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

Citation: *M. N. v. Canada Employment Insurance Commission,* 2016 SSTADEI 315

Tribunal File Number: AD-16-430

BETWEEN:

**M. N.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

and

**Petrogas Energy Service Ltd**

Added Party

# SOCIAL SECURITY TRIBUNAL DECISION

## Appeal Division – Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: June 16, 2016

Canada

## REASONS AND DECISION

## INTRODUCTION

[1] On February 15, 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 employment insurance benefits on a claim he filed in June 2015, because the Commission had determined that the Applicant had lost his employment due to his own misconduct. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant and his brother, as a possible witness, attended the GD hearing, which was held by teleconference on January 5, 2016. Two representatives for Petrogas Energy Service Ltd., the former employer of the Applicant (the Employer), also attended. The Respondent did not attend.

[3] The Applicant testified at the hearing. The Employer's representative also testified.

[4] The GD noted, among other things, that:

a) The Applicant was terminated after an incident at work on June 11, 2015;

b) The Applicant argued that his actions were not intentional, that he had received an excellent performance review and that he only ever received one safety infraction; he maintained that other warnings he had received were not related to safety;

c) The Employer testified that the Applicant was terminated after several warnings and a suspension and that he violated several safety policies;

d) The evidence overall does not support the Applicant's argument, that the incidents which involved working with dangerous goods, were not safety related; and

e) While his performance review did show "excellent" in the column marked "Safety" in January 2015, there were documented infractions on four occasions from January 24, 2015 to June 11, 2015.

[5] The GD found that

a) The incidents which the Applicant disputes are safety related had to do with working with dangerous goods and compliance that was within his duties; they are safety related;

b) The Applicant received a suspension in late January 2015 and three warnings after that;

c) His reluctance to comply with the company's safety policy was "willful or at least of such a careless or negligent nature that one would say he willfully disregarded the effects would have on his employment status constituted misconduct";

d) Whether the Applicant's actions were unintentional, it was still negligence;

e) There was a causal relationship between his conduct and the dismissal;

f) After the January 31, 2015 warning, the Applicant knew or ought to have known his actions of non-compliance could cause him to lose his employment;

g) There is no evidence to support the Applicant's arguments that he was dismissed for other reasons; and

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

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

[7] The Applicant filed an incomplete application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on March 14, 2016.

[8] The Tribunal requested information to complete the Application by letter dated March 17, 2016. The Applicant was advised that if the Tribunal received all of the missing information by April 14, 2016, his Application would be treated as having been filed on March 14, 2016.

[9] The Applicant's missing information was received on April 22, 2016. His letter states that he sent similar documents on April 4, 2016 but they did not arrive at the AD. In the missing information, the Applicant noted that he received the GD decision on February 29, 2016.

## ISSUES

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

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

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

## LAW AND ANALYSIS

[13] 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.

[14] 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."

[15] 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."

[16] 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?**

[17] The Application was filed incomplete on March 14, 2016, and it was completed on April 22, 2016. The GD decision was sent to the Applicant under cover of a letter dated February 16, 2016 and was received by the Applicant on February 29, 2016.

[18] Thirty (30) days from February 29, 2016 is March 30, 2016. As the Application was only completed on April 22, 2016, it was not filed within the 30-day time limit. While an incomplete Application was filed within 30 days, the Application was completed 53 days after the Applicant received the GD decision.

**Extension of Time**

[19] In order for the Application to be considered, an extension of time will be needed.

[20] In *X (Re)*, 2014 FCA 249, the Federal Court of Appeal set out the test when considering whether to allow an extension of time, as follows, in paragraph 26:

> In deciding whether to grant an extension of time to file a notice of appeal, the overriding consideration is whether the interests of justice favour granting the extension. Relevant factors to consider are whether:
>
> (a) there is an arguable case on appeal;
>
> (b) special circumstances justify the delay in filing the notice of appeal;
>
> (c) the delay is excessive; and
>
> (d) the respondent will be prejudiced if the extension is granted.

