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

Citation: *M. D. v. Canada Employment Insurance Commission,* 2016 SSTADEI 227

Tribunal File Number: AD-16-381

BETWEEN:

M. D.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal

DECISION BY:: Shu-Tai Cheng

DATE OF DECISION: April 22, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On January 28, 2016, 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 Applicant had been denied employment insurance (EI) benefits as the Commission determined that he had voluntarily left his employment without just cause. The Appellant requested reconsideration. In July 2014, the Commission maintained its initial decision. The Applicant appealed to the GD of the Tribunal.

[2] The GD of the Tribunal dismissed the appeal, on March 19, 2015, and the Applicant appealed to the Appeal Division (AD) of the Tribunal. The AD allowed the appeal, on July 15, 2015, and returned the matter to the GD, because there had been an error in the Notice of Hearing which resulted in the Applicant not being able to join the teleconference hearing on March 19, 2015. The AD returned the case to the GD for reconsideration.

[3] The GD hearing (of the reconsideration) proceeded by teleconference on November 17, 2015. The Applicant attended the hearing. The Respondent did not attend.

[4] The GD determined that:

a) The Applicant left his job voluntarily; he had resigned by letter dated March 20, 2104;

b) The Applicant relied on subsection 29(c) of the *Employment Insurance Act* (EI Act), in particular in relation to "working conditions that constitute a danger to health or safety", "harassment" (in the form of workplace bullying) and "intolerable work environment" (conflict with co-workers);

c) The Applicant did not meet the onus on him to prove that his work conditions were adversely affecting his health such that he had no reasonable alternative but to quit;

d) The Applicant did not meet the onus on him to prove that the workplace bullying he experienced was "other harassment" such that he had no reasonable alternative but to quit;

e) The Applicant did not establish that his working conditions were so manifestly intolerable that he had no other choice but to leave;

f) A reasonable alternative would have been to make efforts to improve the situation with the employer prior to leaving;

g) A reasonable alternative to quitting his job would have been to continue working until he had secured other employment;

h) The Applicant did not prove that he was left with no reasonable alternative but to quit his employment when he did; and

i) Therefore, the Applicant is subject to an indefinite disqualification from EI benefits pursuant to sections 29 and 30 of the EI Act.

[5] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on March 1, 2016. The Application stated that he received the GD decision on February 10, 2016. The Application was filed within the 30-day limit.

ISSUES

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

LAW AND ANALYSIS

[7] 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.

[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] The Applicant’s reasons and grounds for appeal are:

a) Subsection 29(c) of the EI Act, in particular working conditions that constitute a danger to health or safety and antagonism with a supervisor;

b) That the headaches and stomach problems he experienced were dangerous for the work he did (with rotating powerful machines) and that Service Canada did not explain to him that he needed a doctor’s note to prove that his job situation made him sick; and

c) His supervisor stated that he was high maintenance but had no plans to dismiss him; the General Manager of the company told him that if his supervisor was not happy with his performance then there is no way of working together; taken together, these statements sound like if he did not tolerate his work situation, he would have been dismissed.

[12] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of voluntary leaving. It also noted that it is not necessary for the Applicant to fit precisely within one of the factors listed in subsection 29(c) of the EI Act in order for there to be a finding of "just cause".

[13] The GD stated that the "proper test is whether, on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment, having regard to all the circumstances, including but not limited to those specified in paragraphs 29(c)(i) to (xiv) of the EI Act." This was a correct statement of the applicable legal test.

[14] The GD noted that the Applicant attended the GD hearing. At the hearing, the GD accepted a 5-page "memo" prepared by the Applicant which was read into the record and the Applicant also testified. The GD decision, at pages 4 to 10, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[15] The Applicant's submissions in support of the Application mostly re-argue the facts and arguments that he asserted before the GD.

[16] While it is not clear that the Applicant argued "antagonism with a supervisor" (paragraph 29(c)(x) of the EI Act) before the GD, specifically, he gave evidence regarding his supervisor, which the GD considered. Also, the GD did not restrict its consideration to specific paragraphs of subsection 29(c) of the EI Act.

[17] 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.

[18] 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.

[19] 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.

[20] 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.

[21] 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

[22] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division