2011. The Applicant submits that the General Division found him to be "suspicious" as he could not recall nor explain a $7,000 payment in 2009, which appeared on his Canada Pension Plan contribution history. To succeed on this leave application, the Applicant must persuade me that the appeal has a reasonable chance of success or that there is an arguable case to be made.

ISSUE

[2] Does the ground of appeal raised by the Applicant have a reasonable chance of success?

APPLICANT'S SUBMISSIONS

[3] The Applicant submits that the General Division found him to be "suspicious" as he could not recall nor explain a $7,000 payment in 2009, which appeared on his Canada Pension Plan contribution history. Although he did not articulate it as such, I understand that the Applicant is essentially submitting that the General Division either based its decision on an erroneous finding of fact made without regard for the evidence before it, or that it failed to observe a principle of natural justice. The Applicant essentially says that the General Division wrongly found that he worked in 2009 when there was no concrete evidence to support such a finding, and the General Division could not have fairly come to a decision when it was skeptical of his testimony about his employment history.

RESPONDENT'S SUBMISSIONS

[4] The Respondent has not filed any written submissions.

ANALYSIS

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* ("DESDA"), an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[6] Subsection 58(2) of the DESDA provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[7] Although a leave to appeal application is a first, and lower, hurdle to meet than the one that must be met on the hearing of the appeal on the merits, some arguable ground upon which the proposed appeal might succeed is required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development),* [1999] FCJ No. 1252 (FC). In *Canada (Minister of Human Resources Development) v. Hogervorst,* 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[8] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

> (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] The Applicant is required to satisfy me that the reason he seeks an appeal falls within any of the grounds of appeal and that it has a reasonable chance of success, before leave can be granted.

[10] This application raises an interesting question as to whether the application might appropriately be one to rescind or amend the decision of the General Division. This is so, as the Applicant has filed documentation which he only recently obtained from his employer. The General Division obviously did not have this documentation before it made its decision. However, such an application would require the Applicant to meet the conditions set out in section 66 of the DESDA. He would be required to prove that the new documentation represents new material facts that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. In addition, he would have had to file an application to rescind or amend with the same Division that rendered the decision against which the rescission or amendment is sought. It is debatable that, had the Applicant filed an application to rescind or amend with the General Division, the payroll information he now brings forward in his leave application would have met the requirements under paragraph 66(1)(b) of the DESDA.

Alleged Failure to Observe Principle of Natural Justice

[11] Was it just or fair for the General Division to draw conclusions regarding the source of the Applicant's earnings for 2009, without providing him with an opportunity to obtain any supporting documentation, and then to draw what appears to be adverse findings of credibility against him? After all, it may have been quite reasonable for the Applicant not to have recalled the source of earnings from five years ago, and quite reasonable also that he did anticipate being asked and therefore did not seek out this information in advance of the hearing, given that the earnings were in 2009, two years prior to his minimum qualifying period.

[12] The Applicant obtained records from his employer subsequent to the hearing before the General Division. The employer confirmed that the earnings were in respect of outstanding vacation pay, along with some other benefits (the specifics of which are not legible in the copy of the documents). The employer confirmed that the Applicant had not been paid any employment earnings after 2007, while on long-term disability from his employment.

[13] Usually, any new records would not be considered either on appeal or at the leave stage, unless it addresses one of the enumerated grounds of appeal under subsection 58(1) of the DESDA. Here, the documentation from the employer has been filed to support the allegation by the Applicant that the General Division failed to observe a principle of natural justice, and therefore, it is admissible for that purpose.

[14] In drawing an adverse finding against the Applicant, and drawing conclusions which may ultimately prove to be incorrect, did this in any way colour or prejudice the General Division's overall assessment of the Applicant's claim for disability benefits, even if, on the face of it, the assessment might appear reasonable?

[15] On the whole, the Applicant has satisfied me that there is an arguable case or a reasonable chance of success that the General Division may have failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.

