



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. W. v. Canada Employment Insurance Commission*, 2016 SSTADEI 171

Tribunal File Number: AD-16-258

BETWEEN:

L. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: April 1, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 9, 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 an indefinite disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act) because it had determined that the Applicant was dismissed by his employer due to his own misconduct.

[2] The Applicant attended the GD hearing, which was held by videoconference. The Respondent did not attend.

[3] The GD determined that:

- a) the onus was on the employer and the Commission to show, on a balance of probabilities, that the Applicant lost his employment due to his own misconduct;
- b) the acts that led to dismissal were the Applicant's arrest at the employer's premises, failing to contact his employer and inability to report to work;
- c) he was dismissed after his arrest because he did not contact his employer to advise of his status/situation;
- d) while his arrest at his place of employment was beyond his control, the Applicant's obligations to his employer after his arrest were in his control;
- e) he had access to communication with his employer through his wife and his lawyer, but he did not advise his employer of his situation from October 9, 2014 to November 11, 2014 (the date of his determination);
- f) these actions were of such a careless or negligent nature as to show that he willfully disregarded the effects his actions would have on his employment;
- g) he knew or ought to have known that dismissal was a real possibility;

- h) the fact that the Applicant's criminal case has yet to be determined has no bearing on the finding of misconduct because lack of a criminal conviction does not preclude a finding of misconduct and a criminal conviction was not the reason for his dismissal;
- i) the Applicant conduct in not informing his employer of the reasons for his ongoing absence demonstrated a lack of regard for a fundamental obligation of his employment; and
- j) the Commission met the onus of demonstrating that the Applicant, on a balance of probabilities, lost his employment as a result of his own misconduct.

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

[5] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal January 20, 2016. The Application stated that he received the GD decision on December 21, 2015.

ISSUES

[6] Whether the Application was filed within the 30-day time limit.

[7] If it was not, whether an extension of time should be granted.

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

LAW AND ANALYSIS

[9] 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.

[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 Filed within 30 days?

[13] The Application was filed on January 20, 2016. The GD decision was sent to the Applicant under cover of a letter dated December 14, 2015 and, according to the Application, was received by the Applicant on December 21, 2015.

[14] Thirty (30) days from December 21, 2015 is January 20, 2016. Therefore, the 30-day appeal period ended on January 20, 2016. As such, the Application was filed within the 30-day time limit.

[15] Therefore, an extension of time is not required.

Leave to Appeal

[16] The Application states that the Applicant relies on the presumption of innocence as the basis for his appeal to the AD.

[17] The following summarizes the Applicant's submissions on the specific errors in the GD decision:

- a) There was no evidence of and there are no convictions;
- b) His wife did attempt to inform the employer of the situation but was told that there was no need;
- c) He attempted to call the employer "before filing" (for EI benefits) but his call was not returned; and
- d) It is a violation of human rights to assume his guilt on the criminal charges.

[18] The issue before the GD was whether the Applicant lost employment by reason of his own misconduct.

[19] The GD stated the correct law and jurisprudence when considering the issue of misconduct.

[20] The GD noted that the Applicant testified at the GD hearing. The GD decision, at pages 3 to 5, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[21] The Applicant's submissions mostly re-argue the facts and arguments that he asserted before the GD. In particular, the GD noted:

- a) at paragraph [14], that the Applicant stated that the employer had spoken to his wife on numerous occasions without enquiring when he would return to work;
- b) at paragraph [17], that his wife had been in contact with his employer about his pay cheque;
- c) at paragraph [18], that the Applicant stated emphatically that he is not guilty, that his wife's calls to the employer were of no real depth, and that the employer did not request an update from his wife; and

d) at paragraph [19], that he expected his employer would probably dismiss him, and after he was terminated and after bail was granted, he attempted to call the employer but received no response.

[22] The Applicant's arguments summarized in subparagraphs 17 b) and c), above, repeat evidence and submissions made to the GD.

[23] 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.

[24] As for the arguments summarized in subparagraphs 17 a) and d), above, the GD did not presume his guilt on the criminal charges. The GD noted, at paragraph [30] of its decision, that the Applicant's criminal case "has yet to be determined". The GD did not assume his guilt or a conviction on the criminal charges. It did not make an error in the finding of facts about this, contrary to the assertions in the Application.

[25] 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.

[26] 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.

[27] I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[28] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division