Citation: *K. D. v. Minister of Employment and Social Development,* 2016 SSTADIS 132

Date: April 5, 2016

File number: AD-15-1341

Appeal Division

BETWEEN:

K. D.

Applicant

and

Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

DECISION

[1] The Appeal Division of the Social Security Tribunal, (the Tribunal), refuses leave to appeal.

BACKGROUND

[2] In a decision dated November 30, 2015, the General Division of the Tribunal denied the Applicant's appeal from a reconsideration decision that found he was ineligible for a Canada Pension Plan, (CPP), disability pension. The Applicant seeks leave to appeal the General Division decision, (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant alleged 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. In other words that the General Division breached the provisions of subsection 58(1)(c) of the *Department of Employment and Social Development Act*, (the DESD Act). however, in reading the Applicant's submissions it is clear that the Applicant is also alleging that the General Division committed errors of law, contrary to subsection 58(1)(b) of the DESD Act.

THE LAW

What must the Applicant establish on an Application for Leave to Appeal?

[4] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success". On an Application for Leave to Appeal the hurdle that an Applicant must meet is a first and lower one than that which must be met on the hearing of the appeal on the merits. To grant leave the Appeal Division must be satisfied that the appeal would have a reasonable chance of success.

[5] A reasonable chance of success has been equated with an arguable case[1]; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[6] In order to grant the Application, the Tribunal must determine whether any of the Applicant's reasons for appeal fall within the grounds of appeal set out at subsection 58(1) of the DESD Act. The subsections provides that the following are the only grounds of appeal:

> (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.

ISSUE

[7] The Appeal Division must decide whether the Appeal has a reasonable chance of success.

ANALYSIS

[8] Counsel for the Applicant submitted that the General Division committed a number of errors of fact including stating that the Applicant had a grade 11 education, when in fact he has a grade 9 education. She took issue with the General Division description of the Applicant's education as "good" as well as with its conclusion that the Applicant's physical limitations would not prevent him from pursuing suitable alternative employment.

[9] She contended, as well, that the General Division misapprehended the nature of the Applicant's employment and failed to consider relevant medical evidence that supported a finding of disability as well as his testimony regarding his physical limitations. In addition, Counsel for the Applicant submitted that the General Division made a number of errors of law, including its application of the cases of *Villani v. Canada (Attorney General)* 2001 FCA 248; *Inclima v. Canada (Attorney General)* 2003 FCA 117 as well as failed to apply either

[1] *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

Granovsky v. Canada (Minister of Employment and Immigration), [2001] SCR 703 or *Klabouch v. Canada (Minister of Social Development*, [2008] FCA 33 to the Applicant's case.

Did the General Division commit Errors of Fact?

[10] At paragraph 8 of the decision, the General Division states that the Applicant testified that he had a grade 11 education. However, the General Division noted that his Counsel had submitted that the Applicant had a Grade 9 education. (para. 34). In its consideration of the Applicant's age, level of education, language proficiency, past work and life experience, (the *Villani* factors), the General Division described the Applicant as being still young and having a good level of education. Counsel for the Applicant submits that this amounts to an error of fact. Even if it is the Appeal Division is not persuaded that it is an error that in the context of the Applicant's employment history which appears to consist of continuous employment, at least until the accident of 2011. Leave to Appeal is not granted on this ground.

[11] Counsel for the Applicant also charged that the General Division misapprehended the nature of the Applicant's employment, concluding that he had had "only part time employment when in fact he was employed all year long at different jobs." (AD1-4) The Appeal Division finds that this is not borne out in the decision, which at paragraph 16 records the Applicant's testimony that he had worked for a temporary placement agency and was laid off after working for six weeks on his second job. The Appeal Division finds that the General Division did not commit an error of fact and refuses leave in regard to this submission.

[12] The Appeal Division comes to a similar conclusion with respect to the submissions that the General Division failed to consider relevant medical evidence including evidence of counselling or failed to consider the Applicant's oral testimony about his physical limitations that were recorded at paragraph 15 of the decision. The appeal Division is not persuaded that these submissions could properly form the basis of a ground of appeal. This evidence was before the General Division and it is evident that it considered that evidence in the analysis section of the decision.

[13] In the view of the Appeal Division, these submissions point more to the Applicant's disagreement with the decision as oppose to error on the part of the General

Division. The General Division is in the position of trier of fact. As such, the General Division must hear the evidence of the parties, weigh that evidence and render a decision based on the facts, law and evidence that was before it. It is not for the Appeal Division when deciding whether or not to grant leave to appeal to reweigh the evidence or explore the merits of the General Division decision. *Tracey v. Canada (Attorney General)* 2015 FC 1300 at para. 46. Accordingly, these submissions do not constitute grounds of appeal that would have a reasonable chance of success.

[14] Similarly, the Applicant's desire to return to work in the face of his making no further effort to return to work after he was laid off do not furnish grounds of appeal that would have a reasonable chance of success.

Did the General Division commit Errors of Law?

[15] Counsel for the Applicant submitted that the General Division "did not consider the applicant in Villani. (AD1-5) The Appeal Division infers that Counsel is submitting that the General Division failed to properly apply Villani to the Applicant's case. In the view of the Appeal Division, this submission is not borne out. At paragraph 37 of the decision, the General Division specifically examines the Applicant's age, educational level and work history in the context of determining his ability to find alternative employment. The fact that the Applicant disagrees with the way in which the General Division weighed the evidence is not a sufficient basis for a grant of leave.

[16] The General Division applied *Inclima* with respect to its finding that the Applicant had not discharged his onus regarding work capacity. The Appeal Division finds no error in its statement of the case law or in the General Division's application of the case. Leave to appeal cannot be granted in this regard. Similarly, the Appeal Division finds that the General Division did not err with respect to its application of the cases of *Granovsky* and *Klabouch.*

CONCLUSION

[17] On the behalf of the Applicant, counsel submitted that the General Division made a number of errors of law as well as based its decision on erroneous findings of fact that it made perversely or capriciously or without regard for the material before it. On the basis of the foregoing, the Appeal Division finds that the Applicant has not raised grounds that it is satisfied have a reasonable chance of success on appeal. Accordingly, the Appeal Division would dismiss the application.

[18] Leave to appeal is refused.

Hazelyn Ross
Member, Appeal Division