[21] The Applicant was given until April 14, 2016 to file the information needed to complete the Application. The missing information included the leave to appeal form and the details needed to complete that form.

[22] The Applicant called the Tribunal, on April 18, 2016, to ask whether information that he had sent earlier in the month had been received. He was concerned that he put the GD file number on the documents and not the AD file number.

[23] The Applicant sent the information again, and it was received by the Tribunal on April 22, 2016.

[24] The Tribunal did not require the Applicant to request an extension of time in writing.

[25] Given the Applicant's attempt to send the missing information prior to April 14, 2016, the short length of the delay and in the interests of justice, I grant an extension of time for the filing of the Application.

**Leave to Appeal**

[26] 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, that the GD based its decision on an erroneous finding of fact and that his hearing was unfair. He provided five pages of submissions to support these grounds of appeal. They can be summarized as follows:

a) The GD did not properly gather the facts;

b) The GD Member "might have already been leaning one way before the hearing";

c) The performance review dated January 23, 2015 was actually conducted on February 10, 2015;

d) There are inconsistencies in the Employer's evidence;

e) The GD decision mentions his oral evidence that he disputed that the incidents were safety related; however, he also submitted written evidence and so did the Employer;

f) The GD's finding that the earlier warnings were safety related was wrong;

g) Paragraph 61 refers to railcars without identifying marks on them; the warning is about missing placards not railcars or identifying marks;

h) The Employer is untruthful;

i) He had only one safety violation, and it was the same day that he was terminated;

j) He testified, at the hearing, on his mental state around the time of his termination and it was ignored;

k) CUB 71744 does not apply to his case;

l) Carelessness does not meet the standard of willfulness: *Tucker* A-381-85;

m) He believes that he and his brother were terminated by the Employer to avoid paying them bonuses and because there was a lack of work; and

n) The Employer was given the benefit of the doubt before evidence was carefully reviewed.

[27] 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.

[28] 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.

***Erroneous Findings of Fact***

[29] The Applicant argues that the GD decision mentions his oral evidence but not the documents submitted by him or the Employer.

[30] I note that the GD decision does make reference to materials in the appeal file, for example in paragraphs [7] to [22], [34], [54], and [56]. The GD does not need to make reference to every document submitted in its decision. It is clear from reading the GD decision that all of the evidence was considered, oral evidence and documentary evidence.

[31] The Applicant also argues that the GD decision was based on errors in paragraphs [52], [55] and [61] in that the GD found that:

a) The performance review was conducted prior to the documented infractions;

b) The incidents prior to the last one (that led to termination) were safety related;

c) The Employer provided evidence on dangerous goods and their transport; and

d) Whether the Appellant's actions were unintentional it was still negligence.

[32] Paragraph [52] is not an error in finding of fact. The GD found that:

a) The review is dated January 23, 2015; and

b) The infractions occurred on January 24, 2015, February 2, 2015, March 9, 2015 and June 11, 2015 (paragraph [54]).

The date on the performance review is January 23, 2015 and the documented disciplinary actions are dated as the GD found.

[33] As for the incidents (prior to the last one) being safety related, the GD referred to and considered oral evidence and documentary evidence and the submissions of the parties. This finding of fact was not made in in a perverse or capricious manner or without regard for the material before it.

[34] The evidence on dangerous goods and their transport from the Employer comprises its oral evidence at the hearing and the documentary evidence. That the GD referred to oral evidence in paragraph [61] and not documents does not render the findings of fact erroneous. It also does not mean that the GD ignored the documentary evidence in the appeal file. The GD referenced the documentary evidence in its decision, as described in paragraph [30] above.

[35] As for the Applicant's argument that he and his brother were terminated by the Employer to avoid paying them bonuses and because there was a lack of work, and not because of misconduct, the GD found that the Applicant "was not able to provide any further evidence

that would support his argument therefore [the] Tribunal finds it had no reason not to believe the employer's evidence to be accurate and that it is unfounded that the employer fired him to avoid having to lay him off." The GD considered the Applicant's submissions on this point but did not agree with them. This is not an error in a finding of fact (or an error in law).

