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

**Citation: *S. H. v. Canada Employment Insurance Commission*, 2016 SSTADEI 24**

**Date: January 19, 2016**

**File number: AD-15-1301**

**APPEAL DIVISION**

**Between:**

**S. H.**

**Applicant**

**and**

**Canada Employment Insurance Commission**

**Respondent**

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

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] On October 26, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on an indefinite disqualification imposed pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). The Applicant sought reconsideration with the Canada Employment Insurance Commission (Commission) without success.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on December 3, 2015. The Application states that the Applicant received the GD decision on November 2, 2015.

## ISSUES

[3] Whether the Application was filed within the 30-day time limit.

[4] If it was not, whether an extension of time should be granted.

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

## LAW AND ANALYSIS

[6] 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.

### Was the Application Filed within 30 days?

[7] The Application was date stamped and treated as complete on December 3, 2015.

[8] The GD decision was sent to the Applicant under cover of a letter dated October 26, 2015. The Application states that the Applicant received the decision on November 2, 2015.

[9] Thirty (30) days from November 2, 2015 is December 2, 2015. Therefore, the 30-day period ended on December 2, 2015. The Application was filed on December 3, 2015. As such, the Application was not filed within the 30-day time limit. It was one day late.

[10] In order for the Application to be considered, an extension of time will be needed.

[11] In *X*, 2014 FCA 249, the Federal Court of Appeal set out the test when considering whether to allow an extension of time, 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;
>
> (c) the delay is excessive; and
>
> (d) the respondent will be prejudiced if the extension is granted.

[12] Since the delay was only one day, the Tribunal did not require the Applicant to request an extension of time in writing.

[13] 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**

[14] 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."

[15] 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."

[16] 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.

[17] The Application does not state on which paragraph of 58(1) of the DESD Act the Applicant relies. Rather, it includes a narrative that repeats the factual assertions that the Applicant made before the GD. It also points to paragraph [26] of the GD decision and asserts that this is a false accusation.

[18] 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.

[19] The issues before the GD were whether the Applicant voluntarily left her employment, whether she had just cause for leaving, and whether she established that there was no reasonable alternative to leaving, pursuant to sections 29 and 30 of the EI Act.

[20] The GD referred to the relevant legislative provisions and applicable case law, and it found that:

a) The Applicant voluntarily left her employment: paragraph [24];

b) The reasons provided by the Applicant for leaving her employment do not amount to just cause for leaving: paragraph [34]; and

c) There were reasonable alternatives to leaving, including:

   i) To discuss her health issues and possible solutions with her employer;

ii) To look for and obtain work prior to quitting; and

iii) To use a leave of absence or obtain a medical note from her doctor advising she should quit before doing so: paragraph [35].

[21] The GD correctly referred to the relevant legislative provisions and applicable case law in paragraphs [6] to [9], [21], [22], [29], [37] and [38] of its decision.

[22] The GD decision summarizes the Applicant's evidence and submissions before the GD, which are similar to the arguments in the Application. These include the Applicant's assertions that she was forced to leave her job because she had allergies in the workplace, was being harassed at work, was unfairly treated by her manager, and also that she was promised a new job elsewhere. The Applicant's evidence and submissions on these points were included in the GD decision at pages 5 to 9.

[23] As such, the Applicant's reasons for appeal, for the most part, are an attempt to reargue her case before the AD.

[24] As for the "false accusation" which the Applicant refers to in paragraph [26] of the GD decision – that a reasonable alternative would have been to request a transfer to another department or location – which is false because she did try to work in a different department and she was still getting her allergies, this reason for appeal appears to be an assertion that there was an erroneous finding by the GD.

[25] Paragraph [26] of the GD decision states:

> [26] As the Respondent submitted, a reasonable alternative would have been to request a transfer to another department or location if she was having issues with the manager or her allergies, or secured new employment prior to leaving.

This paragraph summarises submissions made by the Commission on two possible alternatives to leaving: (1) transfer to another department or location, and (2) securing new employment prior to leaving.

[26] Paragraph [27] of the GD decision discussed the Applicant's submissions on an assurance of new employment and concluded that the delay of about four months between

periods of employment does not constitute reasonable assurance of new employment in the immediate future. This relates to the alternative of securing new employment prior to leaving.

[27] The GD found, at paragraphs [34] and [35] of its decision, that:

> [34] The Tribunal finds that all the reason the Appellant provided for leaving her employment do not amount to just cause for leaving one's employment.
>
> [35] The Tribunal is of the opinion that the Appellant did not exhaust all reasonable alternatives prior to leaving. She could have looked for and obtain work prior to quitting her employment if she did not like the environment that she was working in. More importantly, she could have brought up her concerns with her employer and the Health and Safety representative and discuss possible solutions. She could have also used a leave of absence or obtain a medical note from her doctor advising that she should quit her job due to a medical reason.

[28] Therefore, the GD did not make a finding that a reasonable alternative would have been to request a transfer to another department or location. The GD's finding on reasonable alternative is clearly stated in paragraph [35] of its decision.

[29] 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.

[30] The GD did not base its decision on a finding that a reasonable alternative would have been to request a transfer to another department or location. Its findings on a reasonable alternative were stated in paragraph [35] of the decision.

[31] 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.

[32] 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.

[33] 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.

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

**CONCLUSION**

[35] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division