Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *Y. H. v. Canada Employment Insurance Commission*, 2016 SSTADEI 7

Date: January 12, 2016

File number: AD-15-1218

APPEAL DIVISION

Between:

Y. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 28, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on a disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). The Canada Employment Insurance Commission (Commission) had determined that the Applicant lost her employment by reason of her own misconduct.

[2] The GD decision was sent to the Applicant under cover of a letter dated September 28, 2015. It is unclear on what date the Applicant received the GD decision.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on November 9, 2015.

[4] On December 2, 2015, the Tribunal sent a letter to the Applicant with a request to provide missing information. In particular, the Applicant was asked to provide reasons for the appeal and to explain why the AD should give her permission to file an appeal. The letter also stated:

> The Tribunal must receive the missing information identified above in writing together with any submissions you wish to file by January 4, 2016. Please keep in mind, if insufficient detail is submitted, the Member assigned to the file may decide the matter in dispute on the basis of the material filed as of January 4, 2016, without further notice.

ISSUES

[5] First, the AD must determine whether the Application was filed within the 30-day limit.

[6] If the Application was filed late, 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.

Communication of GD Decision

[12] The Application was date stamped and treated as complete on November 9, 2015.

[13] The GD decision was sent to the Applicant under cover of a letter dated September 28, 2015. The Application states that the Applicant received the decision on November 9,

2015. However, this appears to be an error, as November 9, 2015 is the date that the Application was dated, signed and filed by the Applicant.

[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 her on September 28, 2015. Accordingly, I find that the decision was communicated to the Applicant on October 8, 2015.

[15] Thirty (30) days from October 8, 2015 is November 7, 2015 which was a Saturday. Therefore, the 30-day period ended on November 9, 2015, which is the day that the Application was filed. As such, the Application was filed within the 30-day time limit.

Application for Leave to Appeal

[16] The Application states as reasons for the appeal that:

a) The Applicant was treated unfairly because she was not given the employer's policy to read and it was not explained to her;

b) The Applicant and another employer had made a mistake in applying a discount to the Applicant's purchase of clearance items; however, the Applicant was the customer, and the way the discount was applied was not her decision, it was the other employee's decision acting as the cashier;

c) Of the three written notices that the employer relied on to dismiss the Applicant, two of them were from a previous period of employment with the same employer; she had a clean record in her new employment period; the discounted transaction was the only notice in the current employment period, and it was unfair to terminate her based on one notice; and

d) The Applicant was asked to sign a paper, relating to this incident, without reading it or having it explained to her, and English is not her first language.

[17] 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 what specific errors in the GD decision are being asserted (with paragraph number and description of exact error). The Applicant did not respond to this request.

[18] The issue before the GD was a disqualification from EI benefits due to misconduct.

[19] During the GD hearing, the Applicant advanced similar arguments to those in the Application. The Applicant's evidence was included, in detail, in the GD decision on pages 3 to 7. The Applicant's submissions before the GD were summarized on page 7 and included each of the points written in the Application and noted in paragraph [16] above.

[20] The GD stated the correct legislative basis and legal tests for misconduct at paragraphs [4], [24] to [26], and [33] to [35] of its decision.

[21] The Applicant does not state how the GD is alleged to have erred other than repeating her evidence and submissions before the GD. In essence, the Applicant seeks to reargue her case before the AD.

[22] 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.

[23] 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.

[24] 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

[25] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division