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

Citation: *R. C. v Canada Employment Insurance Commission*, 2019 SST 357

Tribunal File Number: AD-19-247

BETWEEN:

R. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: April 16, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Claimant voluntarily left his employment as a delivery person for a drugstore because his deliveries exposed him to second-hand smoke. He applied for Employment Insurance benefits but the Respondent, the Canada Employment Insurance Commission (Commission) denied his claim, finding that he left his employment without just cause.

[3] The Commission maintained this decision when the Claimant asked it to reconsider. The Claimant appealed to the General Division of the Social Security Tribunal but his appeal was denied. He now seeks leave to appeal to the Appeal Division.

[4] The Claimant has no reasonable chance of success. He has not made out an arguable case that the General Division was biased, or that it made an error of law, or that it ignored or failed to understand the evidence.

ISSUE(S)

[5] Is there an arguable case that the General Division decision could give rise to a reasonable apprehension of bias?

[6] Is there an arguable case that the General Division erred in law by misapplying the standard or burden of proof?

[7] Is there an arguable case that the General Division misapplied the law when it considered that the Claimant could have requested a leave of absence as a reasonable alternative to leaving?

[8] Is there an arguable case that the General Division misunderstood the Claimant's testimony regarding his admission that he had not requested a leave of absence?

[9] Is there an arguable case that the General Division overlooked or misunderstood evidence that the Claimant's workplace exposure to second-hand smoke constituted a danger to health or safety?

ANALYSIS

General principles

[10] The Appeal Division may intervene in a decision of the General Division, only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in s.58(1) of the Department of Employment and Social Development Act (DESD Act).

[11] The only grounds of appeal are described below:

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.

[12] To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

Issue 1: Is there an arguable case that the General Division decision could give rise to a reasonable apprehension of bias?

[13] The Claimant argues that the General Division member failed to observe a principle of natural justice. According to the Claimant, the following statement in the General Division decision gives rise to a reasonable apprehension of bias:

> [The Claimant] doesn't believe [requesting a leave of absence] would be a reasonable alternative as "it would not reduce the number of smokers". Of

[1] *Canada (Minister of Human Resources Development) v Hogervorst,* 2007 FCA 41*; Ingram v Canada (Attorney General)*, 2017 FC 259.

> course not, but it would allow him to be unhindered in a search for alternate employment.[2]

[14] The Claimant did not point to any other statement or action of the member as contributing to his perception that the member was biased. I have reviewed the audio record and have not discovered any other comment or direction from the member that would suggest to a reasonable person that he was biased or came to the hearing with a closed mind.

[15] The Supreme Court of Canada has outlined the test for bias as follows:

> The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case.[3]

[16] The Claimant might reasonably view the General Division's statement as dismissive of the Claimant's point, or otherwise off-putting, but it does not appear that the General Division refused to accept that the Claimant's point is true. Rather, it appears that the General Division accepted that the Claimant's point was not just true, but obviously true. The General Division explains that its reason for including "requesting leave" within its analysis of reasonable alternatives is based on different grounds than its ability to reduce the Claimant's workplace exposure to smoke: It considered that requesting leave might have afforded the Claimant an opportunity to obtain alternative employment before quitting.

[17] The General Division appeared to view the prospect of a leave of absence as having some utility in temporarily removing the Claimant from the exposure of which he complains, perhaps while he exhausts other alternatives to quitting. Such an approach would be supported in principle by the courts. For example, the Federal Court of Appeal in *Tanguay v. Canada (Unemployment Insurance Commission),* [4] stated that, "it is the responsibility of insured persons, in

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[2] General Division decision, para. 20
[3] R. v. S. (R.D.), [1997] 3 SCR 484
[4] *Tanguay v Canada (Unemployment Insurance Commission)*(F.C.A.), [1985] F.C.J. no. 910

exchange for their participation in the scheme, not to provoke that risk or, *a fortiori,* transform what was only a risk of unemployment into a certainty." The General Division's suggested that he could have sought a leave of absence. It also suggested he could have sought medical advice to support his need to quit. These are steps that the Claimant might have attempted prior to quitting.

[18] There is no arguable case that a reasonable person might reasonably consider that either the General Division's acceptance of the view that the Claimant could take a leave and look for other work, or the manner in which the General Division expressed that view, gives rise to a reasonable apprehension of bias under section 58(1)(a) of the DESD Act.

Issue 2: Is there an arguable case that the General Division erred in law by misapplying the standard or burden of proof?

