Federal Court  Cour fédérale

Date: 20171120

Docket: T-537-17

Citation: 2017 FC 1054

Ottawa, Ontario, November 20, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

TYRONE EUVERMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Appeal Division of the Social Security Tribunal of Canada ("Appeal Division") under section 58 of the *Department of Employment and Social Development Act*, SC 2005, c 34 [DESDA], denying the Applicant leave to appeal a decision of the General Division of the Social Security Tribunal of Canada ("General

Division"), which found the Applicant was not entitled to a disability pension under paragraph 44(1)(b) of the *Canada Pension Plan*, RSC 1985, c C-8 [CPP].

II. Background

[2] The Applicant is a 43 year-old man who has experienced life-long harassment and discrimination on account of his sexual orientation. As a result, he suffers from mental health issues including anxiety and depression and feels incapable of pursuing and maintaining employment.

[3] The Applicant's history of harassment and discrimination is extensive. He was insulted, excluded and attacked while attending elementary school. He attended an alternative high school that had a strict anti-discrimination policy, but still experienced homophobic rhetoric both generally and aimed at him personally.

[4] After high school, the Applicant was employed at a BC Liquor Distribution Branch from 1995-2003. He claims that the work environment was toxic, the homophobia was "vehement and full of disdain" and he found it difficult to come to work each day. As well, he was a victim of an armed robbery while working at the liquor store. He visited a psychologist for several months as treatment for the psychological effects of the robbery. Eventually the psychologist told him he was ready to stop the treatment, but he never returned to this job.

[5] From 2003-2006, the Applicant attended the Emily Carr Institute of Art and Design. He found it difficult to attend classes due to his fear of homophobia and his many absences brought his grades down, but he was able to obtain a Bachelor of Fine Arts.

[6] For several months in 2006, the Applicant worked at an AirCare facility. He experienced discriminatory commentary, intimidation and angry directives. He became so nervous that he fell at work, injuring his ankle and back. He never returned to this job.

[7] For several months in 2006-2007, the Applicant was employed at Costco. Again, he experienced homophobic discrimination. He claims that colleagues made negative remarks towards him, entered his personal space against his explicit requests, and threw garbage towards him. His hours were reduced because of these difficulties.

[8] When Costco wanted to increase his hours, he obtained a doctor's note stating he had anxiety and depression related to difficulties at work. The note indicated that the symptoms had occurred over a period of weeks and he had stopped working because of them on September 30, 2007. He received counselling but no medication.

[9] Subsequent medical forms provided by a different doctor indicated moderate concentration impairment, but that the Applicant was capable of returning to regular duties on December 7, 2007.

[10] Later that month his employment at Costco ended. It is unclear whether he was fired or resigned, but it is clear the issue was his attendance and reluctance to work more hours.

[11] From September 2007 to April 2008, the Applicant attended the University of British Columbia's teacher-training program. This experience coincided with his negative experiences at Costco. He expressed experiencing an invasion of his personal space and homophobic comments. He was distracted from his studies, failed an initial practicum and needed help from the faculty. He never completed his studies.

[12] For several months in 2008, the Applicant was employed at Secom Plus. He claims one homophobic employee made the workplace unpleasant with incessant snide stares, effeminate gestures, intimidation and invasion of his personal space. He resigned due to this experience.

[13] The Applicant then stayed out of the workforce for some time. He focused on his art work as well as caring for his disabled uncle. His mother died suddenly in 2009 and this was a traumatic experience.

[14] In May 2011, the Applicant saw a counsellor, who admitted him to a hospital due over concerns about his mental health. After several days he was released on a promise to see a psychologist. That psychologist prescribed medication and was adamant that the Applicant find work to avoid becoming destitute.

[15] From August 2011 to August 2012, the Applicant was employed as a caregiver and community support worker, working approximately 18-30 hours per week and earning approximately $33,000 during that period. Again, he claims to have experienced homophobic commentary during that time. As well, the hospital-like environment brought back negative feelings regarding his mother's death. He resigned from his position. He claims his supervisor ignored his complaints and was not understanding of his medical issues.

[16] In September 2012, a doctor completed a medical certificate for employment insurance sickness benefits, which stated the Applicant was incapable of working until November 2012 due to anxiety and depression. Since that time, the Applicant has maintained contact with doctors and tried taking mediation. Recently, one doctor stated the Applicant required income assistance and was not able to work.

[17] On September 20, 2013, the Applicant applied for a disability pension.

[18] On December 31, 2013, Service Canada found the Applicant was not eligible for a disability pension. The Applicant was required to show he was disabled in December 2008 and continuously to the present. There was insufficient evidence to show he was disabled in December 2008 and his employment in 2011-2012 showed he had not been continuously disabled.

[19] On April 3, 2014, at the request of the Applicant, Service Canada reconsidered its decision; however, it found he was not eligible for disability benefits for the same reasons stated in the initial decision.

[20] On July 7, 2016, the General Division denied the Applicant's appeal of Service Canada's decision. It found that the Applicant was not disabled as of December 2008 for two reasons. First, in December 2007, a physician determined he was fit to return to work and there was no evidence anything changed between then and December 2008. Second, the Applicant was employed in 2010 and 2011 for a significant amount of time and remuneration.

