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

Citation: *W. H. v. Canada Employment Insurance Commission*, 2018 SST 972

Tribunal File Number: AD-18-594

BETWEEN:

W. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: October 4, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, W. H. (Claimant), an equipment operator for X, sustained a work-related injury in mid-September 2017. He did not return to this employment. The Claimant applied for Employment Insurance regular benefits. On his application form, he disclosed that he had quit for health or medical reasons because of his ongoing injury.[1] He also disclosed that he did not look for a job with another employer before quitting because of a lack of education.[2]

[3] The Respondent, the Canada Employment Insurance Commission (Commission), denied his application for benefits because it determined that he had voluntarily left his employment without just cause and that voluntarily leaving was not his only reasonable alternative.[3] The Claimant applied for a reconsideration, claiming that he "was refuse[d] employment."[4] The Commission maintained its decision.[5] The Claimant appealed the Commission's reconsideration decision[6] to the General Division, denying that he had quit as the employer had set out in the Record of Employment.[7] He claimed that, after two days of being off work, he was "fit, ready, willing, and capable of doing [his] job however [he] was not given that chance for reasons that are still unknown."

[4] The General Division held a teleconference hearing on August 2, 2018. It found that the Commission had proved the Claimant had voluntarily left his employment. The General Division concluded that the Claimant did not have just cause for leaving his employment because he failed to demonstrate that he did not have any reasonable alternatives to leaving. It dismissed the appeal. The Claimant now seeks leave to appeal, arguing that the General Division failed to

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[1] Application for Employment Insurance benefits, at GD3-7 and GD3-8.
[2] Application for Employment Insurance benefits, at GD3-13.
[3] Commission's letter dated February 12, 2018, at GD3-30 to GD3-31.
[4] Request for Reconsideration, at GD3-32 to GD3-33.
[5] Commission's letter dated April 18, 2018, at GD2-16 and GD3-54 to GD3-55.
[6] Notice of Appeal, at GD2.
[7] Record of Employment, dated November 15, 2017, at GD2-2 and GD3-23 and GD3-24.

observe a principle of natural justice and that it based its decision on an erroneous finding of fact that it made without regard for the material before it. I must now decide whether the appeal has a reasonable chance of success; in other words, I must determine whether there is arguable case on any of these grounds.

[5] I find that the appeal does not have a reasonable chance of success because the Claimant has not provided any evidence to prove his claims that the General Division was biased against him or that it deprived him of a full and fair hearing. Furthermore, I am not satisfied that the General Division based its decision on the employer's statement without regard for the evidence. The General Division based its decision largely on the Claimant's initial statement, although it found that the employer's statement was consistent with the Claimant's initial statement that he had quit his employment.

ISSUES

[6] The issues before me are as follows:

- Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice by depriving the Claimant of a fair hearing?
- Issue 2: Is there 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 when it determined that the Claimant had voluntarily left his employment?

ANALYSIS

[7] 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.

[8] Before granting leave to appeal, I need to 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. This is a relatively low bar. A claimant does 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).*

Issue 1: Is there an arguable case that the General Division failed to observe a principle of natural justice by depriving the Claimant of a fair hearing?

[9] The Claimant argues that the General Division member failed to provide him with a fair hearing because the member was ill-prepared and disorganized, so the hearing itself was unstructured and meandering. He also claims that the General Division member asked multiple confusing questions at once, which left the Claimant unable to concentrate. He was also forced to consult the page numbers and docket numbers that she referred to, leaving him with little time to present his case.

[10] General Division members are masters of their own domain and can conduct hearings in a manner that they deem appropriate, provided that they still make sure that parties are given fair hearings and are provided with the opportunity to fully and fairly present their cases. The Claimant suggests that the General Division member deprived him of an opportunity to fully and fairly present his case because of multiple interventions.