[19] In his supplementary submissions, the Claimant makes the argument repeatedly that the General Division failed to demonstrate certain facts or findings, and he concluded that the General Division must make out its case on a balance of probabilities.[5]

[20] The Claimant is mistaken as to the General Division's role. The General Division is independent of the Commission and is not required, or even permitted, to make the case for the Commission, or for the Claimant. The General Division must review and consider the evidence and submissions provided by both the Commission and the Claimant. Then, it must find the facts on which it relies, which means that it must decide what evidence it accepts or rejects, and what weight to assign to various pieces of evidence. Finally, it applies the law to the facts it has found to make a determination based on what it considers to be the greater likelihood.

[21] When the issue concerns voluntary leaving without just cause, the onus is on the Commission to establish to the satisfaction of the General Division that a claimant voluntarily left his or her employment. If that is established, the burden then shifts to the claimant, who must establish that he or she had just cause for leaving. [6]

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[5] AD1-C

[6] *Canada (Attorney General) v Patel,* 2010 FCA 95

[22] That means that the Claimant must bring forward evidence that is sufficient to rebut any evidence from the Commission and to establish that it is more likely than not that he had no reasonable alternative to leaving.

[23] The General Division reviewed the evidence in general and was not satisfied, on a balance of probabilities,[7] that the Claimant's exposure to second-hand smoke exposure posed a serious or imminent threat to the Claimant's health such that he had no option but to leave his employment when he did.[8] There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act by either misunderstanding or misapplying the standard or burden of proof.

Issue 3: Is there an arguable case that the General Division misapplied the law when it considered that the Claimant could have requested a leave of absence as a reasonable alternative to leaving?

[24] The courts consider the availability of leave and of a claimant's failure to request leave to be relevant. For example, the Federal Court of Appeal in *Canada (Attorney General) v Patel*[9] stated as follows:

> … the burden rested on the claimant to establish just cause and it was incumbent upon the claimant to establish that leave would have been refused if requested. Having failed to do that, it was reasonable for the Board to hold that the claimant had not demonstrated that he had no other reasonable alternative.

[25] The Claimant suggests that the jurisprudence only supports obtaining leave in circumstances where there is a possibility that a claimant's concerns might be remedied or rectified to allow him or her to return to work. According to the Claimant, a leave of absence is not a reasonable alternative if it is only an interim measure to allow a claimant to look for alternative employment.[10]

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[7] General Division, para. 33
[8] General Division decision, paras. 26-28
[9] *Supra* note 6
[10] AD1-8

[26] The Claimant suggests that the General Division misapplied the decision in *Canada (Attorney General) v Imran*.[11] The General Division cited *Imran* for the principle that a claimant must demonstrate he has no reasonable alternative to leaving only. However the Claimant suggests that *Imran* is also authority supporting his position that requesting a leave of absence is not a reasonable alternative if it is for the purpose of seeking alternate employment.

[27] *Imran* does not establish any principle binding on the General Division, other than the principle for which it was cited. The court in *Imran* did not consider that the claimant had a reasonable alternative to leaving because he could have taken a leave of absence instead of quitting. It considered that the claimant had a reasonable alternative to leaving because he could have just held on to his job, period. The claimant in the *Imran* case, did not leave his employment because of a danger to his health or any other intolerable condition but because he thought he could increase his chances of finding a better position. Whether, on those facts, the claimant actually needed to leave his job to secure another position has absolutely no bearing on whether the Claimant, in this case, might take a leave to find other work in order to avoid a return to work under conditions he considers dangerous.

[28] I note that the Claimant referred to various decisions Canadian Umpire Benefit (CUB) decisions under the former appeal process, as well as to the Digest of Benefit Entitlement Principles (Digest). He has suggested that the General Division decision must be consistent with these decisions. This is incorrect. The General Division may find CUB decisions persuasive but it is not required to follow them. The Digest is a guide to the Commission's adjudication policy, but it is likewise not binding on the General Division. The General Division must follow binding precedent from the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada but it does not err by failing to follow CUB decisions or Commission policy.

[29] Having said that, I note that many of the CUB cases or policy citations are addressed to the justification for leaving an employment in conditions that are found to be intolerable, or which are dangers or hazards. The existence of such conditions will depend on the evidence and the facts found in the particular case but, if the General Division has not found as fact that

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[11] *Canada (Attorney General) v Imran* 2008 FCA 17

intolerable or dangerous conditions exist, then the General Division can not make a legal error by not following case authority that is only applicable to intolerable or dangerous conditions.

[30] There is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act, by finding that the Claimant could have requested leave as a reasonable alternative to leaving when he did.

Issue 4: Is there an arguable case that the General Division misunderstood the Claimant's testimony regarding his admission that he had not requested a leave of absence?

