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

Citation: *M. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 20

Date: January 18, 2016

File numbers: AD-15-1271
AD-15-1272
AD-15-1273
AD-15-1274

APPEAL DIVISION

Between:

M. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] On October 15, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) decided the Applicant's four (4) appeals on: disentitlement to benefits, monetary penalty, violation, misconduct, disqualification from benefits, and allocation of earnings pursuant to the *Employment Insurance Act* (EI Act) and the *Employment Insurance Regulations* (EI Regulations). The Applicant sought reconsideration with the Canada Employment Insurance Commission (Commission) without success.

[2] The Applicant received the GD decision on October 27, 2015 and filed one application for leave to appeal (Application) for all four matters with the Appeal Division (AD) of the Tribunal on November 20, 2015, within the 30-day time limit.

ISSUES

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

LAW AND ANALYSIS

[4] 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.

[5] 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."

[6] 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."

[7] 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.

[8] The Application does not state on which paragraph of subsection 58(1) of the DESD Act the Applicant relies. Rather, it states that the Applicant is appealing because:

a) The GD decision is "wrong by law" and "unethical in the highest degree";

b) The record of employment (ROE) was issued without his knowledge, and the reason given of "quit" was changed to "fired";

c) His truck was in disrepair and he could not make it to X for a job, and he called human resources to explain; this was not a "no show" to a posting; he did contact the employer;

d) He did not quit and was not fired, and he was in constant contact with the employer (except for the period that he was incarcerated);

e) He was allowed to file for employment insurance, he did not know that a ROE had been issued and that he should not keep filing; and

f) The GD decision found that he quit or left his employment because he knew he was going to be incarcerated from July 13, 2012 to July 31, 2012, when this was false; he did not know he would be incarcerated.

The Applicant appears to be relying on paragraphs (a), (b) and (c) of subsection 58(1) of the DESD Act.

[9] 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.

Joining of Applications for Leave to Appeal

[10] There were many issues before the GD in the four appeals filed by the Applicant. The GD dealt with all four appeals jointly because the appeals shared common questions of fact and no injustice was likely to be caused by the parties. One written decision was issued to cover all four appeals.

[11] Likewise, the AD may, on its own initiative or if a request is filed by a party, deal with two or more appeals or applications jointly. Since the Application relates to four applications for leave to appeal that deal with common questions of fact and law, relate to the one GD decision, and no injustice is likely to be caused to any of the parties, I am joining the four applications for leave to appeal in accordance with section 13 of the *Social Security Tribunal Regulations*.

GD Decision

[12] The GD referred to the relevant legislative provisions and applicable case law it its decision, reviewed the evidence in the file and testimony given at the hearing, and it found that:

a) The Applicant's inconsistent statements case doubt about his overall credibility;

b) The Applicant was not available for work during his periods of incarceration (May 6 to 21, 2012, July 13, 2012, the week of July 15, 2012, the week starting July 22, 2012, and three days in the week starting on July 29, 2012);

c) The Applicant was disentitled by reason of section 37(a) of the Act for the following dates: July 13, 2012, the week starting July 15, 2012, the week starting July 22, 2012, and three days in the week starting July 29, 2012;

d) The Applicant was not available during the period of October 1-5, 2012 and was disentitled by reason of subsection 18(a) of the Act;

e) The Applicant made false statements, but there were mitigating circumstances taken into consideration by the Commission;

f) The Commission considered all the relevant circumstances in reducing the monetary penalty to a warning penalty, and the Tribunal cannot waive or alter the warning penalty;

g) The Commission acted within its discretion to remove the violation as all mitigating circumstances and prior offenses were considered, and the Tribunal did not have the authority to alter the Commission's overturn violation;

h) The Applicant was dismissed on July 7, 2012 because he did not show up for work and he did not contact the employer;

i) The Applicant lost his employment because of misconduct (absenteeism without notification);

j) The disqualification of benefits begins on July 8, 2012;

k) The Applicant refused work that was offered in the period of October 1 to 5, 2012 but the Tribunal accepted that the refusal was justified because he was unable to make suitable travel arrangements; therefore, the appeal on disentitlement during that period, imposed pursuant to section 32 of the Act, was allowed;

l) The monies reported by the employer as wages and vacation pay are earnings and they are accurate;

m) The monies reported in June and July 2012 were correctly allocated, and the vacation pay was correctly allocated; and

n) The Tribunal does not have any authority or discretion to waive or write-off amounts related to the Applicant's CRA income tax refund.

[13] The GD correctly referred to the relevant legislative provisions on pages 4 to 14, 31 and 32 of its decision. It also correctly identified the applicable case law in paragraphs [104], [110],

[111], [115], [124], [132], [136], [141], [142], [149], [150], [157], [161], [182] to [185], [191] to [193], [212] and [222] of its decision.

[14] The Applicant attended the GD hearing and testified.

[15] The GD decision summarizes the Applicant's evidence and submissions before the GD, and they include most of the arguments raised in the Application.

Reasons for Appeal

[16] The Applicant's reasons for appeal, as summarized in paragraph [8] b) to e), above, are an attempt to reargue his case before the AD.

[17] As for the reason for appeal in paragraph [8] f) – that the GD decision found that he quit or left his employment because he knew he was going to be incarcerated from July 13, 2012 to July 31, 2012, when this was false; he did not know he would be incarcerated – the Applicant does not identify where in the 53 page GD decision this finding was made. The GD found that the Applicant:

a) "…should have known that further absenteeism without notification or permission could result in his dismissal. The Appellant's own actions caused his arrest, and subsequent detention in an X city cell. The Appellant lost his employment by reason of his own misconduct with the meaning of the Act": paragraph [187];

b) " … violation of his parole caused his absenteeism without notification, and as a result the Appellant ought to have known that his absence would be a breach of the loyalty owed to the Employer": paragraph [197]; and

c) "… incarceration for a violation of his parole caused his absenteeism and his inability to contact his Employer. The Appellant ought to have known that a breach of his violation, absenteeism without notification is conduct that would lead to his dismissal": paragraph [234].

[18] The Applicant asserts as an error of fact the GD's finding that he quit or left his employment because he knew he was going to be incarcerated from July 13, 2012 to July 31, 2012. However, the GD did not find this as a fact.

[19] In addition, not every erroneous finding of fact will fall within the terms of paragraph 58(1)(c) of the DESD Act. For example, an erroneous finding of fact upon which the GD does not base its decision would not be caught, nor would one that is not made in a perverse or capricious manner or without regard for the material before the Tribunal.

[20] The reason for appeal in paragraph [8] a) above – that the GD decision is "wrong by law" and "unethical" – is not supported by the submissions set out in the Application.

[21] 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.

[22] 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.

[23] 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. While the Applicant has asserted errors and his assertions which have been duly considered, they do not meet the threshold of having a reasonable chance of success on appeal.

[24] After review, I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[25] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division