[11] The Claimant has not cited any particular instances where the member asked “multiple, confusing questions at once” or where she referred him to any particular pages. I have listened to the audio recording of the hearing to determine whether any of the General Division’s questions were unfair to the Claimant. I have been unable to locate any such instances.

[12] Granted, the General Division asked many questions, but this is different from asking multiple questions at once. It is reasonable and expected of the trier of fact to ask questions that

are central to the issues and to ask for clarification, particularly where there are ambiguities, gaps or inconsistencies in the evidence.

[13] After the Claimant gave some initial evidence, the member stated that, if that was the extent of the Claimant's submissions, she had some clarification questions about the Claimant's submissions and the Commission's decision.[8] For instance, the member asked the Claimant questions about his application for Employment Insurance benefits, where he had stated that he had quit his employment. It was entirely legitimate for the General Division to ask the Claimant questions about his responses on the application, given that, on appeal, he denied that he had quit his employment and claimed that his employer refused to take him back.

[14] When the Claimant stated that he would need time to locate a copy of his application for Employment Insurance benefits, the member responded, "Absolutely. Take your time."[9] After referring him to specific portions of his application where he indicated that he had quit, she asked him whether he wanted to comment on the statements that he had made in his application.[10] This was not "multiple questions." It was one question asked in a simple, straightforward manner. After the Claimant located the page reference, the General Division member re-stated the question. Without any hesitation, the Claimant answered the question.

[15] There were several instances during the hearing where the General Division member referred the Claimant to particular page references in the hearing record so she could ask for clarification. Each time, the member made sure that the Claimant referred to the correct page. I do not see any occasion when the member forged ahead with the hearing without giving the Claimant time to locate the referenced page or time to digest and respond to the question.

[16] The General Division asked the Claimant for clarification on several other issues throughout the hearing. I was unable to find any evidence of the General Division asking multiple confusing questions or any evidence of the Claimant's confusion. He did not signal at any time during the hearing that he did not understand the questioning. I found only two

[8] At approximately 7:10 of audio recording of hearing.
[9] At approximately 7:38 of audio recording of hearing.
[10] At approximately 11:34 of audio recording of hearing.

instances where the Claimant asked the member to repeat the question or to confirm a page reference number,[11] but they do not show any marked confusion on his part.

[17] Towards the end of the hearing, the member thanked the Claimant and invited him to address any outstanding issues before she ended the hearing. She stated, "Thank you for addressing that and thank you for the submissions that you've made. I don't have any further questions, so is there anything further that you wanted to add regarding your appeal that we may not have touched on already?[12]

[18] The General Division provided the Claimant with an opportunity to respond. The Claimant then spoke about a previous injury, his physical limitations and his relationship with the employer before the member ended the proceedings.

[19] The member confirmed at the outset that the hearing was scheduled for 90 minutes. The hearing lasted little more than an hour. There is no evidence that the member rushed the Claimant to finish before the allotted time. The member gave the Claimant time to finish responding.

[20] Given that the General Division member provided the Claimant with an opportunity to respond to questions and to give any further evidence, I am not convinced that there is an arguable case that there was insufficient time or an inadequate opportunity for the Claimant to fully and fairly present his case.

[21] In any event, although the Claimant maintains that the General Division member's questioning left him with little time to concentrate and reply, there is no indication that he would have presented his case differently or that he had additional evidence to provide.

[22] The Claimant contends that the General Division member was disorganized and unprepared for the hearing, so he could not have had a fair hearing. Upon listening to the audio recording, I find that the member was familiar with the issues and the contents of the hearing

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[11] At approximately 47:32 of audio recording of the hearing, the General Division member asked, "and when you were off for two weeks for the therapy for your joint injury, was that after October 30th?" The Claimant responded, "Say that again, when I was off for what?" The member repeated the question and then the Claimant was able to quickly respond. And, at approximately 55:15, the Claimant asked, "Is it GD3-53? Correct?"
[12] At approximately 1:01:53 of audio recording of the hearing.

file. She was able to readily refer the Claimant to particular passages in the hearing file when she asked for clarification—this usually reflects a member's preparedness, organization and knowledge of the material. If the member had been unprepared and unfamiliar with the Claimant's case or the hearing record, she would have been unable to refer to any page references or ask for clarification. I am not satisfied that there is an arguable case that the General Division failed to provide the Claimant with a fair hearing on this basis.

