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

[TRANSLATION]

Citation: *M. B. v. Canada Employment Insurance Commission*, 2016 SSTADEI 49

Date: January 28, 2016

File number: AD-15-1207

APPEAL DIVISION

Between:

M. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

DECISION

[1] Leave to appeal before the Appeal Division (AD) of the Social Security Tribunal of Canada (Tribunal) is granted.

INTRODUCTION

[2] On April 15, 2014, following a hearing held via teleconference, the Tribunal's General Division (GD) issued a decision and dismissed the Applicant's appeal. The GD found that:

> [TRANSLATION]
> there is no merit to the appeal from the decision of the Canada Employment Insurance Commission, hereafter called the Commission, to impose an indefinite disqualification from receiving Employment Insurance benefits on the Appellant because he did not prove that he had just cause for leaving his employment under sections 29 and 30 of the *Employment Insurance Act*.

[3] The Applicant filed an application for leave to appeal before the AD on July 7, 2014. The AD refused leave to appeal in a decision dated February 3, 2015.

[4] The Applicant filed an application for judicial review before the Federal Court, and a hearing was held on September 24, 2015. A Federal Court decision was issued on October 7, 2015. The Federal Court allowed the application for a judicial review and ordered that the application for leave to appeal be sent back to the Tribunal's AD for decision by another AD member. The Federal Court granted the Applicant 30 days in which to resubmit his application for leave to appeal before the Tribunal's AD.

[5] The application for leave to appeal was sent back to the AD and the Applicant drafted a letter dated November 4, 2015, outlining his grounds for appeal, within this prescribed period.

[6] On November 18, 2015, the Respondent filed written submissions to the effect that the grounds for appeal show no reasonable chance of success.

ISSUE

[7] The Tribunal must determine if the appeal has a reasonable chance of success.

THE LAW AND ANALYSIS

[8] In accordance with subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act*, "[a]n appeal to the Appeal Division may only be brought if leave to appeal is granted" and the AD "must either grant or refuse leave to appeal".

[9] Subsection 58(2) of the *Department of Employment and Social Development Act* provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success".

[10] Under subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(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 or order, 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.

[11] An application for leave to appeal is a preliminary step to a hearing on the merits. It is a first, and lower, hurdle for the Applicant to meet than the one that must be met on the hearing of the appeal on the merits. At the application for leave to appeal stage, the Applicant does not have to prove his case, but simply establish a reasonable chance of success.

[12] The Tribunal will grant leave to appeal if the Applicant shows that any of the above grounds of appeal has a reasonable chance of success.

[13] To do so, the Tribunal must, in accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, be able to determine if there is a question of law, fact, jurisdiction, or natural justice that could lead to the setting aside of the decision attacked.

[14] The applicant submits that:

a) The GD issued a decision in violation of paragraphs 58(1)(*a*), (*b*) and (*c*) of the *Department of Employment and Social Development Act*;

b) Contrary to what the employer had claimed during the job interview, the employer's training was for a position as a part-time representative, not a full-time delivery driver;

c) The errors are:

1. The GD rendered its decision without assessing or considering the Applicant's argument that his voluntary leaving was justified because the Applicant did not have the skills necessary to carry out this type of employment;

2. The GD's decision determined that the Applicant was aware that the position was part-time and that there would be a one-month training to complete, whereas the Applicant maintains that he did not know that the position would be part-time, as a representative, or that the training would last one month;

3. The GD may at times retain a factual interpretation that is completely inaccurate and that contradicts what the Applicant had declared in his statements; and

4. Paragraph 29(*c*) of the *Employment Insurance Act* (Act) outlines exceptions that justify voluntary leaving when an employment is unsuitable, or when an employer violates the law. The GD did not take these exceptions into account.

[15] The Respondent submits that:

a) The Applicant claimed that the two-day training was for the position of part-time representative, not full-time delivery driver. However, this is a new factual position that contradicts his sworn testimony at the hearing on March 5, 2014;

b) In the Applicant's testimony, he states that he was offered a part-time delivery driver position, but that he was seeking full-time employment;

c) This new factual position is also at odds with the Applicant's various statements on file;

d) A new argument cannot be constructed by changing facts that were clearly established before the GD;

e) The GD did not commit any factual errors in its decision that could constitute an error of law or of fact; and

f) The arguments submitted in support of the application for leave to appeal show no reasonable chance of success.

[16] The GD's decision states:

> [TRANSLATION]
> [23] In this case, the Tribunal finds that, given all the circumstances, the Appellant's decision to leave his employment at Canpar Transport L.P. cannot be considered the only reasonable alternative in this situation.
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> [24] The evidence on file and the Appellant's testimony show that his main objective was to complete a training course in order to obtain a licence to drive heavy vehicles (Class 1) …
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> [28] Moreover, although the Appellant felt that his employment at Canpar Transport L. P. did not allow him to perform the type of tasks he wanted to perform, and although the employment was only part time whereas he was seeking full-time employment, this type of situation does not represent just cause for voluntary leaving.
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> [29] The Appellant knew when he was hired that the position was part-time and that there would be a one-month training as part of this employment…

