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

Citation: *M. T. v. Canada Employment Insurance Commission*, 2018 SST 792

Tribunal File Number: AD-18-406

BETWEEN:

M. T.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: August 9, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, M. T., was employed as an airline attendant until she was suspended following an incident that occurred on April 2, 2017, in which she was found to be in possession of cannabis while commuting in uniform from Ottawa to Toronto and while using an employee travel pass. The employer found that the Applicant's actions constituted a serious violation of its code of conduct and that such actions were inconsistent with the employer's policies and procedures.

[3] The Applicant made a claim for regular Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim both initially and on reconsideration, having determined that she had been suspended from her employment because of her own misconduct. The Applicant appealed the Commission's reconsideration decision to the General Division. The General Division also found that the Applicant had been suspended due to her own misconduct and that she was therefore disqualified from receiving Employment Insurance benefits.

[4] The Applicant seeks leave to appeal the General Division's decision. She claims that the General Division based its decision on erroneous findings of fact that it made in a perverse or capricious manner or without regard for the material before it, as it relates to (1) her intentions to discard the mint container that had the cannabis inside and (2) when she had been diagnosed with depression. She also argues that the General Division should have considered her extenuating circumstances. The Applicant has provided new supporting documentation. I must now decide whether there is an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it. In other words, does the appeal have a reasonable chance of success?

PRELIMINARY ISSUE

[5] The Applicant filed two pieces of additional supporting documentation: the first, a police occurrence report; and the second, a copy of a photograph that shows that the Applicant had been prescribed an anti-depressant in mid-December 2016. The General Division did not have copies of the police occurrence report or the photograph.

[6] The Social Security Tribunal wrote to the Applicant on July 6, 2018, advising her that she had the option of making a separate application to rescind or amend the General Division decision—on the basis of the new evidence—by July 31, 2018. Otherwise, the Appeal Division would proceed with her application for leave to appeal, likely based only on the documents that were before the General Division. Because the Applicant did not file any response, the application for leave to appeal is proceeding before me.

[7] As the Federal Court has determined, new evidence generally is not permitted on an appeal, except in limited circumstances.[1] The Applicant has not presented any reasons for me to admit these additional records under any of the exceptions to the general rule.

ISSUE

[8] Is there an arguable case that the General Division 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, regarding the Applicant's intentions to discard her mint container or regarding when she was diagnosed with depression?

ANALYSIS

[9] 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;

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

(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.

[10] Before I can grant leave to appeal, I must be satisfied that the reasons for appeal fall within the grounds of appeal set out under s. 58(1) of the DESDA and that the appeal has a reasonable chance of success. It is a relatively low bar. Claimants do not have to prove their case; they simply have 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).*[2]

Paragraph 48

[11] The Applicant argues that the General Division was "misinformed" in finding that her conduct was reckless. She claims that although she had consented to her brother's actions, she had also asked him to remove his marijuana from her mint container before they parted ways. However, they both failed to remember or remind each other and left the marijuana in the container.

[12] The Applicant submits that the General Division also failed to mention that she had moved the mint container from her purse to her uniform pocket with the intention of discarding the container before arriving at airport security. However, she failed to discard the container and maintains that her lapse of judgment was due to the extenuating circumstances that triggered her depressive state.

[13] In other words, the Applicant is suggesting that the General Division should have analyzed and considered this evidence because it explains her actions.

[14] In this case, although the General Division may not have referred to some of this evidence at paragraph 48 of its decision, it was certainly mindful of such evidence. For instance,

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

at paragraph 16, the General Division set out the Applicant's testimony in this regard: that her brother forgot to retrieve his marijuana, that she tried unsuccessfully to contact her brother, and that she had removed the marijuana from her purse and placed it in her uniform pocket so she would remember to discard it.

[15] The General Division also noted the Applicant's explanation for her conduct. At paragraph 45, it noted that the Applicant claims that post-traumatic stress disorder and depression prevented her from acting rationally or from properly analyzing her situation. In this regard, it cannot be said that the General Division overlooked this evidence when it very clearly did consider such evidence, even if it ultimately rejected her explanation.

