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

Citation: *M. P. v. Canada Employment Insurance Commission*, 2018 SST 813

Tribunal File Number: AD-18-186

BETWEEN:

M. P.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 16, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. P., a registered practical nurse, left his employment with X on October 23, 2016. He claims that he had been bullied and harassed and faced homophobia in the workplace, to the point that he developed depression and anxiety. He felt forced to leave his employment.

[3] The Applicant made a claim for Employment Insurance regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), initially denied his claim because it found that he had insufficient hours of insurable employment to qualify for benefits.

[4] The Applicant requested an antedate, as it would provide him with sufficient hours. In its reconsideration decision, the Commission denied the Applicant's request for an antedate because it decided that the Applicant had failed to prove that between October 24, 2016 and March 15, 2017, he had "good cause to apply late for benefits."[1]

[5] The Applicant appealed the Commission's reconsideration decision to the General Division. The General Division determined that the Applicant had failed to prove that he had good cause to apply late between October 23, 2016 and March 15, 2017, and that his claim for benefits therefore could not be antedated.

[6] The Applicant seeks leave to appeal the General Division's decision. He submits that the General Division made "important errors regarding the extenuating facts" contained in his appeal file. He argues that, given his debilitating medical conditions, he should not have been held responsible for having to negotiate what he describes is a complex, unwieldy and unfair process. I must now decide whether the appeal has a reasonable chance of success, that is whether there is an arguable case that the General Division based its decision on any erroneous findings of fact

[1] Reconsideration letter dated May 23, 2017, at GD3-34.

that it made in a perverse or capricious manner or without regard for the material before it, or that it failed to observe a principle of natural justice?

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

PRELIMINARY ISSUE

[8] The Applicant filed supporting documentation in support of his claim. They include a letter dated July 10, 2018, from his family physician, a witness's letter of support dated June 21, 2018 and copies of his Ontario drug benefits history report, pharmaceutical receipts and information relating to his medical condition. He relies on these medical records to establish the gravity of his medical condition. He also relies on the witness's letter to support his claim that he had in fact attempted to file a claim for Employment Insurance benefits sometime between October 23, 2016 and March 15, 2017. The General Division did not have copies of these records or the witness's letter.

[9] The Social Security Tribunal wrote to the Applicant on July 20, 2018, advising him that he had the option of making a separate application to rescind or amend the General Division decision—on the basis of the new evidence—by August 7, 2018. Otherwise, the Appeal Division would proceed with his application for leave to appeal, likely based on only the documents that were before the General Division.

[10] The Applicant responded on August 7, 2018, stating that none of this represented new evidence, as he had discussed all this information at length with the Commission and the General Division. He stated that the only new information related to his employer refusing to provide a verbal reference, which he considers vital to securing future employment in nursing.

[11] As the Federal Court has determined, new evidence generally is not permitted on an appeal, except in limited circumstances.[2] The Applicant has not presented any reasons that justify admitting these additional records under any of the exceptions to the general rule. In any event, as the Applicant notes, these additional records do not materially add to the record that

[2] *Cvetkovski v. Canada (Attorney General)*, 2017 FC 193, at para. 31.

was before the General Division. Further, the fact that the Applicant's former employer refuses to provide a verbal reference is of no consequence to the issue of whether the General Division properly examined whether the Applicant had good cause for the delay in making his initial claim for benefits.

ISSUES

[12] Based on the Applicant's submissions, the issues are as follows:

(1) Is there an arguable case that the General Division based its decision on any erroneous findings of fact when it found that the Applicant did not act as a reasonable and prudent person would?

(2) Is there an arguable case that the General Division failed to observe a principle of a natural justice when it found that it was his responsibility to pursue a timely Employment Insurance claim, despite his medical issues?

ANALYSIS

[13] 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.

[14] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under ss. 58(1) of the DESDA and that the appeal has a reasonable chance of success. It is a relatively low bar. A claimant does not have to prove his

case; he simply has to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v. Canada (Attorney General).*[3]

Issue 1: Is there an arguable case that the General Division based its decision on any erroneous findings of fact when it found that the Applicant did not act as a reasonable and prudent person would?

[15] The Applicant submits that the General made several significant erroneous findings of fact. He described the hostile work environment that forced him to leave his employment. He faced discrimination, homophobia and hostility and, even after leaving his employment, was unable to obtain a reference from his employer, which he felt effectively perpetuated the hostility directed towards him.

[16] The Applicant noted that he was experiencing an unusually high amount of stressors, both before and after he left his employment. These stressors included having multiple health issues, including anxiety and an exacerbation of chronic depression; being unemployed; having to leave the province and find housing; and facing hostility and bias. He asserts that, from October 2016 to March 2017, he took medications for his anxiety and depression, as well as sleeping pills for insomnia.

