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

Citation: *MS v Canada Employment Insurance Commission*, 2021 SST 68

Tribunal File Number: AD-21-42

BETWEEN:

M. S.

Applicant / Claimant

and

Canada Employment Insurance Commission

Respondent / Commission

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: February 22, 2021

Canada

DECISION AND REASONS

DECISION

[1] The Application to the Appeal Division is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Claimant M. S. is seeking leave to appeal the General Division's decision. This is another way of saying that applicants have to get permission from the Appeal Division before they are allowed to move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The Claimant's employer, an excavating company, hired him to do emergency snow removal. The Claimant left this job after a week. The General Division found that the Claimant had reasonable alternatives to leaving. As a result, the General Division found that the Claimant did not have just cause for having left his job. This resulted in a disqualification from employment insurance benefits.

[4] The Claimant argues that he should not be disqualified from receiving employment insurance benefits. He maintains that he had just cause for having left his job. He argues that the General Division made several factual mistakes.

[5] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing leave to appeal.

ISSUES

[6] The issue is whether there is an arguable case that the General Division made factual errors about the following:

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

1. whether the Claimant sought any medical advice before he left his job
2. whether the Claimant looked for other employment before he left his job
3. whether there was any evidence of the Claimant's stress or mental health issues
4. whether the Claimant confirmed information that he had provided on an earlier date and
5. whether the Claimant made a personal choice to leave his employment when he did.

ANALYSIS

[7] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the General Division committed the type of error that is set out in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) Failed to provide a fair process;

(b) Failed to decide an issue that it should have decided, or decided an issue that it should not have decided;

(c) Made an error of law; or

(d) Based its decision on an important factual error (perverse, capricious, or without regard for the evidence).

[8] Of these, the Claimant argues that the General Division made important factual errors.

1. Is there an arguable case that the General Division made a factual error that the Claimant did not seek any medical advice before he left his job?

[9] No. The Claimant does not have an arguable case that the General Division made a factual error that he did not seek medical advice before he left his job.

[10] The Claimant argues the General Division member made a factual error at paragraphs 19 and 21 of his decision. There, the member wrote, "In this case, the [Claimant] neither sought out any other employment … nor did he seek out medical advice prior to his quit and move."

[11] On January 31, 2020, the Claimant saw his massage therapist. He also left his job that same day. The Claimant did not return to work after January 31, 2020. The Claimant asserts that he saw his massage therapist first, and then left his employment. He disputes the General Division's findings that he did not see his massage therapist until after he quit his job.

[12] The Claimant argues that the evidence shows that he sought medical advice before he left his job. He points to his massage therapist's undated letter. His massage therapist wrote:

> [The Claimant] visited me for a massage therapy appointment on January 31, 2020 with acute pain in the feet. … The recommended treatment plan for this condition is rest from work, or activities of daily living that aggravate the condition, the use of ice in the area, stretching & massage therapy treatments.[2]

[13] The massage therapist's letter and invoice[3] confirm that the Claimant visited the therapist on January 31, 2020. However, neither of these documents shows what time the Claimant saw the massage therapist that day.

[14] The General Division member referred to the medical evidence. The member concluded that the Claimant visited his massage therapist AFTER he had already quit his job, although the member did not set out any of the evidence that showed the sequence of events on January 31, 2020.

[15] The massage therapist's plan that the Claimant "rest from work" could indicate two things: (1) that the Claimant remained employed at that time and (2) that he should take time off work to rest. However, this interpretation of the letter directly conflicts with the rest of the Claimant's evidence.

[16] The Commission's telephone log notes dated May 6, 2020 indicate that the Claimant reported that he had not sought any medical advice before quitting his job. The notes also

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[2] Massage therapist's undated letter, at GD2-20.
[3] Massage therapist's invoice, dated January 31, 2020, at GD2-22.

indicate that the Claimant confirmed that, "he was not prescribed to quit his job for medical reasons."[4]

[17] Then, and more importantly, in his letter dated December 29, 2020, the Claimant wrote that he worked the nightshift. He also wrote, "When [the Claimant] finished his 12-hour shift he went directly to a Registered Massage Therapist…"[5]. He did not return to work after January 31, 2020.

[18] From the evidence before it, the General Division could conclude that the Claimant had not sought medical advice before leaving his job. It was open to the General Division to accept this evidence.

