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

Citation: *Canada Employment Insurance Commission v. N. G.*, 2016 SSTADEI 246

Tribunal File Number: AD-16-400

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

N. G.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 4, 2016

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 26, 2016. The GD allowed the Respondent's appeal where the Commission had voluntarily left her employment without just cause within the meaning of the *Employment Insurance Act* (EI Act).

[2] The Respondent requested a reconsideration of the Commission's decision. The Commission maintained its original decision by letter to the Respondent of November 24, 2015.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on March 9, 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 fact and law as follows:

a) The Respondent had a reasonable alternative to leaving which was to schedule interviews outside of her work hours and remain employed until she found more suitable work;

b) The GD erred in law by failing to apply the correct legal test;

c) The GD based its decision on an erroneous finding of fact: in that the finding that the Respondent had reasonable assurance of another employment in the immediate future is unreasonable; and

d) The Respondent did not have interviews with other employers until after she left her employment.

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 Act* (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 at the GD hearing and testified before the GD. The Applicant did not to attend.

[11] The GD found, at page 9 to 11 of its decision, that:

> [16] An indefinite disqualification may be applied when an Appellant voluntarily leaves her employment without just cause. The test to be applied, having regard to all the circumstances, is whether the Appellant had a reasonable alternative to leaving her employment when she did.
>
> […]

[19] The evidence and submissions of the Appellant was that her employment agency and employer were not truthful in what the employment entailed. She left the employment as she was a bookkeeper and the work was data entry. In the 3 days she was there she was called for interviews for other employment. The agency would not permit her to be excused from the job to attend the other interviews. She quit on Wednesday, September 2, had 1 interview the next day, September 3 and the interview which resulted in her new employment, on Friday, September 4, 2015. She commenced her new employment on September 21, 2015.

[20] The evidence and submissions of the Commission were that she did not demonstrate that her situation was so intolerable as to justify her leaving her job before acquiring other employment. Data entry at $17 per hour may not have been what the claimant wanted to be doing, but she had only done it a few days, and she already had possible job interviews for more suitable work coming up. It was the Appellant's personal preference. For the claimant to put the onus on her current employer's refusal to accommodate her and then point to it as a reason to justify quitting so as to avoid being fired for attending interviews is a rationalization.

[21] The Appellant is seeking payment of benefits from September 3, 2015, when she separated from her employment, to September 21, 2015, when she was employed again. A period of 17 days.

[22] The Member finds that the Appellant did not voluntarily quit within the meaning of the Act. The Commission's submission was that she could have requested potential employers schedule interviews outside of her working hours. There is no evidence in the docket that the Appellant did or did not do as the Commission suggests.

[23] The Member finds that the Appellant had just cause for leaving her employment. She had reasonable assurance of another employment in the immediate future**.** Her submissions were proven when, in her direct testimony, she stated she had 2 employment interviews in the 2 days following her separation from the employer. She was interviewed, hired and started new employment all within 17 days after her separation.

[24] The Member finds that the Appellant had a reasonable alternative to leaving her employment when she did. She had two job interviews within 2 days of separation, was interviewed and hired before the 17th day. Her alternative was to be hired for other employment that matched her skills, knowledge and experience.

[25] The Member finds that the Commission incorrectly imposed an indefinite disqualification pursuant to the Act. The Appellant's claim for regular benefits is to be allowed effective from September 3, 2015 until she was employed again on September 21, 2015.

[12] While the GD stated the legislative provisions relevant to the issues on appeal and cited the *Imran* decision of the Federal Court of Appeal (2008 FCA 17), the Applicant argues that the GD erred in law and in fact by misapplying the legal test for just cause and finding that the Respondent had no reasonable alternative to leaving her employment when she did.

[13] In *Imran, supra*, the Federal Court of Appeal found that the Umpire had accepted the claimant's argument that he could not have stayed in his employment and been successful in finding a better job and, on that basis, concluded that he had no reasonable alternative but to leave his employment. This conclusion conflicted with the decision of the Federal Court of Appeal in *Canada (A.G.) v. Traynor*, [1995] F.C.J. No. 836, which held that the EI scheme does not allow a claimant to leave a job with the sole view of improving his/her situation in the market place.

[14] The Federal Court of Appeal also commented on Mr. Imran's argument that because jobs in his field (engineering) were plentiful, he had had reasonable assurance of another employment in the immediate future, which constituted just cause for voluntarily leaving his employment. Also, he was successful in finding an engineering job shortly after leaving his employment. The Court noted that these factors were not sufficient to establish just cause for voluntarily leaving pursuant to subparagraph 29(c)(vi) of the EI Act because the Federal Court of Appeal had established that:

> Subparagraph 29(*c*)(vi) requires that there be reasonable assurance of another employment in the immediate future. In this case, none of the three requirements have been met… At the moment when he himself chose to become unemployed, the respondent did not know if he would have employment, he did not know what employment he would have with what employer, he did not know at what moment in the future he would have employment…

The Court concluded that at the moment that the claimant left his job, it cannot be said that he knew what future employment he would have or the identity of his future employment. Therefore, just cause for leaving his employment on the basis provided in subparagraph 29(c)(vi) of the EI Act has not been established.

[15] The GD in the current matter found that the Respondent had reasonable assurance of another employment in the immediate future (subparagraph 29(c)(vi) of the EI Act). This

finding was based on the Respondent having 2 employment interviews in the 2 days following her separation from the employer, her having been interviewed, hired and starting new employment all within 17 days after her separation.

[16] While the GD decision cites the *Imran* case in support of its decision to allow the Respondent's appeal, the Federal Court of Appeal's reasoning and conclusions were, arguably, contrary to those of the GD.

[17] 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. Here, the Applicant has identified grounds and reasons for appeal which fall into the enumerated grounds of appeal, namely paragraph 58(1)(b) and (c) of the DESD Act.

[18] On the ground that there may be an error of law or an error of mixed fact and law, I am satisfied that the appeal has a reasonable chance of success.

CONCLUSION

[19] The Application is granted.

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

[21] I invite the parties to make written submissions on whether a hearing is appropriate and, if it is, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division