[23] The Claimant also alleges that the General Division exhibited bias towards him. He notes that the General Division's decision included references to a female claimant. For instance, at paragraph 15, the General Division wrote, "The question is not whether it was reasonable for the Appellant to leave **her** employment, but rather whether leaving **her** employment was the only reasonable course of action open to **her**, having regard to all the circumstances…" (My emphasis). He suggests that the General Division member must have been preoccupied with another unrelated case involving a female claimant, possibly because of the size of her workload and any pressures to render as many decisions as possible.

[24] Had there been other instances where the General Division incorrectly referred to the Claimant or if the member had overlooked any of the legal issues or any key pieces of evidence, I would have found that the Claimant raised an arguable case. However, there were only three instances where the General Division used the female pronoun "her," the references were all confined to this single paragraph, and the balance of the decision—and more importantly, the analysis—clearly related to the Claimant. It appears that the General Division member used a "boilerplate" paragraph when defining just cause and that she neglected to change the gender reference. It represents an unfortunate typographical error, but it does not satisfy me that the appeal has a reasonable chance of success.

Issue 2: Is there 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 when it determined that the Claimant had voluntarily left his employment?

[25] The Claimant submits that the General Division's decision was based on an erroneous finding of fact that the General Division made without regard for the material before it. In particular, he argues that the General Division overlooked the fact that his employer provided "false and misleading information" in an effort to dismiss him as soon as possible after learning

that he was injured. In essence, the Claimant is arguing that the General Division should have preferred his evidence to the employer's statement.

[26] In submissions to the General Division, the Claimant argued that the Commission's finding that he had voluntarily left his employment was "false and based on false information."[13] There were discrepancies between the Claimant's and the employer's explanations of the circumstances surrounding the Claimant's departure from his employment. However, the General Division determined that the Claimant had also provided conflicting reasons for his loss of employment.

[27] The General Division noted some of the discrepancies in the Claimant's evidence at paragraph 9. At paragraph 10, the member wrote, "I consider that the Claimant's story has constantly changed during his interactions with the Commission and the Tribunal which seriously affects his credibility."

[28] The Claimant denies that he quit his employment and asserts that, immediately after he went on a brief medical leave to recover from his work-related injury, the employer filled his position. However, according to the Commission, the employer directed the Claimant to take the time he needed to recover and to contact the employer once he was able to resume working. The employer reportedly informed the Commission that the Claimant did not contact the employer again.

[29] Although the Claimant asserts that the General Division based its decision on the employer's statement that he had quit, in fact the General Division's conclusion that the Claimant had voluntarily left his employment was based primarily on the Claimant's initial statement set out in his application for Employment Insurance benefits. The General Division wrote that it preferred the Claimant's initial statement that he left his employment because of health and medical reasons. It noted that the Claimant's initial statement was supported by the "employer's consistent statements."

[13] Claimant's letter dated May 17, 2018, at GD2-13.

[30] As the trier of fact, the General Division is best positioned to assess the evidence, and its findings are to be given significant deference, short of any significant flaws in its reasoning process or any key evidence being misconstrued or overlooked.

[31] As there was an evidentiary basis for the General Division's conclusions, it was open to the General Division to make findings of credibility and ultimately to prefer the employer's account, given the Claimant's conflicting accounts.

[32] If the Claimant is asking that I reassess this matter, s. 58(1) of the DESDA does not provide for any reassessments as a ground of appeal. I am not satisfied that there is an arguable case that a reassessment is appropriate.

CONCLUSION

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

Janet Lew
Member, Appeal Division

APPEARANCE:	W. H., self-represented