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

Citation: ***S. M. v. Canada Employment Insurance Commission*****, 2016 SSTADEI 72**

Date: February 9, 2016

File number: AD-15-1238

APPEAL DIVISION

Between:

S. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

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

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 30, 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 voluntarily left her employment without just cause.

[2] The GD decision was sent to the Applicant under cover of a letter dated October 2, 2015. The Applicant stated that she received the GD decision on October 13, 2015.

[3] The Applicant filed an incomplete application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on November 16, 2015.

[4] The Tribunal advised the Applicant that her file was incomplete, by letter dated November 24, 2015. She was given 30 days to provide the missing information. She sent a response on December 15, 2015. On this basis, the Application was treated as complete but late.

[5] The Tribunal then advised the Applicant that the Application appeared to have been filed more than 30 days after the GD decision had been communicated to her. The Applicant replied that her initial Application was dated November 10, 2015 and she sent a completed Application which was received by the Tribunal on December 15, 2015.

ISSUES

[6] First, the AD must determine whether the Application was filed within the 30-day limit.

[7] If the Application was filed late, in order for the Application to be considered, an extension of time to apply for leave to appeal to the AD must be granted.

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

LAW AND ANALYSIS

[9] 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.

[10] 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."

[11] 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."

[12] 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.

Was the Application Late?

[13] The Application was date stamped and treated as incomplete on November 16, 2015.

[14] The GD decision was sent to the Applicant under cover of a letter dated October 2, 2015. The Application states that the Applicant received the decision on October 13, 2015.

[15] Thirty (30) days from October 13, 2015 is November 12, 2015. Therefore, the 30-day period ended on November 12, 2015.

[16] While the Application is dated November 10, 2015, that is not the day on which the Application was filed. It was filed on November 16, 2015. As such, the Application was filed outside of the 30-day time limit. It was late and incomplete.

[17] The Application was completed on December 15, 2015.

Extension of Time for Late Appeal

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

[19] 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:
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> (a) there is an arguable case on appeal;
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> (b) special circumstances justify the delay in filing the notice of appeal;
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> (c) the delay is excessive; and
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> (d) the respondent will be prejudiced if the extension is granted.

[20] In the circumstances, the Tribunal did not require the Applicant to request an extension of time in writing.

[21] Given the length of the delay, the Applicant's responses to missing information, and in the interests of justice, I grant an extension of time for the filing of the Application.

Application for Leave to Appeal

[22] The Applicant's reasons for appeal can be summarized as follows:

a) The GD acted beyond its jurisdiction and failed to observe a principle of natural justice in that it "inserted itself in the position of the employer", "did not provide unbiased

adjudication" and did not ensure that the employer acted in a fair and professional manner towards her;

b) The GD erred in law by disregarding the evidence and ascribing the sole responsibility for her dismissal on her actions alone;

c) The GD based its decision on erroneous findings of fact in that it failed to recognize evidence that the employer dealt with the Applicant in an unprofessional and unfair manner; and

d) These arguments were based on (1) a refusal of leave time which caused the separation from employment and (2) an agreement reached between the Applicant and the employer during civil court mediation.

[23] The Applicant was asked to provide details on what specific errors in the GD decision are being asserted (with paragraph number and description of exact error). The Applicant responded to this request by filing a typed Application with a similar narrative that was included with the initial Application and entering information in part "C" of the form (reasons for leave to appeal).

[24] The issue before the GD was a disqualification from EI benefits due to voluntary leaving or misconduct. The GD decision stated, at paragraph 37, "the Tribunal will consider the claimant's separation from employment from both a voluntary leaving and misconduct perspective".

[25] 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 3 to 9. The Applicant's submissions before the GD were summarized on page 10 and discussed at pages 11 to 14; they included many of the points written in the Application and noted in paragraph [22] above.

<u>GD Decision</u>

[26] The GD stated the correct legislative basis and legal tests for voluntary leaving and misconduct in its decision.

[27] The GD decision summarized the background of the Applicant's separation from employment as follows:

> [36] In this case, the claimant requested time off in order to babysit her grandchild while her son and daughter-in-law went on holidays. She received verbal confirmation from her employer in September 2014 that she could have this time off at the end of January 2015 returning to work on February 2, 2015; the first working day of February. The claimant later confirmed her dates with her employer stating that she would be away from January 28 to February 7, 2015 returning to work on February 9, 2015. The employer denied the request because company policy states that no vacation time will be granted from February to April. The claimant was asked what she intended to do and she stated that she would stay on as an employee but would take her time off as requested because she could not change the dates of her planned vacation. The employer's husband told her that this was not acceptable and the claimant's employment ended immediately. The Tribunal accepts that these facts are not in dispute.
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> [37] The claimant disputes that she voluntarily left her employment and instead stated that she was terminated from her employment. A mediation agreement required the employer to pay the claimant severance pay and to submit an amended ROE stating that the claimant was dismissed from her employment. The FCA determined in *Canada (Attorney General) v. Easson*, A-1598-92, that the notions of dismissal for misconduct and voluntarily leaving without just cause may be two distinct and abstract notions, but they are dealt with together in sections 29 and 30 of the EI Act, which is quite rational since they both refer to situations where the loss of employment is the result of a deliberate action or actions on the part of the employee. By uniting the two notions in the EI Act, it is clear that the difference between the two situations will have to be taken into consideration. Therefore, the Tribunal will consider the claimant's separation from employment from both a voluntary leaving and misconduct perspective.

