

Citation: *Canada Employment Insurance Commission v. J. H.*, 2015 SSTAD 768

Date: June 19, 2015

File number: AD-13-1167

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

J. H.

Respondent

Decision by: Shu-Tai Cheng, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal of Canada (Tribunal) for leave to appeal the decision of the Board of Referees (Board) issued on May 28, 2013. The Board allowed the claimant's appeal where the Commission had imposed a disentitlement pursuant to subsections 29 and 30 of the *Employment Insurance Act* (Act). The Commission had determined that the claimant had lost his employment by reason of his own misconduct.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on June 6, 2013.

ISSUE

[3] The Tribunal must decide if the appeal has a reasonable chance of success.

LEGISLATIVE PROVISIONS

[4] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESD Act), "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and "the Appeal Division must either grant or refuse leave to appeal".

[5] Subsection 58(2) of the DESD Act provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[6] Subsection 58(1) of the DESD Act states that the only grounds of appeal are 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.

[7] For our purposes, the decision of the Board is considered to be a decision of the General Division.

SUBMISSIONS

[8] In support of the Application, the Applicant referred to subparagraphs (b) and (c) of subsection 58(1) of the DESD Act. In particular, the Application asserts that the Board made an error in law and in fact and law in allowing the appeal.

[9] The reasons stated for the appeal are:

- (a) The Commission disqualified the claimant, finding that his job abandonment equaled misconduct;
- (b) The Commission also argued that the situation could be viewed as voluntary leaving without just cause;
- (c) A disqualification would apply in either instance; and
- (d) The Board allowed the appeal finding that the claimant was not dismissed for misconduct and that he voluntarily left his employment. The Board did not, however, apply the legal test for voluntarily leaving employment.

ANALYSIS

[10] The Applicant needs to satisfy me that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[11] The Board's decision, under the heading "Finding of Fact, Application of the Law", cites *Tucker* (A-381-85) and the test for misconduct set out by the Federal Court of Appeal. The Board found that the claimant had not returned to work at the end of his leave period, that he had quit his job without providing notice to his employer and that this was by the

claimant's own choice. The Board concluded that the claimant's "actions in making a personal choice in this case cannot be deemed as misconduct".

[12] On the issue of voluntary leaving without just cause, the Board stated: "As to whether or not the claimant had just cause for quitting his job was not considered an issue by the Board nor was it presented by the Commission as an issue in this case."

[13] Neither the claimant nor the Commission was present at the Board hearing. The Commission had, however, filed written representations. The Board's decision notes that it reviewed the docket, which included the Commissions' representations. Those representations stated:

In the situation at hand the Commission submits that the facts on file appear unclear or contradictory as to whether the issue is actually a voluntary separation without just cause or a dismissal. [at page 3]

The Commission submits that if it is to be considered a dismissal, the claimant caused his own unemployment when he failed to report for his flight to work. If it is considered to be a voluntary leaving, the claimant has not shown just cause in leaving his job as he did not exhausted [sic] all reasonable alternatives. Either way; a quit or dismissed the claimant is disqualified under Section 29 of the act. [at page 5]

[14] Despite these representations, the Board determined that just cause was "not presented by the Commission as an issue in this case".

[15] In addition, the Federal Court of Appeal in *Easson* (A-1598-92) held that where two distinct notions are dealt with together in the same provision of the Act or Regulations, it could be argued that the issue is not the one contained in each component rather the overall purpose of the provision. The Court confirmed that the Board of Referees did not deviate from the subject matter when it considered the case to be one of a voluntary separation without just cause as opposed to a dismissal for misconduct.

[16] The Applicant, in its Application, also relies on *Canada v. Desson*, 2004 FCA 303, wherein the Federal Court of Appeal stated:

The Board saw the issue of disqualification as one based on misconduct while the Umpire defined it in terms of just cause for quitting the employment. We wish to reiterate that it does not matter whether the employer or the employee took the initiative

in severing the employment relationship where the employment is terminated by necessity and a reprehensible act is the real cause of that termination ... The rationale is simple: the legal issue at stake is a disqualification under subsection 30(1) of the Act and a finding to that effect can be based on any of the two grounds for disqualification stated in that subsection as long as it is supported by the evidence.

[17] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant asserts an error of law and an error of fact and law, refers to the jurisprudence on how to consider disqualification based on misconduct or voluntary leaving without just cause in the same matter, and provides an explanation on how the Board is said to have failed to apply the legal test for voluntary leaving.

[18] Considering the arguments raised by the Applicant and my review of the Board decision and docket, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[19] The application for leave to appeal is granted.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[21] I invite the parties to make submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division