



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *M. S. v. Canada Employment Insurance Commission*, 2016 SSTA DEI 202

Tribunal File Number: AD-16-187

BETWEEN:

M. S.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Leave to Appeal and Appeal Decision

DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: April 12, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 10, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) held a hearing in this matter. It determined that the claimant (Appellant) lost his job due to misconduct. Therefore, the disqualification imposed by the Canada Employment Insurance Commission (Commission or Respondent) was warranted and the Appellant's appeal was dismissed.

[2] The Appellant was present, with a representative, at the GD hearing held by teleconference. The GD rendered its decision on December 23, 2015 and communicated it to the Appellant by letter of the December 24, 2015.

[3] The Appellant received the GD decision on January 5, 2016 and his legal representative filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal, on January 22, 2016, within the 30 day time limit.

[4] On March 14, 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 31, 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.

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 GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in that:
 1. The GD needed to assess the credibility of the Appellant on the inconsistencies between his evidence on being sick on the date of his termination and the information from the employer in the Commission's file, but the GD considered that credibility was not an issue and held a teleconference hearing instead of an in-person hearing; and
 2. The Appellant's representative had informed the GD Member that since filing the appeal, he was able to obtain a copy of the medical report supporting his illness; the GD Member stated that he believed that the Appellant had the medical report and did not want a copy of it; however, in the GD decision the Member states that there is no supporting evidence in the docket of a medical disorder;
- b) The GD erred in law in that the Appellant's termination was for being late reporting that he was sick, which is not misconduct under the *Employment Standards Act*; and
- c) The GD based its decision on an erroneous finding of fact in that the GD decision found that the Appellant had been warned that if he had any further attendance issues his employment would be terminated; however, the Appellant was terminated for being late for reporting that he was sick not for reporting late to work.

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

[15] The GD decision concluded that the Appellant's actions (excessive absenteeism and lateness) were wilful or deliberate or so reckless as to approach wilfulness, 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 the employer being aware of the Appellant's medical

condition, it concluded “there was no supporting evidence in the docket of a medical disorder” at paragraph [22].

[16] The Respondent submits that:

- a) The Appellant provided medical reports confirming that he had a medical condition (abnormal sleep behavior) ;
- b) The GD Member allegedly said he did not need to see it; however, paragraph [22] of the GD decision states that there was no supporting evidence in the docket of a medical disorder; and
- c) In the interest of procedural fairness and natural justice, it recommends that the AD allow the claimant’s Application and return the matter to the GD for a new determination.

[17] 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.

[18] 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.

[19] 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

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

[21] 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