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

Citation: *J. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 168

Tribunal File Number: AD-16-264

BETWEEN:

J. M.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Revised decision – corrections integrated into the main text of the original decision

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DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: ~~March 29, 2016~~

DATE OF REVISED DECISION: April 5, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 6, 2016 the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing in this matter and determined that the claimant (Appellant) lost his job due to misconduct. Therefore, the disqualification imposed by the Canada Employment Insurance Commission (Commission or Respondent) and resulting overpayment were warranted.

[2] The Appellant was not present at the GD hearing held by teleconference. The GD rendered its decision on January 8, 2016 and communicated it to the Appellant by letter of the January 11, 2016.

[3] The Appellant received the GD decision on January 19, 2016 and his legal representative filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal, on February 11, 2016, within the 30 day time limit.

[4] On February 22, 2016, the AD of the Tribunal requested submissions from the Respondent on whether leave should be granted or refused.

[5] The Respondent filed written submissions, on March 9, 2016, stating that the Appellant has grounds for appeal under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) and asking that leave to appeal be granted and the matter be referred back to the GD of the Tribunal to be heard anew.

ISSUE

[6] If the appeal is determined to have a reasonable chance of success, the AD must decide whether to dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

LAW AND ANALYSIS

[7] Pursuant to subsections 57(1) and (2) of the DESD Act, an application for leave to appeal must be made to the AD, in the case of a decision made by the GD Employment Insurance Section, 30 days after the day on which it is communicated to the appellant.

[8] 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".

[9] 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".

[10] 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.

[11] Subsection 59(1) of the DESD Act sets out the powers of the Appeal Division. It states: The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[12] The Tribunal must be satisfied that the reasons for appeal fall within any of the grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[13] The Application refers to all three of the grounds of appeal in subsection 58(1) of the DESD Act. In particular, the Appellant's representative submitted that:

a) The Appellant has been struggling with significant problems related to memory and concentration; he was diagnosed with Post Traumatic Stress Disorder and has been receiving treatment for a considerable period of time;

b) Although there is evidence that he received a Notice of Hearing for the teleconference hearing before the GD, he had no recollection of having received the Notice;

c) He only became effectively aware that there was a hearing when he received the GD's decision dismissing his appeal;

d) Because of his severe disabling condition, he was prevented from exercising his right to participate in the scheduled hearing and, thus, was prevented from exercising his right to natural justice;

e) In addition, by basing its decision solely on the Commission's evidence, the GD erred in law by ignoring relevant evidence; the GD had the Appellant's version of events in the appeal file but did not consider it; and

f) The GD, therefore, also based its decision on erroneous findings of fact which it made in a perverse or capricious manner without regard the material before it.

[14] A Notice of Hearing dated May 19, 2015, for a hearing date of June 9, 2015, was sent to the Appellant. That hearing date was adjourned on request of the Appellant. A new hearing date of January 6, 2016 was scheduled. The second Notice of Hearing was dated June 4, 2016 and a Canada Post Tracking confirmation indicates that it was delivered on June 8, 2015; however, the signatory name (recipient of the Notice) was not indicated and a copy of the signature was not included.

[15] On January 14, 2016, the Appellant called the Tribunal to ask what he could do about the GD decision.

[16] The GD decision stated that the Appellant did not attend the teleconference hearing and that "Canada Post Tracking confirmed that the Appellant signed for the Notice of Hearing on June 8, 2015."

[17] I note that the Canada Post Tracking document does not confirm that the Appellant signed for the Notice of Hearing on June 8, 2015. It does not include a signatory name or signature.

[18] The Respondent was also not present at the hearing, although it did file written representations for the GD's consideration.

[19] The GD decision was made based on information from the docket including the Respondent's representations. That decision concluded that the Appellant's actions (not notifying his supervisor of his absence prior to the start of his shift and not providing medical documentation to support his absenteeism) were wilful, conscious, deliberate and intentional, and that he lost his job as a result of misconduct, pursuant to subsection 30(1) of the *Employment Insurance Act*. While the GD decision referred to a grievance having been filed by the Appellant and his having a WSIB program, it did not make any findings on whether or if the Appellant's medical condition had an impact on his conduct.

[20] The Respondent submits that a valid explanation for the Appellant's absence at the hearing, related to his medical issues, was provided, and due to that explanation and the medical evidence on file, the appeal has a reasonable chance of success. Further, the Respondent agrees with the Appellant that there was a breach of natural justice. Thus, the Respondent recommends that this matter be returned to the GD to be heard as a *case de novo*.

[21] Given the fundamental nature of the right to be heard, the circumstances of this case and the Respondent's agreement, I am satisfied that the appeal has a reasonable chance of success.

[22] Considering the grounds for appeal raised by the Appellant and my review of the GD decision and the file, I grant the application for leave to appeal.

[23] In addition, given all of the above and the Respondent's consent and request, I allow the appeal. Because this matter will require the parties to present evidence, a hearing before the GD is appropriate.

CONCLUSION

[24] The application for leave to appeal is granted.

[25] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration by a different Member.

Shu-Tai Cheng
Member, Appeal Division