[31] The Claimant argued that the General Division misrepresented his testimony where it stated the following:

> The Appellant did not think to request a leave of absence to allow time to seek and possibly obtain alternate employment. It "did not occur to him", he "probably should have".[12]

[32] According to the Claimant, the "General Division was aware that the appellant meant this as a measure of ensuring the General Division could tick this box and not use it against him arbitrarily, not that the appellant agreed that requesting a leave of absence would have represented a reasonable alternative." [13]

[33] I have listened to the audio recording of the hearing and I agree with the Claimant that the General Division was aware that the Claimant did not accept that requesting leave of absence would have been a reasonable alternative. However, the General Division's quotations are still accurate. Nothing in the decision suggests that the General Division accepted or relied on the Claimant's testimony as a concession that he believed requesting a leave would have been reasonable. I do not read the General Division's statement to suggest that the General Division misunderstood the Claimant's testimony or that it is misrepresenting it in any way.

[12] General Division decision, para. 19
[13] AD1-9

[34] There is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act by misunderstanding the Claimant's testimony related to the fact that he did not request a leave of absence.

Issue 5: Is there an arguable case that the General Division overlooked or misunderstood evidence that the Claimant's workplace exposure to second-hand smoke constituted a danger to health or safety?

[35] Whether taking a leave of absence is a reasonable alternative in the circumstances is a question of mixed fact and law. In *Quadir v. Canada (Attorney General)*, [14] the Federal Court of Appeal confirmed that the Appeal Division has no jurisdiction to intervene in questions of mixed fact and law.

[36] However, the General Division's determination that taking a leave of absence was a reasonable alternative to leaving depends on whether, and to what extent, the Claimant's workplace exposure constitutes a danger to his health–a finding of fact.

[37] The Claimant's expressed reason for leaving his employment was that he was exposed to second-hand smoke in the course of his work duties. Furthermore, when the Claimant's disagrees with the General Division's determination that the Claimant could have requested leave as a reasonable alternative to leaving, it is because he believes taking a leave of absence would not have resulted in changes by his employer to reduce his exposure to second-hand smoke.

[38] The Claimant provided extensive submissions to the General Division on the effects of second-hand smoke, and he expressed concern that the General Division did not demonstrate that the exposure was not a danger to his health. As noted earlier, it was not the General Division's responsibility to demonstrate that the Claimant's workplace exposure to second-hand smoke was not a danger to his health or that he did not have to leave his job because of the smoke: It was the Claimant that needed to demonstrate to the General Division that the Claimant's work conditions constituted a danger to his health such that he had to immediately leave his employment.

[39] The Claimant's concern that his working conditions may affect his health correlates to one of the circumstances listed under section 29(c) of the *Employment Insurance Act* (EI Act).

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[14] *Quadir v. Canada (Attorney General)* 2018 FCA 21

"Working conditions that constitute a danger to health or safety" (section 29(c)(iv)). The General Division was therefore required to take this circumstance into account in determining whether the Claimant had just cause for leaving his employment under section 29(c), and it had a responsibility to assess and to weigh the evidence to determine whether the Claimant had met his burden of proof on this point.

[40] I expect the General Division would have been seeking evidence of the Claimant's actual exposure to second-hand smoke (frequency, duration, and concentration of exposure) as well as evidence of the threshold exposure that could cause him appreciable harm. However, I am not the trier of fact and it is not my role to second-guess how the General Division evaluated the evidence.[15]

[41] I appreciate that the Claimant provided extensive submissions and a number of general articles and links related to the risks generally associated with second-hand smoke. While the General Division did not refer to those various items of evidence individually, it is clear that the General Division was not satisfied that the Claimant had established that his particular working conditions presented an unacceptable level of risk to his health.[16] The Federal Court of Appeal in *Simpson v Canada (Attorney General)*,[17] confirmed that a tribunal need not refer in its reasons to each and every piece of evidence before it, but is presumed to have considered all the evidence."

[42] I also broadened my review of the record to search for any other evidence that the General Division might have missed or misunderstood and which might raise an arguable case that the General Division based its decision on an erroneous finding of fact. This is consistent with the Federal Court's decision in *Karadeolian v Canada (Attorney General)*,[18] in which the court determined that Appeal Division can grant leave to appeal where the General Division has arguably overlooked or misunderstood key evidence, even though the applicant may not have properly identified such an error under the grounds of appeal.

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[15] *Tracey v. Canada(Attorney General)* 2015 FC 1300
[16] General Division decision, para 28
[17] *Simpson v Canada (Attorney General*), 2012 FCA 82
[18] *Karadeolian v Canada (Attorney General),*2016 FC 615

[43] However, I have not discovered any other significant evidence on the record that may have been ignored or misunderstood by the General Division in making any finding of fact. Therefore, there is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act.

[44] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	R. C., Self-represented