[17] The Applicant claims that all of his stressors rendered him unable "to conduct [himself] in a normally prudent and responsible manner" in regard to pursuing an Employment Insurance claim in a timely manner.

[18] The Applicant maintains that he submitted two separate applications for Employment Insurance on his iPad and that he contacted the Employment Insurance office several times, in an effort to ensure that his claim had been received by the Commission.

[19] The Applicant contends that at least one witness can verify that he filed an Employment Insurance claim during the second week of November 2016. He notes that he had also received a letter from Service Canada, which he claims shows that it was reasonable for him to believe that the Commission had received his Employment Insurance claim.

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[3] *Joseph v. Canada (Attorney General)*, 2017 FC 391.

[20] As I have noted above, new evidence generally is not permitted on appeal. The Applicant has not identified any exceptions to the general rule that would permit me to consider this new evidence regarding his medical conditions and how they impacted him, or the witness's statement that confirmed that the Applicant had attempted to apply for benefits on his iPad. As I have indicated, this new evidence does not materially add to the record that was before the General Division. Indeed, the General Division accepted the Applicant's evidence that he attempted to apply for benefits using his iPad, first in November 2016 and then again in December 2016.

[21] Setting aside the issue of the admissibility of this new evidence, the Applicant argues that the General Division failed to consider some of the evidence before it, particularly the circumstances that forced him to leave his employment. I do not see this to be the case at all. The General Division may not have cited any of the details that the Applicant may have given in oral testimony, but it is clear that, overall, the General Division was mindful of the Applicant's claims that his medical issues impacted his ability to "conduct [himself] in a normally prudent and responsible manner."

[22] At paragraph 18, the General Division noted the Applicant's evidence that he had been diagnosed with anxiety and depression several years before he left his employment and that he took prescribed medication for his conditions. The General Division also noted that leaving his employment created significant stress and that it was a difficult time in the Applicant's life. The General Division was also mindful of the Applicant's claim that he was "not all there" and that a combination of his medical conditions and medications affected his ability to contact the Commission and to understand any information he received.

[23] Contrary to the Applicant's assertions, the General Division did consider the Applicant's circumstances.

[24] The General Division determined that, in deciding whether the Applicant had good cause for the delay in applying for Employment Insurance benefits, it had to assess whether he had acted as a reasonable and prudent person would have done in similar circumstances throughout the entire period of the delay.

[25] The General Division was aware of the Applicant's medical circumstances but determined that, even in combination with other factors, such as technical issues, a reasonable and prudent person in his circumstances would have nevertheless taken additional measures to ensure that his Employment Insurance application had been received by the Commission.

[26] The Applicant does not suggest that the General Division erred in identifying and applying the applicable law or that it based its decision on any erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it. If anything, he argues that the General Division erred in its assessment of the facts and its conclusions that his medical conditions could not have affected him enough to prevent him from pursuing an Employment Insurance claim.

[27] However, this issue involves the application of settled principles to the facts, and it is a question of mixed fact and law, rather than an error of law. As the Federal Court of Appeal held in *Garvey v. Canada (Attorney General)*,[4] the Appeal Division has no jurisdiction to interfere in factual findings or findings of mixed fact and law unless those findings were made in a perverse or capricious manner or without regard to the evidence. The Appeal Division may also intervene where an error of mixed fact and law discloses an extricable legal issue. However, neither of those scenarios exist here and accordingly, I have no jurisdiction to intervene in this matter. I am not satisfied that there is an arguable case under this ground.

Issue 2: Is there an arguable case that the General Division failed to observe a principle of a natural justice when it found that it was his responsibility to pursue a timely Employment Insurance claim, despite his medical condition?

[28] The Applicant argues that the process is unfair and that the General Division unfairly considered him responsible for pursuing his Employment Insurance claim, despite his medical condition and the intricacies of the process. The Applicant noted the poor reception he received from the Commission. One particular representative was dismissive of his experience dealing with an earlier Commission representative. He also noted the Employment Insurance process had become more burdensome, less "user-friendly" and less helpful over time.

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[4] *Garvey v. Canada (Attorney General)*, 2018 FCA 118.

[29] Natural justice is concerned with ensuring that an applicant has a fair opportunity to present their case, and that the proceedings are fair and free of any bias. It relates to issues of procedural fairness before the General Division, rather than to, say, how decisions rendered by the General Division affect any of the parties. The Applicant's allegations do not address any issues of procedural fairness or of natural justice as they relate to the General Division. He has not provided any evidence that the General Division has otherwise deprived him of an opportunity to fully and fairly present his case.

[30] As such, I am not satisfied that there is an arguable case under this ground.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	M. P., self-represented