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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. A. S.*, 2016 SSTADEI 237

Tribunal File Number: AD-16-369

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

A. S.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: April 27, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On February 9, 2016, the General Division ("the GD") of the Canada Social Security Tribunal ("the Tribunal") allowed the appeal of the Claimant ("the Respondent"). The Canada Employment Insurance Commission ("the Commission") determined that the Claimant "did not have just cause to leave his employment on March 30, 2015, the date on which he refused the position offered because he did not show that he had exhausted all reasonable alternatives to leaving." The DG found "that there is no evidence in the file to show that the appellant voluntarily left the employer… on November 26, 2014. His employment ended because of a shortage of work."

[2] The decision was communicated to the Applicant by letter dated February 10, 2016, and the Applicant acknowledged receipt on February 10, 2016. The Applicant filed an application for leave to appeal ("the Application") with the Appeal Division ("the AD") on March 1, 2016, within the prescribed time limit.

ISSUE

[3] The Tribunal must determine whether the appeal has a reasonable chance of success.

THE LAW AND ANALYSIS

[4] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* ("the DESD Act") provide that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and that the Appeal Division "must either grant or refuse leave to appeal".

[5] 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."

[6] 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.

[7] The Tribunal will grant leave to appeal if it is satisfied that the Applicant has demonstrated that one of the aforementioned grounds of appeal has a reasonable chance of success.

[8] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the Act, whether there is a question of law, fact or jurisdiction, or relating to a principle of natural justice, the response to which might justify setting aside the decision under review.

[9] In its Application and written submissions, the Applicant states:

(a) the GD erred in law in ignoring the provisions of paragraph 29(*b.1*)(ii) of the *Employment Insurance Act* ("the EI Act");

(b) the decision was unreasonable and the GD made it without regard for the material before it;

(c) the facts in the file show that the Claimant refused to resume an employment offered by his employer, and is thus considered to have voluntarily left his employment; and

(d) furthermore, the Claimant did not show that he had exhausted all reasonable alternatives to leaving.

[10] Since a leave to appeal proceeding is a preliminary step to a hearing on the merits (in the event that a hearing is necessary), the parties do not have to prove their case. The Tribunal will grant leave to appeal if it is satisfied that one of the grounds of appeal has a reasonable chance of success.

[11] The GD's decision reads as follows at page 12:

> [Translation]
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> [24] A claimant has just cause for voluntarily leaving their employment if, having regard to all the circumstances, including those set out in paragraph 29(*c*) of the Act, leaving is the only reasonable alternative in their case.
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> [25] In this case, the Tribunal finds that the Applicant did not voluntarily leave the employer Mega Brands Inc. but rather that the employment ended on November 26, 2014, because of a shortage of work.
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> [26] The Appellant's testimony, which was not contradicted, was that the employer informed him in late November 2014 that there was a shortage of work and that he would have to "put him on unemployment."
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> [27] The employer then told the Appellant that he might possibly call him back to work during the Christmas holidays, around the second week of January 2015.
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> [28] The Tribunal finds that the Commission did not show in this case that the Claimant had voluntarily left his employment (*Green*, 2012 FCA 313).
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> [29] The Commission moreover acknowledged that the Appellant had been laid off in November 2014 as a result of a shortage of work (Exhibits GD3-15 and GD4-3).
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> [30] The Tribunal notes that the burden of proof is on the Commission to show that the appellant left voluntarily (*Green*, 2012 CAF 313).
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> [31] The fact that the Appellant subsequently refused temporary employment offered by the employer in late March 2015 in no way alters the fact that his employment ended on November 26, 2014. The employment relationship was terminated when the Appellant was laid off by his employer on November 26, 2014.
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> [32] The Tribunal is of the view that the Appellant's situation cannot be considered a voluntary leaving under subparagraph 29(*b.1*)(ii) of the Act because he declined the offer of employment that his employer made to him on March 30, 2015.

