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

Citation: *S. W. v. Canada Employment Insurance Commission,* 2016 SSTADEI 130

Tribunal File Number: AD-16-160

BETWEEN:

S. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 8, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 11, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision of the Canada Employment Insurance Commission (Commission). The Commission had imposed a disqualification pursuant to subsection 30(1) of the *Employment Insurance Act* for loss of employment by reason of misconduct.

[2] The Applicant attended the GD hearing, which was held by teleconference, with a family member to assist him.

[3] The GD decision was sent to the Applicant under cover of a letter dated December 14, 2015.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 12, 2016 within the 30 day appeal period.

ISSUE

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

LAW AND ANALYSIS

[6] Pursuant to Section 57 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.

[7] 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."

[8] 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."

[9] 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;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (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.

[10] The Application states that the GD accepted evidence that was erroneous and made erroneous conclusions of fact. Therefore, the Applicant relies on which paragraph of 58(1)(c) of the DESD Act.

[11] In particular, the Applicant submits that the specific errors were:

a) He had not previously carpooled; he had a friend drive him to and from work;

b) He had no knowledge of carpooling opportunities; the Human Resources (HR) Department could have made carpooling suggestions;

c) Bus was not a viable option;

d) A 60 day leave of absence may have solved his transportation problems;

e) He did notify the employer of his absences; he contacted HR on February 12 and 13; on February 17, he advised that he would not be attending work until further notice because of his transportation problems; and

f) It was unreasonable for the GD to conclude that it was necessary for him to call everyday that he was missing when he had already advised HR of his problems on February 17.

[12] The issue before the GD was the disqualification imposed by the Commission after determining that the Applicant had lost his employment by reason of his own misconduct.

[13] The GD stated the correct law and jurisprudence when considering the issue of misconduct. It also correctly stated the law and jurisprudence related to "just cause" for voluntarily leaving. The two notions are often connected.

[14] The GD noted that the Applicant testified at the GD hearing. The GD decision, at pages 4 to 10, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[15] The GD decision stated:

> [28] In his testimony, the Appellant now admits he was absent from work and did not contact Global Electric for the three (3) days cited by the employer, but maintains that he was terminated and did not quit his job. In their responding submissions, the Commission states that the decision to impose a disqualification upon the Appellant was made because the Appellant had a number of reasonable alternatives to leaving his employment when he did (GD4-7), although the Commission acknowledges that the Appellant's separation from employment could be viewed as a dismissal for misconduct because he was terminated when his employer considered him to have abandoned his job after three (3) missed days without contacting them (GD4-9). Given the conflicting versions of events, the Tribunal looked to the jurisprudence that has considered section 30 of the EI Act in similar circumstances.
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> [31] The Tribunal finds that the Appellant worked as scheduled at Global Electric on February 11, 2015 and then called HR the next day (February 12, 2015) to advise he was having car troubles and would not be in that day (February 12, 2015), but would be in the following day (February 13, 2015). While there is no dispute that the Appellant ***left the job site*** at the end of his working day on February 11, 2015, there is no evidence that he left ***his employment*** at that time, let alone that he did so voluntarily. Indeed, the Appellant was in contact with his employer, albeit sporadically, between February 12, 2015 and February 17 or 18, 2015 advising of his continuing car troubles and providing updates on when he anticipated he would come back to work. The Tribunal finds that Commission has not met the onus on it to prove that the Appellant left his employment voluntarily.

[32] The Tribunal then considered whether the Appellant lost his employment with Global Electric on February 24, 2015 because of his own misconduct.

What is the conduct that led to the Appellant's dismissal?

[33] The Appellant admits that he was away from work starting on February 20, 2015 and continuing for three (3) consecutive working days, and that he did not contact his employer at any point during these three (3) consecutive working days about his on-going absence. The Appellant further admits that he was terminated thereafter. According to the employer's statements during the Commission's investigations, as well as the termination letter issued to the Appellant, after the Appellant failed to show up for work as scheduled on three (3) consecutive days without contacting them, they deemed the Appellant to have abandoned his employment and he was dismissed accordingly.

[34] The Tribunal finds that the Appellant lost his job at Global Electric because he failed to show up for work as scheduled on three (3) consecutive days without notifying his employer.

Does that conduct constitute "misconduct" within the meaning of the EI Act?

