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

Citation: *K. D. v. Canada Employment Insurance Commission*, 2016 SSTADEI 59

Date: February 2, 2016

File number: AD-15-1146

APPEAL DIVISION

Between:

K. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 21, 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 had left his employment without just cause.

[2] The Applicant made a request for reconsideration, but the Commission maintained its decision on the basis that his departure from employment was voluntary, and given all the circumstances, his departure was not his only reasonable alternative.

[3] A GD hearing was held by teleconference on September 17, 2015. The Applicant attended, but the Respondent did not.

[4] The GD determined that:

a) In accepting a retirement severance package, the Applicant took the initiative to sever the employee/employer relationship;

b) In so doing, he voluntarily left his employment on September 25, 2014;

c) The Applicant did not meet the exemption under section 51 of the *Employment Insurance Regulations* (work-force reduction plan); and

d) The Applicant did not establish that he had no reasonable alternative to leaving his employment having regard to all the circumstances.

[5] The GD decision was sent to the Applicant under cover of a letter dated September 22, 2015. The Applicant stated that he received the decision on September 29, 2015.

[6] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on October 27, 2015, within the 30-day limit.

[7] On December 22, 2015, the Tribunal sent a letter to the Applicant with a request to provide submissions on whether leave should be granted or refused. The letter stated:

> In particular,
>
> (a) The Applicant relies on "failure to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction": What principle of natural justice did the General Division breach or what specific refusal to exercise jurisdiction is being asserted?
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> (b) The Applicant appears to intend to introduce new evidence in the appeal related to intimidation and bullying by "long-time employees and union activists": On what basis would this new evidence be permitted in an appeal to the Appeal Division and what is the significance of this new evidence to the case?
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> (c) Pages 1 to 5 of the attachment sets out the Applicant's disagreement with parts of the General Division decision. However, only the following 3 reasons can be considered on an appeal under the law:
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> a. Reason #1: ***The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction.*** For example, an appellant submitted a Record of Employment, and the document was not included in the appeal file.
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> b. Reason #2: ***The General Division made an error in law in its decision.*** For example: the Member of the General Division based its decision on the wrong section of the applicable law.
>
> c. Reason #3: ***The General Division made an important error regarding the facts contained in the appeal file.*** For example, the Member of the General Division indicated in the decision that there was no Record of Employment submitted by the appellant, when one had been submitted and was in the appeal file.
>
> Please identify which of the reason(s) apply to the points raised in pages 1 to 5 of the attachment. It is not sufficient to simply indicate that there was an error or that natural justice was not respected. Disagreement with the decision is also not sufficient.
>
> (d) In addition to identifying the reasons for the appeal, the Applicant must also explain why the application to the Appeal Division has a reasonable chance of success.

The deadline for response was January 15, 2016. The Respondent was also invited to file written submissions.

[8] The Applicant responded to this request by letter dated January 5, 2016 (received by the Tribunal on January 14, 2016). The Respondent did not file submissions.

ISSUES

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

LAW AND ANALYSIS

[10] 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.

[11] 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."

[12] 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."

[13] 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.

[14] Taking the Application and submissions of January 14, 2016 together, the following summarizes the basis for the Applicant's appeal to the AD:

a) The Applicant is appealing the GD decision on the basis that the GD failed to observe a principle of natural justice or refused to exercise its jurisdiction.

In particular:

(1) The Applicant maintains that his position was terminated due to lack of work;

(2) The buy-out package that he accepted was to compensate employees who were going to lose work because of cutbacks;

(3) He was "strongly persuaded" to accept the buy-out by union activist drivers, but he cannot provide evidence of this; and

(4) His situation should be reviewed on an individual basis and a decision taken which is based on fairness and flexibility. The Applicant adds that if the Tribunal's decision were based on compassion, he would have a fair chance of success.

[15] The Applicant was asked to provide details on what specific errors in the GD decision he is asserting. The Applicant reiterated his position, as summarized immediately above.

[16] 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 6 to 11. The Applicant's submissions before the GD were summarized in its decision (page 11) and considered by the GD (pages 13 to 24).

[17] The GD stated the correct legislative basis and legal tests for voluntary departure, exemption from disqualification due to work-force reduction process, and just cause, in its decision.

[18] The Applicant does not state how the GD is alleged to have erred other than repeating his evidence and submissions before the GD and asserting that the GD decision was wrong in

finding that he had voluntarily left his employment and did not have just cause. In essence, the Applicant seeks to reargue his case before the AD.

[19] In terms of natural justice, an appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. Nothing in the GD decision or the appeal record suggests that the Applicant was denied a fair hearing or procedural fairness.

[20] 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* or to assess or reweigh the evidence put before the GD. 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.

[21] 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.

[22] 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

[23] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division