Citation: ***Canada Employment Insurance Commission v. T. E.*****, 2015 SSTAD 835**

Date: July 2, 2015

File number: AD-13-1158

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Applicant

and

T. E.

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 April 11, 2013. The Board allowed the claimant's appeal where the Commission had imposed an indefinite disqualification pursuant to subsections 29 and 30 of the *Employment Insurance Act* (EI 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 April 22, 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 claimant was a casual employee from April 13, 2011 to August 31, 2012;

(b) He was the subject of a criminal investigation and was convicted of charges on September 5, 2012, and he sent a letter of resignation to the employer on September 11, 2012;

(c) The employer had a policy that no staff member can work if convicted of a criminal offence, and the claimant was aware of the policy;

(d) The Board allowed the appeal giving the claimant the benefit of the doubt that he had informed the employer of his pending charges at the time of hiring;

(e) The Board erred in fact and law when it only considered whether the claimant had informed the employer of the pending charges and ignored the legal test for misconduct; and

(f) The claimant lost his employment due to his own misconduct. That he quit before his was fired does not provide relief from disqualification under the EI Act.

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 test is stated as: whether the act complained of was willful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance.

[12] The Board found that the claimant did report the charges to his supervisor and that his supervisor did not communicate this to the person responsible for hiring. The Board concluded that "based on the evidence provided at the hearing, the Board finds that misconduct has not been proven." In addition, the Board cited section 49(2) of the EI Act for the proposition that a claimant is to be given the benefit of the doubt when the evidence on each side is equally balanced, which the Board found was the case in this instance. The Board also cited a Federal Court of Appeal decision stating that misconduct can only be made on the basis of clear evidence, and it is for the Commission to convince the Board of the presence of such evidence. The Board found that "on a balance of probabilities misconduct has not been proven according to the Employment Insurance Act and related jurisprudence".

[13] The claimant and a representative of the employer were present at the Board Hearing. The Commission was not, but it had filed written representations. The Board's decision notes that it reviewed the Commissions' decision letter and its representations.

[14] 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 and provides an explanation on how the Board is said to have failed to apply the legal test for misconduct. In particular, the Applicant argues that the employer had a policy that no staff member can work if convicted of a criminal offence, the claimant was aware of the policy,

the conviction resulted in the claimant failing to meet a condition of employment, and the fact that he quit before he was fired does not provide relief from disqualification.

[15] 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

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

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

[18] 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