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

Citation: *K. G. v. Canada Employment Insurance Commission,* 2016 SSTADEI 313

Tribunal File Number: AD-16-576

BETWEEN:

K. G.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 15, 2016

REASONS AND DECISION

INTRODUCTION

[1] On March 10, 2016, 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 July 2015, because the Commission had determined that the Applicant had lost her employment due to her own misconduct. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant and her Representative attended the GD hearing, which was held by teleconference on March 10, 2016. The Respondent did not attend.

[3] The GD determined that:

a) The Applicant was credible, open and consistent in her comments and answers to questions;

b) The Applicant did not deliberately violate the employer's clean desk policy, rather it was a mistake;

c) The Applicant's actions were not intentional;

d) The Applicant's action were willful since they were a breach of her responsibility to enforce the clean desk policy and since she was the last one to leave;

e) There will be misconduct where the conduct of the claimant was willful, in the sense that the acts which led to the dismissal were conscious, deliberate or intentional;

f) There is misconduct where the claimant knew or ought to have known the conduct was such as to impair the duties to the employment such that dismissal was a real possibility; and

g) The Applicant lost her job as a result of her misconduct, pursuant to subsection 30(1) of the *Employment Insurance Act*.

[4] Based on these conclusions, the GD dismissed the appeal.

[5] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on April 18, 2016. The Application stated the date that the Applicant received the GD decision was March 16, 2016.

ISSUE

[6] Whether the Application was filed within the 30-day time limit.

[7] If it was not, whether an extension of time should be granted.

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

LAW AND ANALYSIS

[9] Pursuant to subsection 57(1)(a) 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.

[10] 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."

[11] 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."

[12] 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.

Was the Application Filed within 30 days?

[13] The Application was filed on April 18, 2016. The GD decision was sent to the Applicant under cover of a letter dated March 11, 2016 and was received by the Applicant on March 16, 2016.

[14] Thirty (30) days from March 16, 2016 is April 15, 2016 which was a Saturday. Therefore, the 30-day period ended on Monday, April 18, 2016. As such, the Application was filed within the 30-day time limit.

[15] It is, therefore, unnecessary to consider whether an extension of time will be needed.

Leave to Appeal

[16] The Applicant's grounds of appeal are that the GD erred in law in arriving at its decision in that it did not use the correct legal test for misconduct, and that the GD Member was biased. Her Representative provided eight pages of submissions to support these grounds of appeal. They can be summarized as follows:

a) The GD failed to apply the correct test regarding misconduct by finding that the Applicant was credible and her actions were not intentional, yet it determined that the Applicant was willful;

b) The *Mishibinijima v. Canada (AG), 2007 FCA 36* case, referred to by the GD, defined willful as "conscious, deliberate or intentional"; the Applicant's conduct could not be willful as it was determined that her actions were not intentional or deliberate, but a mistake, and her testimony was credible;

c) The *Mishibinijima* case was distinguishable on the facts;

d) The GD failed to consider all the parts of the legal test for misconduct; it should have:

    i. Identified the conduct which is alleged to constitute misconduct;

ii. Determined whether the conduct complained of was misconduct; and

iii. If it was, decided whether the Applicant's loss of employment resulted from that misconduct;

e) The GD did not put its mind to parts (i) and (iii), only to part (ii);

f) The onus is on the Commission or the employer to establish that the conduct of the claimant was misconduct, but there is no evidence from the employer that describes or details the last incident alleged to be misconduct;

g) The only evidence about the last incident was the Applicant's testimony at the hearing, which was not challenged and which the GD determined was credible and consistent;

h) The Applicant refuted that the last incident was a breach of the employer's clean desk policy; as such, it could not constitute misconduct;

i) The GD did not consider whether the claimant's loss of employment resulted from the last incident although the Applicant provided evidence on other reasons why she may have been terminated; and

j) The GD Member made statements during the hearing which were biased against the Applicant.

[17] Many of the Applicant's specific arguments relate to findings of fact and weighing of evidence. However, 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.

[18] 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.

Error of Law

[19] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of misconduct, at pages 3, 6, 7 and 8.

[20] The GD referred to the test for misconduct enunciated in the *Mishibinijima* case which it stated as:

> … there will be misconduct where the conduct of a claimant was willful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional.

[21] The GD also referred to *Tucker* A-381-85 and *Locke v. Canada (A.G.)*, 2003 FCA 262 for the principle:

> … there will be misconduct where the claimant knew or ought to have known the conduct was such as to impair the duties to the employment such that dismissal was a real possibility.

[22] The GD found that the Applicant was credible during the hearing and was open and consistent with her comments and answers to questions. It accepted that she did not deliberately violate the clean desk policy; rather that it was a mistake. It found that her actions were not intentional. However, the GD determined that her actions were willful in that she knew or ought to have known that violating the clean desk policy was a breach of her duty to the employer, such that dismissal was a real possibility. (See paragraphs 33 to 36 of the GD decision.)

[23] The GD appears to have stated two legal tests for misconduct and have applied the principle it took from the *Tucker* and *Locke* cases rather than the test it stated from *Mishibinijima*.

[24] Given that the GD found that the Applicant's conduct was not deliberate and not intentional and that her testimony was credible, it is curious that the GD found that her conduct was willful in light of the definition of "willful" in *Mishibinijima*.

[25] In the circumstances, whether the GD erred in law in making its decision warrants further review.

Natural Justice: Bias

[26] An appellant has the right to expect a fair hearing with a full opportunity to present his or her case before an impartial decision-maker: *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21-22.

[27] Here, the Applicant is arguing that the GD was not impartial but rather that the GD Member showed bias. In particular, the Applicant points to the Member's treatment of the issue of whether the Applicant was fired because of misconduct or whether there was another reason for her termination.

[28] The Applicant refers to points in the hearing when the GD Member allegedly stated:

a) "… the employer, what they did and they did not do, other than the fact that they terminated her, becomes irrelevant in the decision making process";

b) "… she obviously did something because she lost her job"; and

c) "… there does not seem to be any evidence to show that she was terminated for other reasons".

[29] The Applicant's Representative argues that the employer may have terminated her to avoid a payout under the *Employment Standards Act* or termination pay for lack of just cause under common law principles, due to a hostile work environment, or for other reasons.

[30] In *Arthur* v. *Canada (A.G.)*, 2001 FCA 223, the Federal Court of Appeal stated that an allegation of prejudice or bias of a tribunal is a serious allegation. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of the applicant. It must be supported by material evidence demonstrating conduct that derogates from the standard. The duty to act fairly has two components: the right to be heard and the right to an impartial hearing.

[31] Even taking the Applicant's assertions as proved - that the GD Member made the statements that are alleged to have been made during the hearing - they are insufficient to show that the GD was prejudiced or biased.

[32] 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 reasons for appeal which fall into the enumerated grounds of appeal.

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

[34] On the other grounds asserted by the Applicant, the appeal does not have a reasonable chance of success.

CONCLUSION

[35] The Application is granted but limited to subsection 58(1)(b) of the DESD Act.

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

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

Shu-Tai Cheng
Member, Appeal Division