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

Citation: *H. M. v. Canada Employment Insurance Commission,* 2017 SSTADEI 372

Tribunal File Number: AD-17-564

BETWEEN:

H. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: October 30, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 21, 2017, the General Division of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant had left his employment without just cause and that he was thereby disqualified from receiving benefits under the *Employment Insurance Act*. The Applicant filed an application for leave to appeal (Application) with the Tribunal's Appeal Division on August 9, 2017.

ISSUE

[2] The Member must decide whether 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* (DESD Act), 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 DESD Act provides that leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.

SUBMISSIONS

[5] The Applicant's submissions centred on his car problems and his difficulty getting into work without a vehicle, as well as his efforts to explore other alternatives and the lack of carpooling, bus routes serving his work location and the expense of a taxi. He further submits that he could not have taken a leave of absence. He believes that the General Division failed to see this.

ANALYSIS

[6] In his submissions, the Applicant appears to be asking me to review the evidence and come to a different conclusion than that of the General Division. However, I cannot substitute my judgment for that of the General Division, which is the primary trier of fact. I am charged

with determining whether the Applicant's appeal can proceed. This requires only that I find that he has a reasonable chance of success on appeal.

[7] The General Division comments at paragraph 24 that it is, "not confident of the [Applicant's] credibility." The General Division goes on to state that it is "skeptical" that the Applicant spoke with his employer about alternative arrangements (paragraph 25). The General Division also expressed skepticism that the Applicant had spoken to "K." about his car problems (paragraph 25).

[8] The only reason that the General Division gave for its apparent rejection of the Applicant's direct testimony generally at paragraph 24 or for its particular skepticism at paragraph 25 is that the Applicant "was evasive" in response to one question, in that he had to be asked that question three times. However, some additional basis for this skepticism is laid out, at least in part, in the balance of paragraph 25 as follows:

- "…the employer told the Commission that the [Applicant] quit after one week because the job did not suit him".
- "The [Applicant] said that it was difficult to work at the job because he is Muslim and some part of the job was to haul pork in his truck, and this may have been relayed to the employer".
- It was "not clear to the Tribunal that K. held a position of authority with the employer so as to offer alternative transportation options".

[9] On review of the audio recording from the hearing, I note that the Applicant's evidence was as follows:

- He had met the Manager, J., only once at his interview, and he did not speak to him after that. He dealt only with his supervisor, K., and it was with K. that he discussed his transportation problems. He told K. that "[he had] no other choice except to quit" after his car had broken down on the X X (highway) and that he had to get to work by taxi. He had also had an earlier conversation with K. about alternate transportation arrangements, because his car had already been having problems.

- The Applicant said that, as a Muslim, he should not even be in the vicinity of pork, but that he "didn't eat it" and "didn't touch it" (describing his work duties). He did not offer that it was difficult to work at the job because he is a Muslim. Instead, he said that he did not want to lose his job and that he did not care about the pork—all he cared about was his paycheque. On questioning from the Member, the Applicant emphatically rejected the notion that the requirement to work with pork was the reason that his employer might have said that the job did not suit him.

- After the initial interview, he said that he had dealt only with K., whom he repeatedly described as his supervisor. He stated that he had spoken to K. about his car problems and that it was K. whom he had told that he had "no choice except to quit."

[10] The General Division is not required to comprehensively summarize the evidence presented at the hearing, but I have some concerns with how the General Division addresses the above evidence in its decision and, particularly, how this evidence bears on the credibility of the Applicant.

[11] At the hearing, the General Division Member put to the Applicant the employer's statement to the Commission in general terms, but apparently with reference to the November 28, 2016, Commission log record in relation to a conversation with "J." (GD3-14). "J.," did not testify or provide a statement to clarify whether the Commission's log record was accurate and it is not clear from that record whether J. was asserting that he had actually spoken to the Applicant, whether he was reporting what he had been told, or whether he was paraphrasing what he understood the Applicant to have said to him or someone else in authority. It is also not clear what weight the General Division gave to this log record.

[12] The General Division duly notes that the Applicant denied telling the employer that he had quit because the job did not suit him. This brief log record of the Commission's conversation with J. may be the only evidence before the General Division that could be interpreted as contradicting any of the Applicant's evidence. My concern is that the General Division's reasons do not disclose what weight was given to this note, or whether or why it was preferred over the Applicant's testimony. Further, the reasons do not disclose that the Member

gave consideration to the Applicant's additional testimony (set out above), which appears to support the plausibility of his denial that he told the employer the job did not suit him.

[13] My second concern is that the reference to the Applicant's Muslim sensibilities for working with pork implies an alternative motive for quitting or a reason the Applicant may not have pursued all reasonable alternatives. However, the General Division has misstated this evidence, as noted above.

