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

Citation: *Canada Employment Insurance Commission v. T. S.*, 2016 SSTADEI 218

Tribunal File Number: AD-16-354

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

T. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 20, 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 8, 2016. The GD allowed the Respondent's appeal where the Commission had determined that the Respondent had voluntarily left his employment without just cause pursuant to sections 29 and 30 the *Employment Insurance Act* (EI Act).

[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 26, 2016. 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 left his employment because he was dissatisfied with the duties that he was hired to do;

b) The GD allowed his appeal finding that he had just cause under subparagraph 29(c)(ix) of the EI Act ("significant changes to work duties");

c) The evidence does not support the finding that the Respondent's employment was fundamentally different from the employment for which he had been hired;

d) The GD applied the wrong legal test for voluntary leaving and just cause in coming to the conclusion that the Respondent had no reasonable alternative but to quit his employment;

e) The GD relied on case law without explaining how it applied to the current matter; and

f) The GD's decision conflicts with jurisprudence which confirms that in order to establish just cause for quitting employment due to dissatisfaction with working conditions, the

claimant must show that the conditions were so intolerable that he/she had no option but to quit.

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;
>
> (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:

> [14] In cases of voluntary leaving, the test to be applied, having regard for all of the circumstances, is whether on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment.
>
> [15] In *Canada (Attorney General) v. White*, 2011 FCA 190, the Federal Court of Appeal upheld the principle that a significant change in duties is a just cause reason for voluntarily leaving one's employment.
>
> [16] In that case, the Court wrote that a reasonable alternative for that Appellant would have been to stay employed while she looked for another job.
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> [17] The Appellant in the present case stated during the hearing that at his level, looking for a job is a full time endeavour. He could not go to work and at the same time perform all of the necessary tasks required to look for another job. He did try to look for some jobs while he was at this job. One of these tasks was to be available to attend interviews for jobs during business hours. He could not tell his employer that he needed the day off to do such a task on a continuous basis. He also did not want to tell a lie regarding his whereabouts on those days in which he had an interview. He continued his job search after he left that employment and was successful in securing another job shortly thereafter.
>
> [18] The Appellant discussed his situation with the owner before he left. There was nowhere else in the company to which he could transfer. There was no other position in the company at that time for him to assume the duties as a logistics manager, which was the job for which he applied.
>
> [19] In *Chaoui v. Canada (Attorney General)*, 2005 FCA 66, the Federal Court of Appeal upheld the principle that the Appellant in that case voluntarily left his employment because the nature of the duties assigned to him was not as this employer and he had originally agreed.
>
> [20] The Tribunal finds that the Appellant did try to look for another job while he was employed at his former place of employment. He found that it was not possible for a job at his level, to do both at the same time. Since he had spoken with the owner and there was neither any other department to transfer to, nor was there any other job for him to do that was the job of a logistics manger, the Appellant quit the job.
>
> [21] The Tribunal finds that the job as an order taker and order processor was a significant change in duties for the job he was hired to perform.

> [22] The Tribunal finds that the Appellant had just cause, according to subsection 29 (c) (ix) of the *Act,* to voluntarily leave his job

[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 jurisprudence, the Applicant argues that the GD's findings were erroneous because it did not apply the correct test, did not explain how the jurisprudence cited was applicable and rendered a decision in conflict with applicable jurisprudence.

Erroneous findings of fact

[14] The Applicant argues that the Respondent left his employment because he was dissatisfied with the duties that he was hired to do. I note, however, that the GD reviewed the evidence and did not find that this was the reason for the Respondent voluntarily leaving his employment. The GD determined that the Respondent left his employment because he was not allowed to perform the job duties that he was hired to do (i.e. that there was a significant change in his work duties). Then the GD analyzed whether the Appellant had no reasonable alternative to leaving his employment.

[15] The Respondent attended and testified at the teleconference hearing. He gave oral evidence at the hearing that the job he was hired to do was never the one he was allowed to do, as the owner insisted that the priority was something else. He testified that about five percent of his duties corresponded to the position he was hired for, that of logistics manager. The majority of his oral testimony related to this issue and most of the GD Member's questions to the Respondent were also on this issue.

[16] The GD found that there were significant changes in the Respondent's work duties (what he was hired to do compared to what his actual work duties were) and that a significant change in work duties is just cause for voluntarily leaving one's employment.