[28] The conclusions of the GD on voluntary leaving and misconduct were:

> [40] While the claimant disputes that she voluntarily left her employment, the fact remains that she refused to change the dates of her requested time off and insisted that she intended to take her time off as planned thereby initiating the separation from employment. It is the claimant's responsibility to mitigate the risks of unemployment and as stated in the company's policy, the employer reserves the right to determine the timing of vacations. Although an employer should provide an employee with vacation time throughout the year, an employer does have the right to refuse vacation if it conflicts with the operations of the business. Furthermore, the claimant testified that she had already used up all of her vacation for the year and intended to take time off without pay therefore, it cannot be said that the employer had refused to allow the claimant to take vacation.
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> [41] For these reasons, the Tribunal finds that the claimant voluntarily left her employment without just cause. While the claimant might believe that she was acting reasonably, reasonableness is not the same as just cause. The claimant must show that

> she had no reasonable alternative but to leave her employment. In this case, the claimant had the reasonable alternative of confirming her dates with her employer before she made plans that she could not change or making alternate arrangements and taking her vacation at the end January 2015 as originally planned.
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> …
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> [43] The claimant further argued that the vacation policy did not apply to her because she had used up all of her vacation and therefore was not requesting vacation but was requesting time off without pay. The Tribunal finds this argument to not be relevant because the claimant was requesting time off from work. It does not matter if it was with pay or without pay; the employer still maintains the right to deny an employee time off if it will conflict with the operations of the business.
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> …
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> [49] In this case, the claimant and the employer agree that the claimant's separation from employment occurred because the claimant insisted that she would take time off as planned even though it was not authorized by the employer. The Tribunal is satisfied that there is no dispute as to why the claimant was terminated from her employment.
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> [50] The claimant admitted that she was aware of the vacation policy and further admitted that she had originally asked for time off at the end of January 2015. While the employer indicated that they would entertain time off at the end of January, the company policy clearly states that no vacation time will be granted during the months from February to April. The claimant was told that she could not have her time off in February and she stated that she would take the time off anyways. The Tribunal finds this to be wilful and deliberate where she had to know that by defying the employer's decision and ignoring the vacation policy that she could be jeopardizing her employment. For these reasons, the Tribunal finds that the claimant lost her employment by reason of her own misconduct.

Grounds and Reasons for Appeal

[29] The Applicant suggests that the GD inserted itself in the position of the employer and thereby acted beyond its jurisdiction. The GD heard the Applicant's appeal and rendered a written decision that was understandable, sufficiently detailed and provided a logical basis for the decision. These are proper roles of the GD, and the GD did not act beyond its jurisdiction in so doing. The GD did not "insert itself in the position of the employer".

[30] The Applicant argues that the GD failed to observe a principle of natural justice because it disregarded the decision of the employee of the Commission who first approved the Applicant's claim for benefits. This ground of appeal does not have a reasonable chance of

success. Whatever the initial determination of the Commission was, its final decision was that the Applicant was disqualified from benefits. The Applicant appealed from that decision, as she was entitled to do. That appeal was filed with the GD of the Tribunal, and the GD heard the appeal and rendered a decision.

[31] The Applicant also suggests that the GD should have ensured that the employer "acted in a fair and professional manner" towards her, should have determined that the employer did not engage in a fair process in refusing her leave request and should have attributed responsibility for the job separation on the employer. It is not the Tribunal's role to adjudicate conflicts between an employee and his or her employer in relation to a leave request.

[32] The Applicant argues that the GD did not provide "unbiased adjudication". In essence, the Applicant argues a breach of natural justice because the GD Member did not concur with her arguments. This falls far short of what is needed to form an allegation of prejudice or bias.

[33] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[34] The Applicant's arguments are insufficient to show that the GD did not give the Applicant a sufficient opportunity to be heard or that the GD was prejudiced or biased.

[35] For the most part, the Application repeats the Applicant's evidence and submissions before the GD. The Applicant seeks to reargue her case before the AD.

[36] 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.

[37] 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.

[38] 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

[39] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division