[35] The Tribunal considered the statements of the employer's representative regarding the protocol for Global Electric employees when they need to be absent from work, the employer's workplace policy with respect to termination in the event an employee misses three (3) consecutive days without contacting them (GD3-41), and the employer's confirmation that the Appellant had received the policy and subsequent reminders as to the potential for termination for failing to follow it (GD3-42 to GD3-43, and GD3-52 to GD3-53). The Tribunal noted that the Appellant had only started at
Global Electric on February 24, 2014 and yet had already taken a leave of absence to deal with transportation issues. The Appellant could reasonably have been expected to remember what was required of him in the event he needed to be off work, and that an employee was required to make the appropriate arrangements with HR in order to take a leave of absence, however brief, and could not simply decide to go off for an indeterminate time and expect to return to work at an unspecified date in the future.

[36] The Tribunal then considered the Appellant's various explanations as to how long he was away from work and when he notified his employer; his assumptions that Juliana would solve his transportation problems for him and that he could just go away and get his car fixed or find another one and return to work when he had done that (see paragraph 19 above); as well as his admissions that he was away for three (3) consecutive days without contacting his employer.

[37] A failure to attend work as required on a particular date without permission may constitute misconduct (*CUBs 10125, 12421, 10437*). Additionally, an employee has an obligation to notify the employer as to the reasons why he is not reporting for work

> on such a day and the failure to do so can properly lead to the conclusion that the claimant lost their employment due to misconduct (*CUBs 11982, 18712, 18006*). In the present case, the requirement on the Appellant to notify Global Electric in the event of an absence from work is specifically set out in the workplace policy (as well as the collective agreement governing the Appellant's employment), and the Federal Court of Appeal has held that violation of a workplace policy can constitute misconduct (*Vo 2013 CAF 235*).
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> [38] The Appellant was provided with Global Electric's Company Policy Manual and other information regarding absences from the workplace, and had already taken one leave of absence from his employment to address transportation issues. The Tribunal therefore finds that the Appellant's act of failing to show up for work as scheduled on three (3) consecutive days without contacting his employer was so reckless as to approach willfulness, that it was detrimental to the employer's interests and that the Appellant ought to have known it might lead to his dismissal.
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> [39] The Tribunal finds that the Appellant's conduct in failing to show up for work as scheduled on three (3) consecutive days without contacting his employer was misconduct within the meaning of subsection 30(1) of the EI Act.

[16] The Applicant's submissions mostly re-argue the facts that he asserted before the GD.

[17] Regarding the specific errors of fact that the Applicant relies upon, the GD found that:

a) the Appellant was in contact with his employer, albeit sporadically, between February 12, 2015 and February 17 or 18, 2015 advising of his continuing car troubles and providing updates on when he anticipated he would come back to work;

b) In his testimony, the Appellant now admits he was absent from work and did not contact Global Electric for the three (3) days cited by the employer; and

c) He did not talk to the employer about making arrangements for carpooling because he lived the farthest away on the west side (based on his testimony at the GD hearing).

[18] The GD decision did not make findings of fact in relation to carpooling. It recited evidence and submissions of the parties about carpooling. The submissions in the Application related to carpooling were made by the Applicant at the GD hearing and noted in the GD decision. The same applies to the Applicant's submissions about busing to work.

[19] The GD decision did not make erroneous findings about the Applicant's notification of his employer in the period February 12 to February 18, 2015. It found that he had contacted his employer during this time.

[20] As for the Applicant's argument that it was unreasonable for the GD to conclude that it was necessary for him to call everyday that he was missing work when he had already advised HR of his problems on February 17, the Applicant's evidence at the GD hearing was that he assumed after the February 17 or 18 phone call that HR knew he would not be coming back to work until the problem was solved, which could take some time. The GD considered the Applicant's testimony and submissions on this point, in addition to the employer's policies and other evidence on file, and concluded that "failing to show up for work as scheduled on three (3) consecutive days without contacting his employer was so reckless as to approach willfulness, that it was detrimental to the employer's interests and that the Appellant ought to have known it might lead to his dismissal". The GD is the trier of fact and its role includes the weighing of evidence and making findings based on its consideration of the evidence. The GD's conclusion that the Applicant's conduct was "so reckless as to approach willfulness" was not made in a perverse or capricious manner or without regard for the material before it. It was also not an error of law.

[21] In terms of the possibility of requesting leave time from his employer, the GD stated: "In his appeal materials (GD2 and GD2A), the Appellant denies that a 60-day leave of absence would have helped with his transportation issues" (paragraph [18]) and "a 60-day leave of absence would not have helped because he could not afford to repair his car or purchase another one" (Applicant's submissions at paragraph [22]). The Applicant now argues that a 60 day leave of absence may have solved his transportation problems, which is contrary to the position he took earlier. I note that, in any event, the Applicant did not request a leave of absence in the time period of February 2015 when he has having transportation problems. Therefore, this cannot be the basis upon which he grounds an appeal to the AD.

[22] If leave to appeal is granted, then 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 anew. 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.

[23] 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.

[24] 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

[25] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division