Citation: ***M. S. v. Canada Employment Insurance Commission*****, 2015 SSTAD 1408**

Date: December 8, 2015

File number: AD-15-66

APPEAL DIVISION

Between:

M. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

REASONS AND DECISION

INTRODUCTION

[1] On December 15, 2014, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on his disqualification from receiving benefits. The Canada Employment Insurance Commission (Commission) had determined that the Applicant had lost his employment due to misconduct, while the Applicant maintained that he was wrongfully dismissed (in that his employer did not first followed a progressive discipline system before dismissing him).

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 6, 2015, outside of the 30 day limit.

[3] The Applicant was asked, by letter dated October 14, 2015, to provide a written explanation addressing all of the following by November 13, 2015:

a) Whether and how the Applicant made a continuing effort to pursue an appeal;

b) A detailed explanation for the delay in filing the Application for Leave to Appeal;

c) The merits of the case, and the grounds upon which the Applicant believes there is a reasonable chance of success on the substantive issues; and

d) Whether there is any prejudice to other interested parties if an extension of time is allowed.

[4] The same letter also stated:

In addition, the Applicant has filed a letter with a narrative from his perspective. Please provide details on the following:

a) What specific errors in the General Division decision is the Applicant relying upon? (Provide paragraph number and describe the exact error asserted.)

b) There is reference to a grievance filed which challenges the Applicant's termination. Certain hearing dates were mentioned (letter of July 25, 2014). Has there been a decision rendered or an agreement reached on that grievance? Please provide details.

c) What is the effect of this grievance on the appeal before the Tribunal?

This letter warned: "Please note that if you do not provide submissions by the specified date, the Tribunal Member may make a decision based on the information already on file." The other parties were advised that they may also make submissions.

[5] The Applicant did not respond. The Respondent did not make submissions. The employer did not request to be added as a party.

ISSUES

[6] In order for the Application to be considered, an extension of time to apply for leave to appeal to the AD must be granted.

[7] Then, the AD must decide if the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[8] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant. Further, the AD may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

[9] According to subsections 56(1) and 58(3) of the 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."

[10] 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."

[11] 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.

Extension of Time

[12] The Application was date stamped February 6, 2015. The GD decision was sent to the Applicant under cover of a letter dated December 15, 2014.

[13] The Applicant did not state on what day he received the GD decision.

[14] Under paragraph 19(1)(a) of the *Social Security Tribunal Regulations*, I deem that the decision of the GD was communicated to the Applicant 10 days after the day on which it was mailed to him on December 15, 2014. Accordingly, I find that the decision was communicated to the Applicant on December 29, 2014, taking into consideration the statutory holidays falling within the 10 day period.

[15] The Application was, therefore, filed 39 days after it was communicated to the Applicant, 9 days after the 30 day limit.

[16] The factors which the Tribunal considers and weighs in determining whether to extend the time period beyond the 30 day limit within which an applicant is required to file his or her application for leave to appeal are as follows:

(a) Whether there is a continuing intention to pursue the application or appeal;

(b) Whether the matter discloses an arguable case;

(c) Whether there is a reasonable explanation for the delay; and

(d) Whether there is prejudice to the other party in allowing the extension.

[17] In *Canada (Attorney General) v. Larkman*, 2012 FCA 204 (CanLII), the Federal Court of Appeal (FCA) held that the overriding consideration is that the interests of justice be served, but it also held that not all of the four questions relevant to the exercise of discretion to allow an extension of time need to be resolved in an applicant's favour.

[18] In *X*, 2014 FCA 249, the FCA set out the test, as follows, in paragraph 26:

> In deciding whether to grant an extension of time to file a notice of appeal, the overriding consideration is whether the interests of justice favour granting the extension. Relevant factors to consider are whether:
>
> (a) there is an arguable case on appeal;
>
> (b) special circumstances justify the delay in filing the notice of appeal;
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> (c) the delay is excessive; and
>
> (d) the respondent will be prejudiced if the extension is granted.

[19] In *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 4, the Federal Court of Appeal found that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success.

[20] Given the short length of the delay and in the interests of justice, I grant an extension of time for the filing of the Application.

Leave to Appeal

[21] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[22] The Applicant makes a number of submissions as to why his appeal should be allowed. His main argument is that his case is one of wrongful dismissal, in that his employer did not post warnings that employees were under camera surveillance and he was denied progressive discipline. The Applicant and his Representative were present at the GD teleconference hearing; the Applicant gave evidence and made submissions.

[23] The Application does not make reference to subsection 58(1) of the DESD Act, and it is not clear to me how the GD is alleged to have erred. The Applicant was asked to provide details on whether the matter has a reasonable chance of success on the substantive issues, what specific errors of the GD decision are being asserted (with paragraph number and description of exact error) and information about a grievance mentioned in the Application. The Applicant did not respond to this request.

[24] The issue before the GD was the Applicant's disqualification due to loss of employment by reason of misconduct.

[25] During the GD hearing, the Applicant advanced similar arguments to those in the Application, namely, that employees were not aware that they were under camera surveillance and that he was denied progressive discipline.

[26] The GD stated the correct legal test for misconduct at paragraphs [28] to [30] of its decision. At paragraph [30], the decision notes:

> [30] The Federal Court of Appeal in *Lemire* (2010 FCA 314) upheld the principle that the claimant's conduct was wilful and that the claimant knew that this conduct could lead to serious disciplinary consequences. In fact, he expected to be suspended. That the disciplinary sanction was harsher than the one the claimant expected does not mean that his conduct was not misconduct. The GD Member did mention wrongful dismissal in his decision and correctly stated that the question is not whether the employer's conduct constituted unjust (wrongful) dismissal but whether the claimant's behaviour amounted to misconduct which resulted in the loss of his employment. The GD found that the Applicant had lost his employment as a direct result of his own misconduct.

It continues with the following findings and conclusion:

> [31] The Appellant took several very long breaks and watched television over a 55 day period in which he was caught on a camera which was installed in the room in which he took these breaks. Some of these breaks were up to 3 hours in length.
>
> [32] The Appellant has been with the employer for over 23 years. On the balance of probabilities, he ought to have known that this type of behaviour is not acceptable.
>
> [33] On the balance of probabilities, the Appellant ought to have known that this behaviour which led to his dismissal was conscious, deliberate, or intentional. He knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that as a result, dismissal was a real possibility.

> [34] The Tribunal finds that there was a causal link between the behaviour, that is, the taking of several abnormally long breaks, and the dismissal.
>
> [35] The Tribunal finds that the conduct of the Appellant was misconduct according to the *Act.*
>
> [36] The Appellant thought that he might be suspended for his behaviour. The fact that the consequence was more severe than he believed it would be, does not mitigate the fact that his actions are misconduct according to the *Act*.

[27] The Application refers to a grievance filed against the employer. The Applicant was asked by the Tribunal to provide further details about the grievance but did not respond to this request.

[28] Further, the Applicant does not state how the GD is alleged to have erred other than repeating his position, that he was wrongfully dismissed. In essence, the Applicant seeks to reargue his case before the AD.

[29] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo*. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[30] I have read and carefully considered the GD's decision and the record. There is no suggestion that the GD failed to observe a principle of natural justice or that it otherwise acted beyond or refused to exercise its jurisdiction in coming to its decision. The Applicant has not identified any errors in law or any erroneous findings of fact which the GD may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[31] In order to have a reasonable chance of success, the Applicant must explain how at least one reviewable error has been made by the GD. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[32] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division