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

Citation: *X. Q. v. Canada Employment Insurance Commission,* 2016 SSTADEI 270

Tribunal File Number: AD-15-891

BETWEEN:

X. Q.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: May 25, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 14, 2015, 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) with a modification. The Applicant had been denied benefits on a claim she filed in December 2012, because the Commission had imposed a disqualification for voluntarily leaving her job, and a penalty and a notice of violation for knowingly making false or misleading statements. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant attended the GD hearing, which was held by teleconference on July 8, 2015. The Respondent did not attend.

[3] The GD determined that:

a) The Applicant did not have just cause for leaving her employment in January 2013;

b) The Applicant had a reasonable alternatives to leaving her employment;

c) Therefore, the Commission correctly imposed an indefinite disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act);

d) The penalty was imposed correctly pursuant to section 38 of the EI Act, but the Commission did not properly exercise its discretion regarding the amount of the penalty;

e) There were mitigating factors and the penalty is to be reduced to $1; and

f) The Notice of Violation was correctly imposed.

Based on these conclusions, the GD dismissed the appeal with the exception of the amount of the penalty which was reduced to $1.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 11, 2015. The Application stated the date that the

Applicant received the GD decision was July 23, 2015. The Application was filed within the 30 day time limit.

ISSUE

[5] Whether the appeal has a reasonable chance of success.

LAW AND ANALYSIS

[6] 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.

[7] 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."

[8] 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."

[9] 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.

[10] The Applicant's grounds of appeal are that GD misstated her submissions and she disagrees with the analysis on penalty and violation. The Applicant's submissions in support of the Application largely re-argue the facts and arguments that she asserted before the GD.

[11] 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.

[12] 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.

[13] The GD decision stated that the Applicant submitted that "she did not quit EB Games" at paragraphs [21] and [25]. However, the Applicant did not take the position (in the record or at the GD hearing) that she did not quit; rather, she has maintained that she did not know that she had to report that she had quit. Therefore, the GD made an erroneous finding of fact in a perverse or capricious manner or without regard for the material before it.

[14] In order for an erroneous finding of fact to be reviewable by the AD, the GD must have based its decision on it.

[15] Here, the GD found that it was the Applicant's personal choice to quit. However, it is unclear whether the GD based its decision on its finding that the Applicant took the position that she did not quit. This erroneous finding of fact may have affected the GD's decision regarding the issues of voluntary leaving, penalty and violation.

[16] On the issue of penalty, the GD found that the penalty was correctly imposed by the Commission but that it did not properly exercise its discretion. These appear to be contradictory findings.

[17] The GD decision referred to the Federal Court of Appeal decision in *Mootoo v. Canada (Minister of Human Resources Development)*, 2003 FCA 206, for the principle that if the trier of fact is of the view that the claimant really did not know that the representation was false, there is no violation of the penalty provisions of the EI Act.

[18] The GD found that the Commission did not properly consider that the Applicant "honestly believes that if she reported wrongly it was due to miscommunication as her English

is not perfect". If the GD accepted the Applicant's evidence on this point, it is unclear how it could have concluded that the Applicant knew that the representation was false. The GD noted, at paragraph [39] of its decision, that the Applicant "was very forthcoming with her testimony".

[19] 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.

[20] 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

[21] The Application is granted.

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

[23] 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