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

Citation: *S. H. v. Canada Employment Insurance Commission*, 2018 SST 680

Tribunal File Number: AD-18-164

BETWEEN:

S. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: June 18, 2018

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant, S. H., worked for a plastics company until March 22, 2017, when he left that employment while on medical leave, ostensibly to pursue other career opportunities. The Applicant had sustained a workplace injury that left him with various physical limitations. He claims that the employer was not prepared to provide him with suitable accommodations, forcing him to leave. He denies that he voluntarily left his employment and claims that he had just cause.

[3] On May 29, 2017, the Applicant applied for regular Employment Insurance benefits. He declared that he had left his employment because of illness or injury. The Respondent, the Canada Employment Insurance Commission (Commission), denied the Applicant's claim for regular benefits, having determined that he had voluntarily left his employment without just cause within the meaning of the *Employment Insurance Act* (EI Act). It found that voluntarily leaving his employment was not his only reasonable alternative. The Commission maintained this position on reconsideration.

[4] In August 2017, the Applicant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal of Canada. The General Division determined that, based on the evidence before it, the Applicant was capable of performing modified duties at work and that he had voluntarily left his employment "as he certainly had a choice to stay employed." The General Division also determined that the Applicant had failed to prove that he had no other alternatives to quitting his employment. It therefore found that he was disqualified from receiving Employment Insurance benefits under ss. 29 and 30 of the EI Act.

[5] The Applicant seeks leave to appeal the General Division's decision, largely on the basis that the General Division failed to observe a principle of natural justice because some of the evidence he had filed "was not admitted as proof." I must decide whether the appeal has a reasonable chance of success on this or any other ground.

[6] For the reasons that follow, I am not satisfied that the appeal has a reasonable chance of success.

ISSUES

[7] Based on the Applicant's submissions, I have identified the following issues:

(a) Is there an arguable case that the General Division erred by relying on the Record of Employment?

(b) Is there an arguable case that the General Division erred by not admitting some of the evidence?

(c) Is the Applicant entitled to a reassessment of the evidence?

(d) Is there an arguable case 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 when it found that the Applicant was capable of modified duties, other than as a forklift operator, at his place of employment?

ANALYSIS

[8] Subsection 58(1) of the *Department of Employment and Social Development Act* (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] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under s. 58(1) of the DESDA and that the appeal has a reasonable chance of success. The Federal Court endorsed this approach in *Tracey*.[1]

Is there an arguable case that the General Division erred by relying on the Record of Employment?

[10] The employer issued a Record of Employment,[2] citing that the Applicant had quit. The Applicant submits that the General Division erred by accepting this reason for his departure from X. He argues that the reason should have read "other," because he was seeking "opportunity for advancement." He suggests that if the Record of Employment had properly cited "other" as his reason for departure, it would have established that he had just cause for leaving his employment, i.e. it would have shown that his employer refused to accommodate his physical limitations, thereby forcing him to seek alternatives to his employment.

[11] In dismissing the appeal, the General Division did not rely on the Record of Employment. The General Division examined the circumstances leading to the Applicant's departure from X. It relied, in part, on the fact that the Applicant's doctor had provided an opinion that the Applicant was able to return to work "by a certain date on modified duties." The General Division concluded that the Applicant "chose instead not to return," because he assumed that the employer would not accommodate his physical restrictions without ascertaining what they would be. Accordingly, because the General Division did not base its decision solely on the Record of Employment, I am not satisfied that the appeal has a reasonable chance of success on the basis of this argument.

[1] *Tracey v. Canada (Attorney General)*, 2015 FC 1300.
[2] Record of Employment dated May 17, 2017 (GD3-15).

Is there an arguable case that the General Division erred by not admitting some of the evidence?

[12] The Applicant further submits that he had submitted medical evidence to the Social Security Tribunal on November 24, 2017, but that it "was not admitted as proof." The Applicant suggests that had the General Division considered this evidence, it might have decided differently.

[13] The General Division member did not specifically address this evidence in his decision. However, this evidence was clearly before the General Division. The Applicant enquired about whether the General Division had received all the documentation, including a fax transmission that he had filed approximately one week before the hearing. The member acknowledged—twice—that he had received these records that had been recently filed.[3] It can therefore be generally presumed that the member considered these records[4] and determined that they were not determinative of the ultimate issues.

[14] The evidence consists of four pages and includes the fax cover page, a hand-written letter, the results of a February 2017 CT scan of the Applicant's cervical spine, and his physician's November 2017 prescription for compression socks (GD7). Seemingly, the Applicant intended to furnish this evidence to establish that he had significant restrictions, which required the employer to provide him with workplace accommodations. The Applicant was of the view that the only position suitable for him was as a forklift operator, but the employer disagreed.

[15] As the Federal Court of Appeal has held, in the end, a decision-maker expresses only the most important factual findings and justifications for them.[5] Here, the General Division relied on a doctor's note that stated that the Applicant was ready to return to work by a certain date on modified duties. Unlike the doctor's note, the medical evidence that he submitted on November 24, 2017 did not address whether the Applicant had any capacity for modified duties.

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[3] Approximately 4:37 to 5:00 of the audio recording of the General Division hearing.
[4] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[5] *Canada v. South Yukon Forest Corporation*, 2012 FCA 165.

[16] I am not satisfied that the appeal has a reasonable chance of success on the ground that evidence was "not admitted as proof," particularly since the General Division acknowledged that that evidence had been received and therefore formed part of the hearing record before it.

Is the Applicant entitled to a reassessment of the evidence?

[17] The Applicant indicated in his application requesting leave to appeal that he was "applying for a second application." He revisited the evidence that he had presented before the General Division. It is clear that he is seeking a reassessment of that evidence. However, s. 58(1) of the DESDA provides for only limited grounds of appeal. It does not provide for a reassessment of the evidence.[6]

Is there an arguable case 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 when it found that the Applicant was capable of modified duties, other than as a forklift operator, at his place of employment?

[18] The Applicant suggests 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 by finding that he was capable of modified duties, other than as a forklift operator, at his former place of employment.

[19] The Applicant suggests that the medical evidence before the General Division indicated that he was capable only of driving a forklift. However, the family physician's progress report[7] and Functional Abilities Form,[8] as well as medical records filed approximately one week before the hearing, only go so far as to say that the Applicant had various functional restrictions. For instance, the progress report indicates that he is unable to bend, twist, climb, lift, push, or pull, while the Functional Abilities Form indicates that he is able to walk only up to 100 metres and stand for no more than 15 to 30 minutes, and that he is unable to sit for any appreciable period. The medical evidence before the General Division does not establish or state that the Applicant was capable only of driving a forklift. Accordingly, I am not satisfied that there is an arguable

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[6] *Tracey*, *supra.*
[7] Health Professional's Progress Report, at page GD3-31.
[8] Functional Abilities Form, at pages GD3-30 to 31.

case that the General Division erred in finding that the Applicant was capable of performing modified work, other than as a forklift operator.

CONCLUSION

[20] The application for leave to appeal is refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	S. H., self-represented