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

Citation: *R. C. v. Canada Employment Insurance Commission,* 2016 SSTADEI 160

Tribunal File Number: AD-16-219

BETWEEN:

R. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

Trans Tech Contracting

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: March 22, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 30, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal from a reconsideration decision of the Canada Employment Insurance Commission (Commission). The Commission had decided to not allow the hours accumulated from the Applicant's previous employment, which ended on May 28, 2014, because it was determined that he voluntarily left that employment without just cause. The claimant sought reconsideration of the Commission's decision, and the Commission maintained its decision by letter dated April 9, 2015.

[2] A teleconference hearing was held by the GD on December 22, 2015. The GD decision was sent to the Applicant on December 31, 2015.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 28, 2016. The Application was filed within the 30 day limit.

ISSUE

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

SUBMISSIONS

[5] The Applicant submitted in support of the Application that there were errors of law and errors of mixed fact and law in the GD decision. In particular, the Applicant argued that the GD failed to give due and proper weight or consideration to all the circumstances in its determination that the Applicant voluntarily left his employment without just cause, gave disproportionate weight to second-hand evidence and failed to give proper weight to the testimony of the Applicant and the level of sophistication common amongst workers and labourers in the trade industry.

LAW AND ANALYSIS

[6] 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 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 Applicant attended the GD hearing. A representative of the employer also attended the hearing. Both testified during the hearing.

[11] The departure of the Applicant from his employment can be summarized as follows: there was a difficult relationship between the Applicant and his shop foreman, it escalated on May 28, 2014, the Applicant advised the foreman that he was taking time off, he had used all of his vacation entitlement for that year, the foreman said "do not bother coming back", the Applicant went away on holiday for a week, during this time the foreman emailed him and

asked that the Applicant go to see him when he returned, the Applicant replied “how can I even walk in when you told me not to come back?”, and the foreman replied “come pick up your belongings”. The Applicant had taken the foreman’s words on May 28, 2014 as a dismissal from his job. The employer considered that the Applicant had quit his job.

[12] The issue before the GD was the disqualification imposed by the Commission after determining that the Applicant had voluntarily left his employment without just cause.

[13] The GD stated the correct law and jurisprudence when considering the issues of voluntarily leaving and just cause, at pages 3 and14 to 17 of its decision.

[14] The GD noted that the Applicant testified at the GD hearing. The GD decision, at pages 5 to 12, summarized the evidence in the file, the testimony given at the hearing and the Applicant’s submissions. The Applicant’s submissions before the GD related to the situation surrounding his separation from work. In particular, the Applicant submitted that he was wrongfully dismissed by the foreman, he was just taking a few days off and planning to return to work but got fired instantly, he gave short notice for time off because of the conduct of the foreman and needed to calm his nerves, and the foreman treated him badly so that he would quit.

[15] The GD decision stated:

> [52] When citing harassment as the reason for voluntarily leaving employment, the claimant must show that the harassment complained of rendered the workplace genuinely intolerable. Even where the harassment has been proven, there may be an obligation to make all reasonable efforts to rectify the situation before quitting.
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> [55] While the claimant argued that he did not quit his employment, he initially applied for EI benefits and completed a quit questionnaire stating that he quit because of his foreman. The foreman initially told the claimant that if he takes the time off then he should not bother coming back. The Tribunal finds that the foreman did not fire the claimant but was not authorizing the claimant’s time off request. Although the claimant took the time off despite the foreman’s threat, the Tribunal accepts that the foreman was still expecting the claimant to return to work following his time off as evidenced by the foreman’s email asking the claimant to go and see him when he returned. The claimant refused to accept that the foreman was not authorizing time off and refused to discuss the matter further with his foreman when given the chance therefore, the

> Tribunal is satisfied that the claimant is responsible for the separation from his employment and was not terminated from his employment but quit his job. Thus, the next question before the Tribunal is whether the claimant had just cause to voluntarily leave his employment.
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> [58] The Tribunal finds that the claimant did not have just cause to voluntarily leave his employment. According to the case law, it is the claimant's responsibility to protect his employment by attempting to resolve workplace conflicts or to attempt to find other employment before making the decision to quit. The claimant felt he was being harassed by his foreman but did not make a formal complaint with Human Resources. The claimant did inform his shop manager of the foreman's behaviour and the employer acknowledged that they had received complaints about the foreman. However, the employer stated that they had not received complaints that required discipline and were implementing leadership training to address the complaints that they had received. Although the claimant stated that the foreman was always grumpy and screaming and yelling, he admitted that the foreman treated everyone the same way therefore, it cannot be said that the claimant was singled out and harassed. The claimant further stated that he needed to take time off due to stress and he feared for his health however, he did not consult with a doctor and was not being treated for stress related illnesses. This leads the Tribunal to believe that the claimant's employment was not so intolerable that he had to quit immediately.
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> [59] The legal test that must be applied is whether the claimant had no reasonable alternative but to quit his job when he did. The Tribunal finds that the claimant did have reasonable alternatives to leaving his employment. Considering all the circumstances, the claimant could have applied for leave by completing an Absence Form, he could have spoken with the foreman when he was asked to go in to his office or he could have returned to work following his trip to speak with the foreman. If the claimant felt he was being harassed by his foreman, he had the reasonable alternative of filing a formal complaint with Human Resources or of contacting an outside agency. If the claimant was concerned about his health, he had the reasonable alternative of consulting with a doctor.
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> [60] Furthermore, the Tribunal is satisfied that the claimant made the decision to voluntarily leave his employment and he did so without first fulfilling his obligation to try and remedy the situation or to find new employment before leaving.

[16] The Applicant's submissions in support of the Application, while framed as errors of law and errors of fact and law, reargue the facts that were before the GD. The Applicant argues that the GD erred in giving disproportionate weight to some evidence, improper weight to other evidence and misapplying the evidence to the facts. The GD is the trier of fact and its role includes the weighing of evidence and making findings based on its consideration of that evidence. The AD is not the trier of fact.

[17] 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.

[18] 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.

[19] 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

[20] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division