[17] The Applicant argues that the evidence does not support the finding that the Respondent's employment was fundamentally different from the employment for which he had been hired.

[18] 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. 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.

[19] 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 Respondent's testimony.

[20] 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).

Errors of law

[21] The Applicant's other ground of appeal is that the GD erred in law, by failing to apply the legal test for voluntary leaving, relying on case law without explaining its application to this matter, and rendering a decision in conflict with existing jurisprudence.

[22] Paragraph [14] of the GD decision stated that: "In cases of voluntary leaving, the test to be applied, having regard for all of the circumstances, is whether on the balance of probabilities, the Appellant had no reasonable alternative to leaving his employment." The Applicant's written submissions before the GD framed the test as: having regard to all the circumstances,

whether the claimant had a reasonable alternative to leaving his employment when he did. The Applicant, therefore, is not challenging the legal test for voluntary leaving stated by the GD.

[23] The Applicant's position is that the GD erred by failing to apply this test properly.

[24] The GD decision referred to *Canada (Attorney General) v. White*, 2011 FCA 190, for the principle that a significant change in duties is a just cause reason for voluntarily leaving one's employment. I note that the Applicant's written submissions before the GD also referred to the *White* case but as authority for another principle.

[25] The GD's reference to *White, supra*, was not an error of law. The Federal Court of Appeal, in *White*, noted that the Board of Referees had failed to comprehensively address Ms. White's allegations of a "significant change in work duties" and had concluded that no significant change in duties had been imposed, and that the Umpire found that a significant change in her duties constituted just cause for leaving her employment and allowed her appeal. The Federal Court of Appeal acknowledged that a significant change in duties is one of the just causes for leaving employment, but it determined that the Umpire had failed to afford any deference to the Board's findings and had substituted his view of the facts for that of the Board, thereby making a reviewable error.

[26] The GD decision referred to *Chaoui v. Canada (Attorney General)*, 2005 FCA 66, stating that the Federal Court of Appeal upheld the principle that the Appellant in that case voluntarily left his employment because the nature of the duties assigned to him was not as his employer and he had originally agreed.

[27] In the *Chaoui* matter, the claimant relied on "significant change in work duties" and submitted that he had no reasonable alternative to leaving his employment. The Board of Referees had allowed his appeal, but the Umpire had overturned the Board's decision. The Federal Court of Appeal stated that the Umpire was correct to intervene because the Board did not ask whether there was no reasonable alternative and failed to ask whether there were "significant changes in work duties" within the meaning of the EI Act but also stated that the Umpire was not entitled to accept the employer's version of the facts since they were disregarded by the Board. The Court stated that the Umpire should have asked himself if the

claimant's version of the facts supported a finding that there was "significant changes in work duties" which he did not do. The Federal Court of Appeal allowed the appeal and referred the matter to the Chief Umpire for redetermination "while answering the following questions: does the claimant's version of the facts support a finding that there were "significant changes in work duties" within the meaning of subparagraph 29(*c*)(ix) and, if so, was there no reasonable alternative to voluntarily leaving within the meaning of paragraph 29(*c*)?"

[28] The GD did consider whether the Respondent's version of the facts support a finding that there were significant changes in his work duties within the meaning of subparagraph 29(c)(ix) of the EI Act and whether there was no reasonable alternative to voluntarily leaving within the meaning of paragraph 29(c) of the EI Act, and it answered both questions in the affirmative.

[29] I note that in *Chaoui*, the Federal Court of Appel also stated:

> Furthermore, in stating that the claimant should have "continued to work until he found a job that was more consistent with his aspirations" and that there was "no evidence that the working conditions were intolerable", the Umpire went beyond the requirements of paragraph 29(*c*) and imposed a burden that ultimately renders that paragraph meaningless.

[30] The last reason for appeal listed in the Application is that the Respondent must show that conditions were so intolerable that he had no option but to quit. In the words of the Federal Court of Appeal in *Chaoui*, this goes beyond the requirements of paragraph 29(c) of the EI Act and imposes a burden that ultimately renders that paragraph meaningless.

[31] The Applicant also argues that the decision of the GD "conflicts with existing jurisprudence which confirmed that in order to establish just cause for quitting employment due to dissatisfaction with working conditions, the claimant must show that the conditions were so intolerable that he had no option but to quit". This is part of the reason for appeal discussed immediately above.

[32] 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.

[33] 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.

[34] 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.

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

CONCLUSION

[36] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division