> [33] The Tribunal finds that the Appellant did not refuse "to resume an employment, in which case the voluntary leaving occurs when the employment is supposed to be resumed…," as provided in subparagraph 29(*b.1*)(ii) of the Act.
> [34] The evidence shows that the Appellant did not refuse to resume his employment when he was supposed to do so in January 2015. The employer did not call the Appellant back in January 2015 as planned.
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> [35] The employer did not communicate with the Appellant until late March 2015, nearly three months after telling him that he might "possibly" call him back to work in January 2015. Furthermore, the employer did not suggest that the Appellant resume the employment that he initially had, but rather offered him a temporary employment for a period of two or three months.
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> [36] The Tribunal is of the view that the amended or replacement Record of Employment (serial number S09480796), issued by the employer on April 1, 2015, does not adequately reflect the reason for termination of the Appellant's employment (Exhibit GD3-16). The Tribunal finds that the appellant cannot have left voluntarily, as that document indicates (Code E – Quit), when he was laid off following a decline in production at the employer.
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> [37] The Tribunal does not accept the Commission's argument that the Appellant "did not have just cause to leave his employment on March 30, 2015, the date on which he refused the position offered because he did not show that he had exhausted all reasonable alternatives to leaving." (Exhibit GD 4-3)
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> [38] The Appellant cannot have left his employment voluntarily on March 30, 2015 as he had not had an employment relationship with his employer for more than three months.
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> [39] The Tribunal is of the view that there is no evidence in the file to show that the Appellant voluntarily left the employer, Mega Brands Inc., on November 26, 2014. His employment ended as a result of a shortage of work.
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> [40] The Tribunal finds that the Commission did not meet its burden to show that there was a voluntary leaving (*Green*, 2012 FCA 313).
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> [41] The appeal on the issue has merit.

[12] The Applicant contends that "the facts in the file show that the Claimant refused to resume an employment offered by his employer, and is thus considered to have voluntarily left his employment" and that the GD's findings of fact on the matter were made "without regard for the material before it."

[13] If a party chooses not to be present at a hearing before the GD, that party should not think that it can simply appeal from a decision of the GD with which it is not satisfied.

[14] The Applicant's submissions on the alleged errors of fact are affected by its choice not to be present at the hearing.

[15] For an error of fact to be reviewable, the GD must have "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." This expression does not refer to just any erroneous finding of fact.

[16] For example, it is not enough for an error of fact to be established; the GD must also have based its decision on that finding. In this case, the GD based its decision *inter alia* on the following findings:

(a) the Claimant was laid off in November 2014 as a result of a shortage of work;

(b) the employer did not ask the Appellant to resume the employment he initially had but rather offered him a temporary employment for a period of two or three months; and

(c) the Claimant cannot have voluntarily left his employment on March 30, 2015 as he had not had an employment relationship with his employer for more than three months.

[17] The Applicant contends that each of these findings is erroneous.

[18] One of the aforementioned preconditions must be met in order to establish an erroneous finding of fact that the GD "made in a perverse or capricious manner or without regard for the material before it."

[19] It is difficult to present a convincing argument that the GD made an erroneous finding of fact "in a perverse or capricious manner or without regard for the material before it" when the Applicant chose not to be present when all the evidence was put before the GD, particularly the testimony and submissions at the hearing. Did the Applicant here consult the recording of the hearing to confirm all the evidence adduced before the GD?

[20] On the question whether the Claimant's refusal to accept an employment offered by his employer in March 2015 can be considered as voluntary leaving, there is a reasonable chance it can be successfully shown that an error in law was committed. However, there is no reasonable chance of success with respect to the allegations of erroneous findings of fact.

[21] Upon review of the appeal file, the General Division's decision and the Applicant's arguments, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has raised a question pertaining to an error in law, described in paragraph [20] above the response to which may lead to the setting aside of the decision under review.

CONCLUSION

[22] Leave to appeal is granted. However, it is limited by the findings in paragraphs [20] and [21] above.

[23] This decision granting leave to appeal does not presume the result of the appeal on the merits of the case.

[24] I invite the parties to make submissions on the following questions: whether a hearing is appropriate; if so, the form of hearing; and the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division