> [30] Despite the Appellant's legitimate dissatisfaction with the tasks he had to perform or the training that he had begun barely two days prior, the Tribunal finds that there was no urgent need for him to voluntarily leave his employment. There is no evidence showing that his employment conditions were such that they could justify his immediately leaving his employment.
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> [31] Rather than leave his employment after a few days of work, the Appellant could have first tried to speak with his employer to find a solution to the problems encountered in performing the tasks assigned to him or concerning the training that he had begun for this employer, which was expected to run for one month (*White*, 2011 FCA 190).
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> [32] Despite the reasons given by the Appellant to justify his voluntary leaving, the Tribunal is of the view that he could have continued to work for Canpar Transport L. P. while waiting to obtain new employment that was more suited to his expectations and interests, or first ensuring that he had the Commission's authorization to take a training course.
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> [33] Although the Appellant's decision to leave his employment at Canpar Transport L. P. can be supported by excellent reasons, none of them constitute just cause for voluntary leaving within the meaning of the Act (*Vairamuthu*, 2009 FCA 277; *Beaulieu*, 2008 FCA 133).
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> [34] The Tribunal finds that there is no evidence on file to suggest that the voluntary leaving was the Appellant's only reasonable alternative in this situation. Based on the above-mentioned case law, the Tribunal finds that the Appellant did not demonstrate that there was no reasonable alternative to leaving his employment at Canpar Transport L. P. The Appellant could have continued to work for this employer, tried to find solutions with the employer to the problems encountered while performing his tasks, or could have obtained the Commission’s permission to take a training course (*Rena-Astronomo*, A-141-97; *Tanguay*, A-1458-84; *Landry*, A-1210-92; *Peace*, 2004 FCA 56; *White*, 2011 FCA 190; *Beaulieu*, 2008 FCA 133).
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> [35] In light of all the circumstances, the Tribunal finds that the Appellant did not have just cause for voluntarily leaving his employment under sections 29 and 30 of the Act.

[17] The GD considered the Applicant’s testimony that his voluntary leaving was justified; however, given all the circumstances, it found that leaving his employment could not be considered the only reasonable alternative in this situation. This decision is based on the Applicant’s main intention to complete a training course, the fact that the employment was part time (whereas the Applicant was seeking full-time employment), the Applicant’s dissatisfaction with the tasks he was to perform, the way the training was going after two days,

and on the fact that there was no urgent need to leave, amongst others. The decision does not address the skills required to perform the job and it is unclear if the Applicant had brought up this argument before the GD (it is not stated under "Submissions").

[18] The GD found that the Applicant knew when he was hired that the position was part-time and that there would be a one-month training to complete. Based on the Applicant's submissions to the GD, the employer did not guarantee that there would be a full-time position as delivery person or delivery driver. The Applicant knew when he met with the employing officer that the employer could not offer him a full-time position. Furthermore, the employer always advertised part-time, not full-time positions. The GD's factual finding that the Applicant was aware that the position was part-time was therefore not "based […] on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[19] As regards the one-month training, the GD refers to two documents on file. They state that the [translation] "employer told him that he would be on his delivery driver training". The Applicant claims that the employer never told him that the training would be one-month long at the job interview. The GD's finding that the Applicant was aware of these facts at the time he was hired do not seem to be based on the Applicant's testimony at the hearing. The transcript of the hearing before the GD does not provide proof from which to conclude that the Applicant knew from the moment he was hired that there would be one month of training to complete.

[20] The Applicant submits that the assessment of these facts is unreasonable and that the GD had capriciously dismissed certain aspects of his testimony regarding the job interview description. This is the only example that the Applicant provides of a "completely inaccurate and inconsistent factual interpretation with what the Applicant declared in his statements, particularly with regard to the employment conditions discussed with the employer at the job interview".

[21] The GD's finding that the Applicant had known from the moment he was hired that there would be a one-month training to complete does not seem to be based on the Applicant's testimony at the hearing or on the documents on file. The GD's decision therefore seems to be

based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[22] Moreover, the Applicant submits that the GD had disregarded the exception listed in paragraph 29(*c*) of the Act; however, this is not the case. The GD's refers to this exception on paragraph 22 of its decision. Nonetheless, the GD found that the Applicant's voluntary leaving was not an exceptional case.

[23] As regards the Applicant's submission that, contrary to what the employer had claimed during the interview, the employer's training was for a position as part-time representative rather than full-time delivery driver, the Respondent submits that this factual position contradicts the Applicant's testimony and statements on file.

[24] I agree that a new argument cannot be constructed by altering facts clearly established before the GD.

[25] According to the transcript of the hearing before the GD, the Applicant testified that he had met with the employer two days into the training and that the employer told him that he could not guarantee a full-time position throughout the year and that the Applicant knew that the position advertised was part-time. Furthermore, the Applicant had realized after two days of training that the training was not really for a delivery driver position. As for the representative position, the Applicant stated that the employer had told him that there was a possibility that he could do this job once he had proven himself [translation] "on the trucks". The Applicant believed that the training was for a position as representative, not as delivery driver; however, the GD did not decide on this issue.

[26] At this stage, I am not drawing any conclusions regarding the Applicant's claim that the employer's training was for a position as part-time representative rather than a position as full-time delivery driver, and that this conflicts with the testimony and statements on file. The GD found that the Applicant knew from the moment he was hired that the position was part-time and that there would be a one-month training to complete; however, the second conclusion seems to be erroneous.

[27] After reviewing the appeal file, the GD's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question relating to an erroneous finding of fact, the answer to which could lead to the setting aside of the contested decision.

CONCLUSION

[28] The Tribunal grants leave to appeal before the Tribunal's AD.

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

[30] I invite the parties to make submissions on: a) whether a hearing should be held, b) the type of hearing, and c) the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division