[19] The Claimant insists that there was other evidence confirming that he did seek medical treatment before he left his job. Indeed, a medical letter showed that the Claimant saw a doctor before January 31, 2020. The Claimant consulted a doctor in November and December 2019 for his longstanding bilateral foot problems.[6] However, he saw this doctor before he even started working for the excavating company. So, obviously he did not see the doctor about whether he should quit or continue working.

[20] The Claimant saw that same doctor on February 23, 2020, but the Claimant had already left his employment by then.

[21] I am not satisfied that there is an arguable case that the General Division made a factual error on this point.

2. Is there an arguable case that the General Division made a factual error about whether the Claimant looked for other employment before he left his job?

[22] No. The Claimant does not have an arguable case that the General Division made a factual error about whether he looked for other employment before he left his job.

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[4] Supplementary Record of Claim dated May 6, 2020, at GD3-39.
[5] Claimant's letter to Social Security Tribunal dated December 29, 2020, at GD2-14.
[6] Medical letter dated August 12, 2020, at GD2-19.

[23] The Claimant argues the General Division member made a factual error at paragraph 19 of his decision. There, the member wrote, “In this case, the [Claimant] neither sought out any other employment …``

[24] The Claimant does not deny that he did not look for work before leaving his job. But, he explains why he did not look for work at that time. He claims that it was impossible to get suitable work. For one, he had medical issues and, two, the city was crippled because of a record-breaking snowfall and windstorm. The only available work was snow clearing, but the Claimant claims that he could not perform this work because of his medical issues.

[25] These may be legitimate reasons why the Claimant did not look for work. But, that does not mean the General Division member misstated the facts when he found that the Claimant did not look for work before leaving his job. I am not satisfied that there is an arguable case that the General Division member made a factual mistake when he found that the Claimant did not look for work before quitting his job.

3. Is there an arguable case that the General Division made a factual error when it found that there was no evidence of stress or any other mental health issues?

[26] No. The Claimant does not have an arguable case that the General Division made a factual error when it found that there was no evidence of stress or any other mental health issues.

[27] The Claimant argues that the General Division member made a factual error at paragraph 30. The General Division found that there was no evidence, “that would allow [the Claimant] to use stress or any other mental health issue as just cause …”

[28] The Claimant states that he was in fact under considerable stress and that his job affected his mental health. While that may be so, the Claimant acknowledges that his doctor’s letter only referred to the problems with the Claimant’s feet.

[29] The Claimant does not deny that the General Division did not have any evidence of his mental state. For that reason, I find that the Claimant does not have an arguable case that the General Division made a factual error when it found that there was no evidence of stress or any other mental health issues.

i. The Claimant's confidentiality concerns

[30] The Claimant claims that his doctor did not disclose all the medical details of his visits. The doctor did this to respect the Claimant's confidentiality. The Claimant states that he should not have had to disclose any information about the state of his mental health to the General Division member. The Claimant believed that if he disclosed his medical history, his personal details would then become public.

[31] If the Claimant left his job for health reasons, he should have mentioned this to the General Division. He should have also produced evidence to support his claims. He did not have to fear that his health records would become a matter of public record. The Social Security Tribunal does not make a claimant's health records available to the public. The Tribunal goes to great lengths to protect personal information. For instance, the Social Security Tribunal redacts identifying information in its published decisions.

ii. The Claimant's expectation that the General Division would tell him what records he should produce

[32] The Claimant also argues that, if the General Division required medical records from him to show that he had stress or mental health issues, it should have let him know that he had to produce these records.

[33] A claimant is responsible for proving his case. He cannot rely on the General Division to tell him what documents he should produce. After all, one cannot expect the General Division to guess or know if there are other reasons why a claimant might have left their job, if that information is not already on file. There is no obligation on the General Division to inform a claimant what kind of evidence they should produce for different scenarios, especially those that a claimant does not bring to a member's attention.

iii. Just cause under the *Employment Insurance Act*

[34] In any event, the fact that the Claimant was under considerable stress and had mental health issues alone would not have proven just cause for leaving a job. The circumstances when just cause arises are listed under section 29(c) of the *Employment Insurance Act*. They include circumstances when the working conditions constitute a danger to health or safety, among other

things. The existence of mental health issues does not necessarily establish that the working conditions represented a danger to the Claimant's health and safety.