[16] Essentially, the Applicant is asking me to reconsider this evidence and accept that she had a momentary lapse of judgment attributable to her depressive state. However, s. 58(1) of the DESDA provides for only limited grounds of appeal. The subsection does not provide for a reassessment of the evidence or a rehearing of the matter. The General Division is permitted to consider the evidence; assess its relevance; determine what weight, if any, it decides is appropriate; and then come to a decision based on its interpretation and analysis of that evidence.[3]

[17] I am not satisfied that there is 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 at paragraph 48 that the Applicant's conduct was reckless.

Paragraph 49 – Diagnosis of depression

[18] The Applicant submits that the General Division erred at paragraph 49 in finding that she had yet to be diagnosed with depression.

[19] The evidence before the General Division was that the Applicant had experienced significant stressors throughout 2016, including her own health issues, multiple deaths within her family and among her friends, and being stranded in Turkey for three days during an attempted

[3] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.

coup against the government. In her request to the Commission for a reconsideration of its initial decision, the Applicant wrote that she had been "so lost in depression and stress that [she] wasn't even aware of it until [she] stopped working."[4] The Commission's Supplementary Record of Claim documented a telephone conversation with the Applicant in which she is reported to have stated that she was unaware of her depression at the time of the incident and that a few weeks after the suspension, she saw her physician, who told her that she was depressed. The record also reads: "However, she was unaware of her medical conditions and her physician did not diagnose her with the depression prior to the incident at airport for which she was suspended."[5] The Applicant had also filed a letter dated November 21, 2017, prepared by Dr. Josiah Moffatt, an internist. He confirmed that the Applicant had been under his care since December 2016, but there was no indication as to why she was consulting him or that she had any history or diagnosis of depression.[6]

[20] The documentary evidence before the General Division suggested that the Applicant had yet to be diagnosed with depression. Given this evidence, I am not satisfied that the General Division necessarily made any erroneous findings of fact in regards to when the Applicant might have been diagnosed with depression. Besides, it is clear that the General Division did not base its decision on whether the Applicant had yet to be diagnosed with depression. After all, the General Division wrote: "Regardless of the [Applicant's] as yet undiagnosed depression…." The General Division was of the opinion that the Applicant's depression—whether it had been diagnosed or not—did not result in a momentary lapse. I am not satisfied that the appeal has a reasonable chance of success on the basis of this particular argument.

Paragraph 49 – Taking steps to throw marijuana away

[21] The Applicant contends that the General Division based its decision on an erroneous finding of fact made at paragraph 49 that she had not taken any steps to discard the marijuana before she went to the airport in Ottawa. The Applicant maintains that she took steps to throw the marijuana in the garbage. She claims that the police report proves that she took these steps.

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[4] Request for Reconsideration, dated June 5, 2017, at GD3-23.
[5] Supplementary Record of Claim, July 5, 2017, at GD3-31.
[6] Letter dated November 21, 2017, prepared by Dr. Josiah Moffatt, internist.

[22] Setting aside the issue of the admissibility of the police occurrence report, the statements in the police report do not serve to establish that the purported events occurred. They do not prove truth of fact. At most, they serve to establish that the Applicant reported what occurred, but they do not prove that what she reported to the police actually occurred.

[23] In any event, I find that the police occurrence report does not assist the Applicant. The police did not record or suggest that the Applicant had indeed taken any steps to dispose of the marijuana. The report corroborates the Applicant's position that she mistakenly left the marijuana in the mint container because she had intended to return it to its legal owner.

[24] Contrary to the Applicant's assertions, I do not find that there was any evidence before the General Division that she had taken any steps to dispose of the marijuana in the garbage. The General Division noted the Applicant's testimony at paragraph 16 that she intended to discard the marijuana. While the General Division was aware that the Applicant had intended to discard the marijuana by first moving the container from her purse to her uniform pocket, it found that this did not represent taking a step to dispose of the marijuana. While she may have intended to dispose of the marijuana before arriving at airport security, if she remembered that she had it in her possession, this is not the equivalent of actually taking positive steps to dispose of it.

[25] I am not satisfied that there is 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 referred to the Applicant's depression as "yet undiagnosed" or stated that she had not taken any steps to throw the marijuana in the garbage.

[26] I have reviewed the underlying record and do not see that the General Division might have erred in law in making its decision or that it either overlooked or misconstrued any important evidence or arguments.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVES:	M. T., self-represented