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

Citation: *H. Z. v. Canada Employment Insurance Commission,* 2016 SSTADEI 280

Tribunal File Number: AD-15-894

BETWEEN:

H. Z.

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 27, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 22, 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). The Applicant had been denied benefits on a claim she filed in August 2014, because the Commission had determined that she had lost her job due to her misconduct. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant attended the GD hearing, which was held by teleconference on July 15, 2015. The Respondent did not attend.

[3] The GD determined that:

a) After the Applicant was refused time off to go on vacation, she called in sick and went on vacation;

b) Her actions constituted a breach of duty that is expressed or implied in her contract of employment;

c) The Applicant was terminated due to misconduct; and

d) The Applicant's actions are that of misconduct under the *Employment Insurance Act* (EI Act).

Based on these conclusions, the GD dismissed the appeal.

[4] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 8, 2015. It was filed within the 30 day time limit.

[5] The Tribunal requested that the Applicant provide reasons for the appeal. The Applicant replied within the requested time.

ISSUE

[6] Whether 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 ground of appeal is that “the decision is not just.” The Applicant’s arguments can be summarized as follows:

a) The basic principle that both employers and employees should follow the written regulations of the company was overlooked;

b) She asked for vacation time for August 16, 17, 18, 22 and 23, 2014; she was approved for vacation on August 22 and 23; and she was sick on August 16, 17 and 18;

c) She was sick because the work conditions made her sick;

d) She quit her job because of the work conditions; and

e) She relies on sections 29 and 30 paragraphs (c)(iv), (x) and (xi) of the EI Act and takes the position that her employment was caused not by dismissal for misconduct but by voluntarily leaving for just cause.

[12] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of misconduct, at pages 3 to 5, 7 and 8.

[13] The GD noted that the Applicant attended the GD hearing, testified with the assistance of an interpreter and was accompanied by her husband. The GD decision, at pages 5 to 7, summarized the evidence in the file, the testimony given at the hearing and the Applicant's submissions.

[14] The Applicant argued similar points before the GD as are stated in the Application, i.e. that she was entitled to take days off for sickness and had the right to resign. The Applicant's submissions in support of the Application largely re-argue the facts and arguments that she asserted before the GD.

[15] 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.

[16] It is not my role, as a Member of the AD 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.

[17] As for the Applicant's submissions that the GD Member did not give consideration to the employer's misconduct, the Applicant had argued before the GD that her leg condition was exacerbated by working in a freezer at her job site and that it would not recover if she continued that work (see paragraphs [7] to [9] of the GD decision). Therefore, the GD did consider this argument and did not find in the Applicant's favour on this point. The GD noted that dismissal for misconduct and voluntarily leaving without just cause are rationally linked, and it considered that the Applicant may have voluntarily quit her job without just cause. It concluded that the Applicant's actions "are that of misconduct."

[18] As for the Applicant's arguments that she voluntarily left her employment for just cause because of antagonism in the workplace, this is the first time that the Applicant has asserted antagonism. In any event, the GD considered the issue of voluntarily leaving and determined that the Applicant lost her employment by reason of misconduct and not due to voluntary leaving.

[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