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

Citation: *C. S. v. Canada Employment Insurance Commission,* 2016 SSTADEI 384

Tribunal File Number: AD-16-212

BETWEEN:

C. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: July 19, 2016

REASONS AND DECISION

INTRODUCTION

[1] On December 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 December 2014, because the Commission had determined that the Applicant had lost her employment due to misconduct. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant and her Representative attended the GD hearing, which was held by videoconference on November 2, 2015. The Respondent did not attend.

[3] The GD determined that:

a) The Applicant applied for regular benefits under the *Employment Insurance Act* (EI Act);

b) She was terminated by her employer on December 8, 2014, for repeated contravention of the employer's policy prohibiting cell phones at work;

c) The Applicant alleged harassment and intimidation by the employer and filed a complaint;

d) The employer provided statements to the Commission but subsequently wrote to the Tribunal to advise that "no cause existed for [the Applicant's] termination" and that it withdrew its opposition to her request for employment insurance benefits;

e) The Applicant "did in fact take her cell phone with her to the bathroom, which violated the employer's workplace policy";

f) She deliberately violated the employer's policy, consciously and willfully disregarded the affects her actions would have on her job performance, and ought to have known that her conduct was such that dismissal was a real possibility;

g) While the employer conceded in the complaint filed against it by the Applicant, the GD applied the Federal Court of Appeal decision in *Canada (A.G.) v. Morris*, (1999) 173 DLR (4th) 766 and did not consider the agreement between the employer and the Applicant; and

h) Therefore, the Applicant lost her employment as a result of her own misconduct and disqualification from benefits must be imposed pursuant to sections 29 and 30 of the 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 January 26, 2016, within the 30-day time limit.

[5] The Tribunal requested submissions from the Respondent; and the Respondent filed submissions in April 2016.

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.

Submissions

[11] The Applicant's grounds of appeal are that the GD based its decision on erroneous findings of fact. Her submissions can be summarized as follows.

a) The GD concluded that her lapse of memory (in taking her cell phone into the washroom) was "negligent and reckless" and satisfied the test that the conduct was "conscious, deliberate or intentional";

b) The employer's policy prohibiting possession of a cell phone in the workplace was unenforceable because it represented a significant change to the Applicant's employment contract and no fresh consideration was provided to her for this change; and

c) A policy that limits an employee's right to go to the washroom is also likely void and unenforceable as contrary to public policy.

[12] The Respondent's submissions are:

a) The GD took into account that the employer confirmed that no cause existed for her termination;

b) As notated in the legal test for misconduct, the Applicant's actions were wilful, or at least of such a careless or negligent nature that one could determine that the employee disregarded the effects his/her actions would have on the job performance. In other words the act that had led to the Applicant's dismissal was conscious, deliberate or

intentional where the claimant knew or ought to have known that his/her conduct was such as to impair the performance of the duties owed to his /her employer and that as a result, dismissal was a real possibility;

c) Establishing a workplace policy is within the realm of an employer to decide;

d) This particular employer had established a policy, to which the Applicant has appended her signature, and the evidence establishes that the Applicant had her cell phone in her possession while in the washroom and in so doing had violated the employer's policy, resulting in her dismissal from her employment; and

e) The GD rendered a reasonable decision in accordance with the evidence presented and the established jurisprudence.

Leave to Appeal

[13] 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.

[14] 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.

[15] The findings of fact which the Applicant alleges were erroneous are:

a) The taking of her cell phone into the washroom was "negligent and reckless"; and

b) Her conduct was "conscious, deliberate or intentional".

[16] I note that the GD did not find that the taking of the Applicant's cell phone into the washroom was "negligent and reckless". This statement was in the Respondent's written submissions before the GD, not in the GD's findings of facts.

[17] The GD did find that the Applicant's conduct was conscious and willful in paragraph [33] of the GD decision. It did so based on weighing the evidence, considering the evidence in light of the established jurisprudence on misconduct, and applying the Federal Court of Appeal decision in the *Morris* case.

[18] In *Morris*, the Federal Court of Appeal held that the Board of Referees:

> … is not bound by how the employer and employee characterize the grounds on which the employment was terminated. In the present case, there was sufficient documentary evidence available to the Commission and the Board to justify a finding of misconduct. The fact that the settlement agreement required the employer to withdraw the allegation of dismissal for cause cannot be treated as conclusive of whether there was actually misconduct for purposes of the Act. This is particularly true since the settlement agreement did not include an admission by the employer, either express or implicit, that the dismissal for cause was not fully justified. (Emphasis added)

[19] The GD referred to the formal complaint filed by the Applicant against her employer and found that "the employer has since conceded" and "indicat[ed] that no cause existed for the Claimant's termination" (see paragraph [34] of the GD decision).

[20] Given these findings, the *Morris* case is distinguishable from the present matter because in *Morris*, as the Federal Court of Appeal noted, there was no admission by the employer that the dismissal for cause was not fully justified. In the present matter, the employer conceded and admitted that no cause existed for the Applicant's dismissal.

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

[22] 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 "erroneous findings of fact" as the grounds and reasons for appeal. However, the AD has identified a possible error of law that appears on the face of the record.

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

CONCLUSION

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

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

[26] 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