Alleged Erroneous Finding of Fact

[16] The Applicant essentially submits that the General Division made its decision in a perverse or capricious manner or without regard for the material before it, in finding it "conceivable that he was … able to return to some work in 2009, and earn $7,889". The Applicant acknowledges that he was unable to recall the source of these earnings at the time of the hearing before the General Division, and apparently offered that he would endeavour to find out.

[17] If I am to find that the General Division may have made an erroneous finding of fact as contemplated by paragraph 58(1)(c) of the DESDA, I would also need to find that it did so without regard for the material before it, or that it was done in a perverse or capricious manner. As there was an absence of records and no evidence relating to the Applicant's 2009 earnings at the hearing, the General Division drew a conclusion about the source of the earnings, based on the Applicant's past employment history. While ultimately that conclusion may prove to be mistaken, an argument could be made that it was based on the very limited facts or material that the General Division had before it.

[18] That however leaves me to determine the possibility that the finding may have been made in a perverse or capricious manner. What is perverse or capricious? Neither the DESDA nor the *Social Security Tribunal Regulations* defines the term. In *Synchrosat Ltd. v. Canada*, 2004 FCA 55, the Federal Court of Appeal dealt with the issue of whether the Tax Court Judge had made findings of fact in a perverse or capricious manner. While Létourneau J.A. did not explicitly define the term, he concluded that there was, "sufficient evidence to support the findings and conclusions" and dismissed the application for judicial review.

[19] In *Canada (Attorney General) v. Schultz*, 2006 FC 1351, the Federal Court determined that the evidence had to have been "overwhelming". It found that the evidence before the Pension Appeals Board was overwhelming that Mr. Schultz did not become disabled until at least 1986, and that the determination by the Board that there was an arguable case that Mr. Schultz was disabled continuously since 1976 was therefore simply perverse or made without regard to the evidence. Similarly, in *Wirachowsky v. Canada*, 2000 CanLII 16702, the Federal Court of Appeal found that, having regard to all of the evidence before the Board, the decision of the Pension Appeals Board could not stand. It was satisfied that the Board had failed to consider all of the medical evidence before it in deciding that the applicant was not disabled under the *Canada Pension Plan.*

[20] These authorities suggest that there must be some evidence or some basis upon which the General Division is to make a finding of fact, to avoid being perverse or capricious. In this particular case, one's past employment history alone may be insufficient, as that is not concrete evidence of the 2009 source of earnings. This is a very subtle distinction from basing a decision on the material before it, as "material" is not necessarily required to be evidence of a specific matter.

[21] The Applicant has satisfied me that there is an arguable case or a reasonable chance of success, that the General Division may have based its decision on an erroneous finding of fact that it made in a perverse or capricious manner.

Appeal

[22] Issues which the parties may wish to address on appeal include the following:

a) Is the appeal an appellate review or appeal in the nature of judicial review? What is the level of deference which is owed by the Appeal Division to the General Division?

b) What is the applicable standard of review?

c) Did the General Division fail to observe a principle of natural justice?

d) Did the General Division base its decision on an erroneous finding of fact that it made in a perverse or capricious manner? The parties may wish to address some of the considerations which I have raised in paragraphs 18 to 20 and also may wish to address the issue of what qualifies as "perverse or capricious manner".

e) If the answer to paragraph 22(c) or 22(d) is "yes", and if a correctness standard applies, what outcome should the General Division have reached? If a reasonableness standard applies, can the decision of the General Division be justified, is it transparent and intelligible and does it fall within a range of possible, acceptable outcomes which are defensible in respect of the law and the facts before it?

f) Is the appeal moot, in light of the fact that there were other bases upon which the General Division concluded that the Applicant's disability could not be found severe?

g) If the General Division erred and the decision is seen to be unreasonable, what is the appropriate remedy, if any?

[23] I invite the parties to make submissions also in respect of the mode of hearing (i.e. whether it should be done by teleconference, videoconference, other means of

telecommunication, in-person or by written questions and answers) and the appropriateness for such.

CONCLUSION

[24] The application for leave is granted.

[25] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division