[36] I also note that not every erroneous finding of fact will fall within the terms of paragraph 58(1)(c) of the DESD Act. An erroneous finding of fact upon which the GD does not base its decision would not be caught, nor would one that is not made in a perverse or capricious manner or without regard for the material before the Tribunal.

***Error of Law***

[37] The GD decision stated the correct legislative provisions and applicable jurisprudence when considering the issue of misconduct, at pages 3 and10 to 15.

[38] The GD referred to the evidence in the appeal record and at the hearing (pages 3 to 9 of the GD decision). It also considered the submissions of the parties (page 9 and 10 and in the "Analysis" section).

[39] The GD decision stated:

> [59] The Tribunal finds the Appellant`s reluctance to comply violated the company`s safety policy and was willful or at least of such a careless or negligent nature that one would say he willfully disregarded the effects would have on his employment status constituted misconduct.
>
> [62] The Tribunal finds there was a causal relationship between his conduct and the dismissal. Basically misconduct is a willful act without regard for the interest of the employer or a disregard by an employee of a standard of behavior which an employer has the right to expect of the employee.
>
> [64] The Tribunal finds the Appellant had received several warnings and continued to violate the company polices and that the Appellant's own actions caused him to lose his employment. The Tribunal finds the warning on January 31, 2015, which was read by the employer to the Appellant, clearly indicates that further failure to adhere to policies could lead to termination, which the Appellant confirms it was read and provided in writing. Therefore the Tribunal finds the Appellant knew or ought to have known his actions of non-compliance could cause him to lose his employment.

> [69] The Tribunal finds the Appellant was not able to provide any further evidence that would support his argument therefore Tribunal finds it had no reason not to believe the employer's evidence to be accurate and that it is unfounded that the employer fired him to avoid having to lay him off.

[40] The GD did not err in law in its application of the legal test for misconduct.

[41] The Applicant argues that CUB 71744, referred to in the GD decision, does not apply to his case. However, the GD relied on CUB 71744 in relation to the failure of a claimant to adhere to the safety policies of the employer. The GD found that the Applicant had multiple infractions and that his reluctance to comply with his Employer's safety policy was "willful or at least of such a careless or negligent nature that one would say he willfully disregarded the effects would have on his employment status constituted misconduct." This was not an error in law.

[42] The GD referred to the *Tucker* case and also other Federal Court of Appeal cases. While it noted that "mere carelessness does not meet the standard of willfulness required to support a finding of misconduct", the GD found that the Applicant's conduct was not mere carelessness.

***Natural Justice: Bias***

[43] 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.

[44] Here, the Applicant is arguing that the GD was not impartial but rather that the GD Member "might have already been leaning one way before the hearing". In particular, the Applicant points to the Member's treatment of the evidence and the "gathering of evidence".

[45] The Applicant also argues the Member did not gather the facts correctly, did not understand him, and gave the Employer the benefit of the doubt but did not do the same for him.

[46] The GD decision noted that the Applicant stated that he has trouble communicating (paragraph [23]). During the hearing, the GD Member asked the Applicant to clarify when she could not hear or understand something.

[47] As for "gathering the facts", the GD Member's role as the trier of fact includes the weighing of evidence and making findings based on its consideration of that evidence. If the GD Member has questions of the parties, then he/she may pose them. But the Member's role is not to investigate or cross-examine or argue for or against any of the parties.

[48] 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.

[49] The Applicant's submissions are based on suspicion and impressions and not supported by material evidence demonstrating that the GD Member's conduct derogates from the standard. They are insufficient to show that the GD was prejudiced or biased.

***Summary***

[50] 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.

[51] 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. While the Applicant has provided detailed submissions, the Application is nonetheless deficient in this regard and I am satisfied that the appeal has no reasonable chance of success.

## CONCLUSION

[52] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division