



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *T. E. v. Minister of Employment and Social Development*, 2017 SSTADIS 98

Tribunal File Number: AD-16-1124

BETWEEN:

T. E.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: March 14, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal (Tribunal) dated July 7, 2016. The General Division had earlier conducted a hearing by teleconference and determined that the Applicant was not eligible for a disability pension under the *Canada Pension Plan* (CPP), as it found that his disability was not severe as of the minimum qualifying period (MQP), which ended on December 31, 2008.

[2] On September 12, 2016, the Applicant submitted to the Appeal Division an incomplete application requesting leave to appeal. Following a request for further information, the Applicant perfected his appeal on October 3, 2016, within the specified time limitation. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

THE LAW

[3] 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 be brought only if leave to appeal is granted and the Appeal Division must either grant or refuse leave to appeal.

[4] 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.

[5] According to subsection 58(1) of the DESDA, the only grounds of appeal are 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 made in a perverse or capricious manner or without regard for the material before it.

[6] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.¹ The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada*.²

[7] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for an applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

[8] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[9] In his application requesting leave to appeal, the Applicant submitted that the General Division failed to recognize that he had a severe and prolonged disability as of December 31, 2008. He stated that his condition crossed the statutory threshold when he was exposed to homophobic discrimination while working at the British Columbia Liquor Distribution Branch from 1995 to 2003, and the psychological trauma that he experienced there went on to negatively affect his subsequent jobs.

[10] He has been the subject of teasing, bullying and harassment going back to his school years. As a result, he suffers from anxiety, depression and an inability to concentrate, which would make him a hazard in any workplace. As noted by Dr. Wodynski (GD1-10), he experiences symptoms of sleeplessness, headaches and nausea, which are aggravated when he is subjected to homophobic discrimination. As a result, his employment record has been one of

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

² *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

dismal failure. It is difficult to find gainful employment if your resume shows one termination after another. The metropolitan Vancouver area is only so large, and there are few places of employment that are free from discrimination.

[11] According to *Villani v. Canada*,³ the severe criterion must be assessed in a real world context with regard to a claimant's background. The Applicant submits that the General Division ignored the available information about his past work and life experience, particularly the homophobia that he endured prior to his MQP. Bigotry, discrimination and harassment have caused him to be fearful, anxious and depressed in institutional environments, especially the workplace, where he found himself subject to targeting. For example, during his time at Costco, he was subject to homophobic harassment that hindered his studies at the University of British Columbia (UBC) and ultimately caused him to fail his practicum in 2007. As a result, he was unable to graduate from his Bachelor of Education program. At the same time, his complaints to Costco management were ignored, and he felt he had no choice but to resign. None of this was taken into account by the General Division, which disregarded medical evidence documenting his treatment for anxiety, psychological trauma, post-traumatic stress disorder (PTSD) and claustrophobia.

ANALYSIS

[12] The Applicant suggests that the General Division dismissed his appeal despite medical evidence indicating that his condition was "severe and prolonged" as of the MQP, according to the criteria governing CPP disability.

[13] However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, committed an error in law or made an erroneous finding of fact. My review of the decision indicates that the General Division analyzed in detail the Applicant's medical conditions—which include depression, anxiety, PTSD and claustrophobia—and how they have affected his capacity to regularly pursue substantially gainful employment. In particular, the General Division took into account a number of factors, among them:

³ *Villani v. Canada (Attorney General)*, 2001 FCA 248.

- Psychological trauma inflicted on the Applicant as a result of a 2003 armed robbery;
- Homophobic discrimination, whether real or perceived, in his places of employment; and
- The effect of harassment on his studies at UBC.

[14] The General Division supported its decision with an analysis that suggests it meaningfully assessed the evidence and had defensible reasons supporting its conclusion. In the end, it determined that there was insufficient evidence to indicate a severe and prolonged disability and found the Applicant's more than \$30,000 of earnings in 2011–12 to be “substantially gainful” and not the largesse of a “benevolent employer.” I see no indication that the General Division ignored, or gave inadequate consideration to, any significant component of the evidence that was before it.

[15] The Applicant also alleges that the General Division failed to apply, or misapplied, the *Villani* principle, which demands a real world assessment of a CPP disability claimant's employability in light of their personal background. However, I see no arguable case on this ground. The General Division correctly cited *Villani* in paragraph 41 of its decision and, more importantly, proceeded to consider the Applicant's claim that his sexual orientation made him the target of homophobic discrimination, leading to the premature termination of a succession of jobs. Ultimately, the General Division concluded, correctly in my view, that it had no jurisdiction to take into account prevalent conditions in specific workplaces or in the labour market at large.

[16] I find that the Applicant's submissions recapitulate evidence and arguments that were already presented to the General Division. Unfortunately, the Appeal Division has no mandate to re-hear disability claims on their merits. While applicants are not required to prove the grounds of appeal at the leave stage, they must set out some rational basis for their submissions that fall into the grounds of appeal enumerated in subsection 58(1) of the DESDA. It is not sufficient for an applicant to merely state their disagreement with the decision of the General

Division, nor is it enough to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

CONCLUSION

[17] The Applicant has not identified grounds of appeal under subsection 58(1) that would have a reasonable chance of success on appeal. Thus, the application is refused.



Member, Appeal Division