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

Citation: *A. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 52

Date: February 1, 2016

File number: AD-15-1336

APPEAL DIVISION

Between:

A. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] On November 4, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing by teleconference, after which it determined that the claimant voluntarily left his employment without just cause within the meaning of the *Employment Insurance Act* (EI Act) and dismissed his appeal regarding a disqualification imposed pursuant to section 30 of the EI Act. The decision of the GD was dated November 10, 2015 and was issued on November 12, 2015.

[2] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on December 10, 2015, within the 30 day limit.

ISSUE

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

SUBMISSIONS

[4] The Applicant submitted in support of the Application that there were errors in the GD decision, including those related to:

a) The GD's determination that the Applicant did not have just cause for voluntarily leaving his employment;

b) In particular, the Applicant asserts that the GD made errors in its findings of facts, as follows:

   (1) The Applicant did not continue to work permanent part-time 25 hours a week throughout 2013 until his departure date: GD decision [81] and [82];

   (2) The Applicant was not personally responsible for the variability of his shift schedule: GD decision [83] and [85];

(3) Maintaining his employment in Toronto while attending a full-time program of study in Vancouver would have been impossible: GD decision [118];

(4) Asking the employer for an unpaid educational leave for 4 years would have been against the employer's policy on leaves of absence (a maximum of 6 months): GD decision [118] and [119]; and

(5) Not having applied for work during the period of September to November 2014, should have read 2013: GD decision [120].

LAW AND ANALYSIS

[5] Subsection 52(1) of *Department of Employment and Social Development* (DESD) *Act* states that an appeal of a decision made under the *Employment Insurance Act* must be brought to the General Division of the Tribunal within 30 days after the day the decision is communicated to the Applicant.

[6] 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".

[7] 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".

[8] 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.

[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.

[10] The Applicant is relying on paragraph (c) of subsection 58(1) of the DESD Act: erroneous findings of facts.

[11] 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.

[12] I will take each of the erroneous findings of fact asserted by the Applicant in turn.

[13] No hourly wage reduction, continued regular part time 25 hours a week and to work 5 hours per day, five days a week: The Applicant submits that he was hired in 2008 to work 5 days a week for 5 hours a day, but that this schedule lasted for about one year and his work schedule evolved from 2009 to 2013. The specific error asserted is the GD's finding that the Applicant continued to work 5 hours a day, five days a week, when the number of hours worked a day and of days worked in a week had changed.

[14] Applicant personally responsible for variability of his shift schedule: The Applicant argues that management decided on the shift schedule and not him. The GD's finding was: "the Appellant in choosing to work casual shifts was personally responsible for the variability of his shift schedule, and his overall salary". The GD did not find that the Applicant decided his shift schedule rather than management, but that by choosing to work additional casual shifts he was personally responsible for his shift schedule and his overall salary. This finding of fact was not made in a perverse or capricious manner or without regard for the material before it.

[15] Requesting a leave of absence as a reasonable alternative: The Applicant argues that the GD assumed that a leave of absence would have been approved, when it would not have been. The employer's policy on leaves of absence was a maximum of 6 months leave. The Applicant's program of study was 4 years long and in Vancouver. "Remaining job attached" and resuming his duties in Toronto during breaks in his program would have been impossible. Therefore, the Applicant asserts that the finding that requesting a leave of absence was a reasonable alternative was an error of fact made in a perverse or capricious manner or without regard for the material before it.

[16] Applying for work in Vancouver from September to November 2014: The Applicant submits that "2014" is a typographical error and it should read "2013". I agree that 2014 was a typographical error; the sentence should have read 2013. However, the GD did not base its decision on the 2014 date but the correct year (2013).

[17] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal. Here, the Applicant asserts errors of fact, as discussed in paragraphs [4]b)(1), (3) and (4), [13] and [15] above, and provides an explanation on how the GD is said to have based its decision on these erroneous findings of fact which were made in a perverse or capricious manner or without regard for the material before it.

[18] Considering the arguments raised by the Applicant and my review of the GD decision and docket, I am satisfied that the appeal has a reasonable chance of success on the ground of erroneous findings of fact that the GD made in a perverse or capricious manner or without regard for the material before it, as specified above.

CONCLUSION

[19] The Application is granted.

[20] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[21] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division