[14] My third concern is that the General Division gives no reason why, "[…] it is not clear to the Tribunal that K. held a position of authority with the employer so as to offer alternative transportation options." The Applicant testified that K. was his supervisor, that he had sought help with transportation options from K. and that K. had spoken in the first person plural, i.e. "we," in reference to what could be done or what the employer required. The General Division does not suggest that it found evidence that K. did not represent the employer and, if the Member had questions as to K.'s authority, the audio recording of the hearing reveals that no such question was put to the Applicant for his response.

[15] According to subsection 53(2) of the DESD Act, the General Division is required to provide written reasons. I accept that the sufficiency of reasons should be considered in light of the deference afforded on findings of credibility; however it is still necessary to articulate how credibility concerns are resolved (see *R. v. Dinardo*, 1 SCR 788, 2008 SCC 24). In this case, a general finding against credibility appears to have been made as a result of the Applicant's manner of response to one question, but no reason was provided as to why this specific response should taint the whole of his testimony. Further, it is arguable that the General Division misapprehended some of the other evidence in respect of those facts of which it was "skeptical." In such circumstances, deference may not be warranted.

[16] I note that the General Division refers to *Canada (Attorney General) v. Lanteigne*, 2009 FCA 195 (paragraph 29). The General Division correctly noted that *Lanteigne* concerned a case where a claimant asserted transportation issues, did not make arrangements to commute to work and left his job **without advising his employer of his alleged inability to find return transportation**. All these circumstances would need to be present for *Lanteigne* to be considered authoritative.

[17] While the General Division made no specific finding on whether the Applicant had advised his employer of his inability to find return transportation, its citation of *Lanteigne* implies that it either made a *de facto* finding that the Applicant had not advised his employer of his inability to obtain transportation, or it was at least adversely influenced by its skepticism on this point.

[18] The General Division found that the Applicant had not asked his employer for a leave of absence to try to make alternate commuting arrangements or repair his car. Apart from that, it is not clear that whether the General Division rejected all or any of the other postulated alternatives to leaving and if so, whether it was due to the failure of the Applicant to consider or attempt the alternative, or due to the insufficiency of the attempt. Nor is it clear on what basis the General Division considered any of these alternatives to be "reasonable", including the fact that the Applicant had not asked for a leave before quitting.

[19] The Applicant conceded that he had not requested a leave from his employment to seek alternate transportation. Depending on the circumstances, it may have been open to the General Division to find, on this singular failure alone, that the Applicant had not exhausted all the alternatives to leaving. However, the Applicant's concession that he did not specifically request a leave is not a concession that he acted unreasonably in failing to do so. This still requires consideration of the surrounding circumstances, which cannot be done without regard to the credibility of the Applicant in describing those circumstances.

[20] Whether it is reasonable to approach the employer and request a leave cannot be determined apart from its context. Had the Applicant's evidence been found credible, it would have been open to the General Division to find that it would be unnecessary for the Applicant to frame his request for assistance as a request for leave, in order that the General Division might consider his investigation of alternatives to be reasonable. The Applicant provided a substantial context in which he explained that he had worked for only a few days, that he was still in training, that he had tried to explore with his supervisor the available options for getting to work and his supervisor's offered no assistance or advice. According to the Applicant, the gist of the supervisor's response was: "You have to be here and if you can't be here, the job is not for you."

[21] In my view, the General Division's specific and general findings of credibility factored significantly into its assessment that the Applicant had no reasonable alternative to quitting and that, therefore, he had voluntarily left his employment without just cause.

[22] Credibility findings are clearly the prerogative of the General Division as a trier of fact, however there is still an argument that the General Division member may have failed to consider or misapprehended the Applicant's evidence in such a manner as to influence his findings on credibility. Therefore, it might be said that the credibility finding was based on an "erroneous finding of fact, made in a perverse or capricious manner or without regard for the material before it [the General Division]" per paragraph 58(1)(*c*) of the DESD Act. Alternatively, the Applicant might argue that the General Division's reasons are insufficient for him to determine why the General Division gave so little weight to his testimony, which could represent a failure to observe a principle of natural justice under paragraph 58(1)(*a*) of the DESD Act. In either case, I find that the Applicant's appeal has a reasonable chance of success.

[23] To the extent that the Applicant's submissions may have contained allegations of fact that were not already before the General Division, I have not considered that evidence. The grounds of appeal before the Appeal Division are limited to those specific grounds set out in section 58 of the DESD Act. The Appeal Division is not a second chance for an Applicant to reinforce or reargue his case before the General Division.

CONCLUSION

[24] The Application is granted.

[25] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

Stephen Bergen
Member, Appeal Division