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

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. Y. B.*, 2016 SSTADEI 363

Tribunal File Number: AD-16-355

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

Y. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division - Leave to Appeal

DECISION BY: Shu-Tai Cheng

DATE OF DECISION: July 11, 2016

REASONS AND DECISION

INTRODUCTION

[1] On February 8, 2016, the General Division ("the GD") of the Canada Social Security Tribunal ("the Tribunal") allowed the Respondent's appeal. The GD held as follows:

(a) the Respondent admitted that she had made an error in judgment;

(b) the Respondent's testimony was credible;

(c) the claims of the Commission ("the Applicant") respecting certain alleged facts were never proven;

(d) a preponderant value was attached to the Respondent's direct testimony;

(e) there was professional fault on the Respondent's part, but not misconduct;

(f) the Respondent was not aware that the breach was of such scope that she could normally anticipate being dismissed;

(g) she did not act in a wilful or deliberate manner or exhibit such recklessness or negligence as to cause her own dismissal; and

(h) she did not lose her employment through misconduct in accordance with sections 29 and 30 of the Employment Insurance Act ("the EI Act").

History of the file

[2] The Respondent filed a claim for regular benefits in March 2014. She was suspended from her employment on March 4, 2014, and dismissed on July 8 of that same year.

[3] The Applicant determined that the Respondent had lost her employment due to her own misconduct and denied her benefits. It also dismissed the request for reconsideration.

[4] The respondent appealed to the Tribunal's GD.

[5] The Respondent's former employer, the Correctional Service of Canada ("the employer"), informed the Commission that the Respondent had been dismissed as a result of a breach of trust between employer and employee. It had appeared before the GD as an added party but sought to abandon the matter in September 2015. It no longer wanted "to pursue the matter in a file or an audience."

[6] On October 14, 2015, the GD held a hearing in person. The Respondent was present together with her spouse. The Applicant was not present but filed written submissions.

[7] The GD rendered its decision on February 8, 2016. The Applicant filed an application for leave to appeal ("the Application") on February 26, 2016, within the prescribed time limit.

[8] The respondent and the employer were invited to file their submissions on the question of whether leave to appeal should be granted or denied. The Applicant was invited to provide additional grounds of appeal as it wished.

[9] The Respondent filed written submissions on May 11, 2016. The employer did not respond and is not an added party before the Tribunal's Appeal Division ("the AD"). The Applicant did not supplement its application.

ISSUES

[10] Does the appeal have a reasonable chance of success?

THE LAW AND ANALYSIS

[11] Subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* ("the DESD Act") provide that "an appeal to the Appeal Division may only be brought if leave to appeal is granted" and that the Appeal Division "must either grant or refuse leave to appeal".

[12] 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."

[13] 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.

[14] The Tribunal will grant leave to appeal if it is satisfied that the Applicant has demonstrated that one of the aforementioned grounds of appeal has a reasonable chance of success.

[15] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the DESD Act, whether there is a question of law, fact or jurisdiction, or relating to a principle of natural justice, the response to which might justify setting aside the decision under review.

[16] The Applicant referred to paragraphs 58(1)(*b*) and (*c*) of the Act in specifying its grounds for appeal. According to those grounds, it contends that the GD erred in law in its interpretation of subsection 30(1) of the *Employment Insurance Act* ("the EI Act") and 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. According to the Applicant, the erroneous finding of fact is the finding that the alleged action of the Respondent did not constitute misconduct. The Applicant contends that the GD's decision does not reflect the facts in the file.

[17] The Respondent contends that she made an error of judgment in the context of her work, but her employer acknowledged in writing mitigating factors and undertook not to enter submissions in the Tribunal's file. In addition, the GD found, upon hearing her in person, "that one should not conclude that there was misconduct on [her] part."

Alleged errors of fact

[18] It is not up to the Member of the Appeal Division who has to determine whether to grant leave to appeal to clarify the grounds of appeal or to reweigh and reassess the evidence submitted before the General Division. Based on my reading of the file and of the GD's decision, the reasons that the Applicant raised in its Application – that the Respondent deliberately chose not to take the employer's policy into consideration and that that action constitutes a serious breach of her contract of employment – were previously advanced before the GD.

[19] It is not my role as an AD member considering an application for leave to appeal to weigh and assess 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 based on the grounds and reasons specified by the Applicant: an erroneous finding of fact based on evidence that is before the GD, in accordance with paragraph 58(1)(*c*) of the Act, that it made in a perverse or capricious manner or without regard for the material before it and an error in law in accordance with paragraph 58(1)(*b*) of the Act.

[20] The GD found that the Respondent did not lose her employment as a result of misconduct within the meaning of the EI Act. It arrived at that finding because it was satisfied that the Respondent did not did not act in a wilful or deliberate manner or exhibit such recklessness or negligence as to cause her own dismissal. That finding was based on the evidence in the file and the Respondent's credible and preponderant testimony at the in-person hearing.

[21] Furthermore, the employer made a statement to the Commission during its review of the application but abandoned the file and was not present at the hearing. In the meantime, the employer acknowledged the Applicant's good faith, "as the submitted memorandum of understanding shows" (paragraphs 34 and 53 of the GD's decision). The GD noted that "the mitigating factors are consistent in all points with the version of the facts presented" by the Respondent.

[22] The Applicant was invited to but did not attend the hearing before the GD. Its written submissions and the appeal file were before the GD. As it was not present, the Applicant was unable to cross-examine the Respondent in person. If the Applicant chooses not to be present at a hearing before the GD, it should not think that it can simply appeal from a decision of the GD with which it is not satisfied.

[23] The Applicant's arguments on the alleged factual errors are affected by its choice not to be present at the hearing. It is difficult to present a convincing argument that a finding of fact was "made in a perverse or capricious manner or without regard for the material before [the General Division]" when the Applicant chose not to be present when all the evidence was before the GD, including the testimony and submissions presented at the hearing. The Applicant appears not to have consulted the recording of the hearing to confirm all the facts that were put before the GD. The Application does not refer to the specific points in the Applicant's testimony.

[24] I have carefully reviewed the GD's decision and the file. The GD's findings of fact were not made without regard for the evidence before it. The decision refers specifically to the testimonial and documentary evidence on the basis of which the GD made its findings of fact. Furthermore, the findings of fact identified by the Applicant as erroneous were not made in a perverse or capricious manner.

[25] I find that the GD did not base 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.

Alleged error in law

[26] As regards the Applicant's argument that the GD erred in its interpretation of subsection 30(1) of the EI Act, that subsection provides as follows:

> A claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause.

27] The GD's decision refers to the sections of the EI Act and the relevant case law.

[28] The GD found that no willingness “to avoid considering the impact of her actions on her work” was shown and that the Applicant “was not aware that the breach was of such scope that she would normally foresee that it would be likely to result in her dismissal.”

[29] The GD applied the principles set forth, *inter alia*, in *A.G. of Canada v. Tucker*, A-381-85, and *Locke v. Canada (AG)*, 2003 FCA 262, to the Applicant’s situation.

[30] Since the Applicant raises none of the grounds of appeal provided for in subsection 58(1) of the Act, the appeal has no reasonable chance of success.

CONCLUSION

[31] Leave to appeal is refused.

Shu-Tai Cheng
Member, Appeal Division