[35] Besides, the Claimant would have had to show that he did not have any reasonable alternatives to leaving his job. As the General Division found, the Claimant had reasonable alternatives to leaving. He could have asked for time off. But, as the Claimant initially reported, it did not occur to him to ask for time off.[7]

[36] In his Notice of Appeal to the General Division, the Claimant claims that he asked for time off from work.[8] But, this is inconsistent with his initial report to the Commission, as well as the employer's statements.[9] It was open to the General Division to prefer the employer's statements and the Claimant's initial report that he did not ask for time off, to his subsequent statement.

[37] Furthermore, even if the Claimant had been able to establish just cause due to working conditions that represented a danger to health or safety, it does not mean that the Claimant was also available under section 18 of the *Employment Insurance Act.* To be eligible for benefits, a claimant must be able to show that they are capable of and available for work and unable to obtain suitable employment.[10] As the Claimant has stated, he was unable to continue working due to medical reasons. He also stated that he needed time off to rest.

4. Is there an arguable case that the General Division made a factual error when it found that, on March 25, 2020, the Claimant confirmed the information he provided on March 20, 2020?

[38] The Claimant argues that the General Division made a factual error when it found that, on March 25, 2020, he was able to confirm the information that he provided on March 20, 2020.[11]

[39] The Claimant does not challenge the General Division's finding that he confirmed information that he had provided on the earlier date. However, he argues that the General Division overlooked the fact that he gave incomplete information on March 20, 2020. He claims

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[7] Supplementary Record of Claim, dated May 6, 2020, at GD3-39.
[8] Claimant's letter to Social Security Tribunal dated December 29, 2020, at GD2-13.
[9] Supplementary Record of Claim, dated May 5, 2020, at GD2-38.
[10] *Canada (Attorney General) v Penney*, 2005 FCA 241.
[11] General Division decision, at para. 35.

that he had been unable to provide "full details of [his] issues"[12] even on that earlier date, because of his medical condition. The Claimant did not want to share personal information, including his mental health issues, because of stigma and bias. The Claimant says that his doctor's letter proves that he was under medical care.

[40] The Claimant did not provide full details of his medical history to the General Division. There was no documentation or any records before the General Division that showed the Claimant had mental health issues. There was no evidence either to show that the Claimant was unable to share his medical history because of his health issues. The General Division did not overlook any evidence of the Claimant's mental health issues that could have explained why he left his job. Simply, the General Division did not have any of this evidence before it.

[41] The real issue here is about whether the Claimant had the chance to present his case. The Claimant was not limited to explaining why he left his job. He had many chances—other than on March 20 and 25, 2020—to explain why he left his job.

[42] I am not satisfied that the Claimant has an arguable case on this issue.

5. Is there an arguable case that the General Division made a factual error when it found that the Claimant chose to leave his job when he did?

[43] No. The Claimant does not have an arguable case that the General Division made a factual error when it found that the Claimant made a personal choice to leave his job.

[44] The Claimant argues that the General Division made a factual error at paragraph 40. The General Division wrote that the Claimant made a personal choice to leave his employment when he did.

[45] The Claimant denies that he had any choice about leaving his job. He claims that medical issues forced him to leave his work. He relies on letters from his massage therapist and doctor to prove that he had medical issues.

[46] The Claimant had medical issues which he claims forced him to leave work. But, that does not override the fact that it was the Claimant who took the initiative in severing the

[12] Claimant's Application to the Appeal Division, filed on February 11, 2021, at AD1-10.

employer-employee relationship, rather than the employer. Indeed, the General Division noted that the Claimant agreed that he voluntarily left his employment on January 31, 2020. In his request for reconsideration, he wrote that he chose to quit. He wrote that he left his job for his physical well-being and ability [*sic*] to make a plan to get a place to stay near [his] place of employment."[13]

[47] I am not satisfied that the Claimant has an arguable case that the General Division made a factual error when it found that he Claimant chose to leave his job when he did.

6. Employment Insurance sickness benefits

[48] Given his medical condition at the time, the Claimant questions whether he might have been eligible for Employment Insurance sickness benefits.

[49] I do not have any authority to decide that issue. However, the Claimant can make enquiries with the Commission or Service Canada about either converting his claim from regular to sickness benefits, or making an application for sickness benefits and seeking an antedate. He would still need to prove eligibility either way.

CONCLUSION

[50] The appeal does not have a reasonable chance of success. The Application to the Appeal Division is refused.

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	Elizabeth Stacey Kearley, for the Applicant

[13] Request for reconsideration, at GD3-31 to GD3-32.