

Citation: *Canada Employment Insurance Commission v. J. H.*, 2015 SSTAD 1047

Date: September 4, 2015

File number: AD-13-1167

APPEAL DIVISION

Between:

Canada Employment Insurance Commission

Appellant

and

J. H.

Respondent

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

Decided on the record on September 4, 2015

REASONS AND DECISION

INTRODUCTION

[1] On June 19, 2015, the Appeal Division of the Social Security Tribunal of Canada (Tribunal) granted leave to appeal on the grounds that there may have been an error of law or an error of fact and law in the decision of the Board of Referees, issued on May 28, 2013.

[2] The Tribunal requested the parties' submissions on the mode of hearing, whether one is appropriate and, also, on the merits of the appeal.

[3] The Respondent Commission filed submissions which sets out its arguments on the merits of the appeal and requested that the Appeal Division (AD) of the Tribunal either return the matter back to the General Division (GD) of the Tribunal for redetermination or give the decision that the Board should have given. The Respondent claimant did not file submissions.

ISSUE

[4] The Tribunal must decide whether to dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

LAW AND ANALYSIS

[5] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

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

[7] Leave to appeal was granted on the basis that the Appellant had set out reasons which fall into the enumerated grounds of appeal and that at least one of the reasons had a reasonable chance of success, specifically, under paragraph 58(1)(b) and (c) of the DESD Act.

[8] The Commission argues that the Respondent was terminated from his job due to job abandonment, that these actions resulted in his job loss, and that he is subject to disqualification under sections 29 and 30 of the *Employment Insurance Act* (EI Act). It submits that the applicable standard of review for questions of law is correctness and for questions of mixed fact and law is reasonableness. It asserts that the Board erred in law and in fact and law:

- a) when it determined that the claimant had not been dismissed but had voluntarily left his employment and then failed to apply the legal test to the issue of voluntary leaving and just cause; and
- b) when it allowed the appeal.

The Appellant argues that a proper application of the legal test to the facts in this case leads to the reasonable conclusion that the claimant had alternatives to not returning to his employer as scheduled.

[9] As previously determined by the Federal Court of Appeal in *Canada (AG) v. Jewett*, 2013 FCA 243, *Chaulk v. Canada (AG)*, 2012 FCA 190 and other cases, the standard of review for questions of law and jurisdiction in employment insurance appeals is that of correctness, while the standard of review for questions of fact and mixed fact and law is reasonableness.

[10] In the decision granting leave to appeal, I noted the following:

- a) The Board set out the test for misconduct, found that the claimant had quit his job by his own choice, and concluded that the claimant's "actions in making a personal choice in this case cannot be deemed as misconduct";
- b) 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.";
- c) However, the Commission had made written representations 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. It made submissions regarding both issues;
- d) Despite these representations, the Board determined that just cause was "not presented by the Commission as an issue in this case"; and
- e) Federal Court of Appeal jurisprudence has held that a finding of disqualification under subsection 30(1) of the EI Act can be based on any of the two grounds for disqualification stated in that subsection (voluntary separation without just cause or a dismissal) as long as it is supported by the evidence.

[11] The Board failed to identify the test on the issue of just cause. This is an error of law and reviewable under the correctness standard. Having failed to consider the issue of just cause altogether, the Board also did not make sufficient findings of fact in relation to this issue.

[12] Section 59(1) of the DESD Act sets out the powers of the Appeal Division. It states:

The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[13] Considering the submissions of the parties, my review of the Board's decision and the appeal file, I allow the appeal. Because this matter may require the parties to present evidence and will require a trier of fact to make findings of fact, a hearing before the General Division is the appropriate form of hearing.

CONCLUSION

[14] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng
Member, Appeal Division