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

Citation: *Canada Employment Insurance Commission v. K. S.,* 2016 SSTADEI 178

Tribunal File Number: AD-15-78

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

K. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 5, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applies to the Social Security Tribunal (Tribunal) for leave to appeal the decision of the General Division (GD) issued on February 6, 2015. The GD allowed the Respondent's appeal where the Commission had determined that the Respondent had voluntarily left her employment without just cause pursuant to sections 29 and 30 the *Employment Insurance Act* (EI Act). The Commission had also imposed a disentitlement pursuant to paragraph 18(a) of the EI Act for failing to prove her availability for work while attending school.

[2] The Respondent requested reconsideration of the Commission's decision. The Commission maintained its original decision.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division of the Tribunal on February 25, 2015. The Application was filed within the 30 day time limit.

[4] The grounds of appeal stated in the Application are that the GD erred in law and in fact, as follows:

a) The Respondent failed to prove her availability for work while attending a course of her own initiative but the GD found that she met the criteria to be considered available for work from October 21, 2013;

b) The GD decision is based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it;

c) There were no exceptional circumstances from October 21, 2013 to May 29, 2014 to overcome a presumption of non-availability;

d) The GD simply accepted the Respondent's statements at the hearing that she was available for work and had previously worked while attending school;

e) There was evidence that the Respondent was not available for the first and second semester of her course, she had not sought work during the relevant period and she provided no job search details; and

f) The GD cannot ignore evidence, especially when it relates to the core of the issue under appeal.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development* (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”.

[7] 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”.

[8] 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
>
> (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.

[9] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the enumerated grounds of appeal. At least one of the reasons must have a reasonable chance of success, before leave can be granted.

[10] The Tribunal notes that the Respondent was present and testified at the hearing before the GD, but the Applicant chose not to attend.

Errors Asserted

[11] The GD found, at pages 4 and 5 of its decision, that:

> [13] Availability under the Act is defined as a willingness to work under normal conditions without unduly limiting the chances of obtaining employment.
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> [14] Availability needs to be assessed on the basis of attitude and conduct, taking into account all circumstances specific to each case (Carpentier A-474-97; Whiffen A-1472-92; Rondeau A-133-76).
>
> [15] There is a presumption that a person enrolled in a course of full-time study is not available for work. This presumption of fact is rebuttable by proof of exceptional circumstances (Cyrenne 2010 FCA 349; Wang 2008 FCA 112; Gagnon 2005 FCA 321; Rideout 2004 FCA 304; Boland 2004 FCA 251; Primard 2003 FCA 349; Landry A-719-91).
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> [16] The presumption may be rebutted by a history of full-time employment while studying. This history must be established over the years (Rideout 2004 FCA 304; Boland 2004 FCA 251; Loder 2004 FCA 18; Primard 2003 FCA 349; Landry A-719-91).
>
> [17] In the case of Wang 2008 FCA 112, a claimant was found available even if studying because they made many efforts to find employment. The case rested on the claimant`s credibility.
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> [18] As in this case, the claimant submitted that working while studying was possible as she had done it in the past. There is no reason for the Tribunal not to find the submissions of the claimant as credible. During the hearing, the claimant was able to demonstrate that she was indeed looking for work while in school and how she had a history of working while studying. The claimant also proved her ability to do both as she is currently working full time hours between two jobs and studying full time.
>
> [19] The Tribunal is therefore satisfied that the claimant meets all the necessary criteria during the time period in question to be considered available for work under section 18(a) of the Act.

[12] On the basis of these findings, the GD allowed the Respondent’s appeal.

[13] While the GD stated the legislative provisions relevant to the issues on appeal and cited applicable jurisprudence, the Applicant argues that the GD's findings were erroneous because there were no exceptional circumstances to overcome a presumption of non-availability.

[14] The GD allowed the Respondent's appeal relating to availability. It did so by finding that the presumption - that a person enrolled in a course of full-time study is generally not available for work within the meaning of the EI Act - was rebutted in this case by proof, by the claimant during the hearing, of exceptional circumstances.

[15] The Applicant was invited to but did not attend the hearing before the GD. Its written submissions and the record on appeal were before the GD. By its absence, the Applicant lost the ability to cross-examine the Respondent in person. If the Applicant chooses not to attend a hearing before the GD, it should not believe that it can simply appeal a decision of the GD if it is not to its satisfaction.

[16] The Applicant's submissions on the alleged factual errors are affected by its choice not to attend the hearing. Presenting a convincing argument that an erroneous factual finding was "made in a perverse or capricious manner or without regard for the material before it" is difficult when the Applicant chose not to be present when all elements of the evidence were before the GD, including the testimony and submissions at the hearing. It does not appear that the Applicant consulted the recording of the hearing to confirm all the facts brought to the knowledge of the GD since the Applicant's submissions do not point to specific portions of the Applicant's testimony.

[17] It is not my role, as a Member of the Appeal Division of the Tribunal on an application for leave to appeal, to review and evaluate the evidence that was before the GD with a view to replacing the GD's findings of fact with my own. It is my role to determine whether the appeal has a reasonable chance of success on the basis of the Applicant's specified grounds and reasons for appeal: erroneous finding(s) of fact based on the evidence that was before the GD which finding of fact, pursuant to paragraph 58(1)(c) of the DESD Act, was made in a perverse or capricious manner or without regard for the material before it (emphasis mine).

[18] I have read and carefully considered the GD's decision and the record. The GD's findings of fact were not made without regard to the material before it. The decision specifically refers to the testimonial and documentary evidence upon which the GD arrived at its findings of fact. In addition, the findings of fact identified by the Applicant as erroneous were not made in a perverse or capricious manner.

[19] 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 of law upon which the GD based its decision.

[20] While an applicant is not required to prove the grounds of appeal for the purposes of a leave application, at the very least, an applicant ought to set out some reasons which fall into the enumerated grounds of appeal.

[21] The Application is deficient in this regard, and the Applicant has not satisfied me that the appeal has a reasonable chance of success.

CONCLUSION

[22] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division