[21] On March 14, 2017, the Appeal Division denied the Applicant leave to appeal the decision of the General Division. It found the Applicant had not identified any grounds on which the appeal had a reasonable chance of success. Essentially, the Applicant was rearguing the same case, but the Appeal Division had no mandate to rehear disability claims on their merits.

[22] On April 12, 2017, the Applicant applied for judicial review of the Appeal Division's decision.

A. *Preliminary Issue*

[23] The Respondent submits that Exhibits C, D and E in the Applicant's affidavit are inadmissible because they are not contained in the certified tribunal record and therefore were not before the Appeal Division when its decision was made. I agree. These materials and

submissions based on them are not admissible and will be disregarded (*Flaig v Canada (Attorney General)*, 2017 FC 531 at para 28).

III. Issue

[24] Is the Appeal Division's decision to deny leave to appeal reasonable?

IV. Standard of Review

[25] Decisions of the Appeal Division to grant or deny leave to appeal are reviewable on the standard of reasonableness (*Tracey v Canada (Attorney General)*, 2015 FC 1300 at paras 12-23). Such decisions are owed deference and the Court will only interfere with them if they fall outside the range of possible, acceptable outcomes having regard to the facts and law.

V. Analysis

[26] The Applicant essentially relies on the same information that was put before the Appeal Division and argues that he meets the requirements for a disability pension.

[27] The Respondent submits that based on the information before it, the Appeal Division could reasonably refuse leave to appeal the General Division's determination that the Applicant did not qualify for a disability pension.

[28] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for a disability pension. An applicant must:

- be under 65 years of age;
- not be in receipt of a retirement pension;
- be disabled; and
- have made sufficient contributions to the CPP during the minimum qualifying period ("MQP").

[29] At the time of his application, the Applicant had not made sufficient contributions to the CPP and therefore was considered a late applicant under subparagraph 44(1)(b)(ii) of the CPP. This required him show that he was disabled when he previously met the contribution requirements and continuously to the present.

[30] It was not disputed that December 31, 2008 was the date the Applicant previously met the CPP contribution requirements; therefore, the Applicant was required to show he was disabled as of December 31, 2008, and continuously to the present.

[31] Paragraph 42(2)(a) of the CPP defines "disabled" as having a "severe and prolonged mental or physical disability". "Severe" means "incapable regularly of pursuing any substantial gainful occupation". "Prolonged" means "likely to be long continued and of indefinite duration or is likely to result in death".

[32] The Federal Court of Appeal in *Klabouch v Canada (Social Development)*, 2008 FCA 33, at paragraphs 13-17, stated three principles applicable to a determination of severity. First, it is the applicant's capacity to work and not the diagnosis of his disease that determines the severity of the disability. Second, it is not premised upon an applicant's inability to perform his regular

job but on his inability to perform any substantially gainful occupation. Third, an applicant must adduce not only medical evidence in support of his claim, but also evidence of his efforts to obtain work and to manage his medical condition.

[33] The severity requirement must be applied in a "real world" context and a decision-maker should consider the particular circumstances of the applicant, such as age, education level, language proficiency and past work and life experience (*Villani v Canada (Attorney General)*, 2001 FCA 248 at paras 38-39).

[34] Subsections 58(1) and (2) of the DESDA provides that leave to appeal a decision of the General Division may be granted only where a claimant satisfies the Appeal Division has a "reasonable chance of success" on one of three grounds:

- A breach of natural justice;
- An error of law; or
- An erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[35] In December 2007, the Applicant's doctor declared the Applicant capable of returning to work. During the following year the Applicant struggled in his education, but he also worked for several months before resigning from his job. Furthermore, he provided no medical evidence to show the doctor's declaration was incorrect or his condition had changed.

[36] As stated above, in 2011 and 2012 the Applicant worked for several months at two different caregiving facilities, held down one of those jobs for almost one year and earned over

$30,000. The General Division found this indicated a regular capacity for substantially gainful employment and that his condition was not prolonged.

[37] The Applicant has not identified any reasons his appeal had a reasonable chance of success on any of the enumerated grounds in section 58 of the DESDA. Although a doctor recently stated he is incapable of working due to anxiety and depression, that diagnosis came several years subsequent to the qualifying date of December 2008. It was considered by the General Division and the Appeal Division in refusing leave. There was insufficient medical evidence that the Applicant was unable to work in December 2008, the minimum qualifying period, and no basis to reasonably argue that his earnings in 2011 and 2012 should not be considered as evidence of his ability to work (*Monk v Canada (Attorney General)*, 2010 FC 48 at para 10). While I have sympathy for the Applicant's history of chronic homophobic harassment, it is not the role of this Court to re-weigh the evidence and make a new determination on the merits.

[38] The Appeal Division found the General Division meaningfully assessed the Applicant's history, medical conditions and capacity for employment. That finding is supported by the record – the General Division considered the Applicant's circumstances at great length.

[39] The Appeal Division also reasonably found that the General Division provided defensible reasons supporting its conclusion that the Applicant was not disabled in December 2008. The Appeal Division's decision is detailed and well-reasoned and I find that there is no reason to interfere with that decision.

JUDGMENT in T-537-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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