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

Citation: *S. K. v. Minister of Employment and Social Development*, 2016 SSTADIS 243

Tribunal File Number: AD-16-195

BETWEEN:

S. K.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Hazelyn Ross

DATE OF DECISION: June 29, 2016

Canada

DECISION AND REASONS

DECISION

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

INTRODUCTION

[2] The Applicant applied for disability benefits under paragraph 42(2) (a) of the Canada *Pension Plan,* (CPP). The Respondent denied her application and maintained the denial on reconsideration. The Applicant appealed to the Tribunal's General Division, which, by a decision dated October 27, 2015, determined that a CPP disability pension was not payable to her. The Applicant seeks leave to appeal the decision, (the Application).

REASONS FOR THE APPLICATION

[3] Counsel for the Applicant submitted that the General Division failed to observe a principle of natural justice in that it failed to adjourn the hearing in circumstances where an adjournment was warranted. Counsel for the Applicant also submitted 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. Specifically, that the General Division misinterpreted the Applicant's evidence that her symptoms were not as severe prior to the end of her minimum qualifying period on December 31, 2011.

ISSUE

[4] The Appeal Division must decide if the appeal has a reasonable chance of success.

THE LAW

[5] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), govern the granting of leave to appeal. As provided by subsection 56(1) of the DESD Act, leave to appeal a decision of the General Division of the Tribunal is a preliminary step to an appeal before the Appeal Division. According to subsection 56(1) "an appeal to the

Appeal Division may only be brought if leave to appeal is granted." Subsection 58(3) provides that "the Appeal Division must either grant or refuse leave to appeal."

[6] In order to obtain leave to appeal, subsection 58(2) of the DESD Act requires an applicant to satisfy the Appeal Division that their appeal would have a reasonable chance of success; otherwise the Appeal Division must refuse leave to appeal. 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."

[7] An applicant satisfies the Appeal Division that his appeal would have a reasonable chance of success by raising an arguable case in his application for leave.[1] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and in *Fancy v. Canada (Attorney General)*, 2010 FCA 63 an arguable case has been equated to a reasonable chance of success.

[8] Subsection 58(1) of the DESD Act sets out the only three grounds of appeal, namely:-

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] *Tracey v. Canada (Attorney General)*, 2015 FC 1300 supports the view that in assessing an application for leave to appeal the Appeal Division must first determine whether any of the Applicant's reasons for appeal fall within any of the stated grounds of appeal

ANALYSIS

Did the General Division breach natural justice?

[10] Counsel for the Applicant submitted that the General Division breached natural justice by preventing the Applicant the opportunity to respond to questions when it continued the

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

hearing after she had left the hearing room rather than adjourning the hearing. The objection stems from the following paragraph in the decision.

> [13] The Tribunal observed the Appellant had a complete breakdown in the hearing room and was unable to continue. The Appellant's Representative did not seek an adjournment as at the point of the breakdown the oral evidence of the Appellant was substantially completed. The reaction of the Appellant occurred when the Tribunal Member was asking clarification questions after completion of the questions of the Appellant's representative.

[11] The Appeal Division does not have the benefit of a recording or transcript of the hearing in order to satisfy itself of what transpired. While the absence of a recording or transcript is not in and of itself a breach of procedural fairness or natural justice, without either one the Appeal Division cannot deal effectively with the issues as raised by the Application. It is a basic tenet of natural justice that if they are to have a fair hearing persons must be able to make "full answer and defence". The Appeal Division finds that in the present case it is not possible to determine whether this principle has been disregarded. Consequently, the Appeal Division finds that the Applicant has put forward an arguable case sufficient to warrant the grant of leave.

[12] It is sufficient that the Applicant show that one ground of appeal has a reasonable chance of success. *M.C.M v. Minister of Human Resources and Skills Developmen*t, 2013 SST-AD 2. Accordingly, the Appeal Division does not feel it necessary to examine the other grounds of appeal.

CONCLUSION

[13] The Application is granted.

[14] This decision granting leave to appeal does not presume the result of the appeal.

Hazelyn Ross
Member, Appeal Division