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

Citation: *C. A. v. Canada Employment Insurance Commission,* 2016 SSTADEI 393

Tribunal File Number: AD-16-345

BETWEEN:

C. A.

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 25, 2016

REASONS AND DECISION

INTRODUCTION

[1] On January 25, 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 he filed in January 2015, because the Commission had determined that the Applicant had lost his employment due to misconduct. The Applicant appealed to the GD of the Tribunal.

[2] The Applicant attended the GD hearing, which was held by teleconference on December 18, 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) He was terminated by his employer on December 15, 2014;

c) The Applicant had an alcohol addiction and had missed work because of this;

d) There was "was no medical evidence that the circumstances in which the [Applicant] started to drink following his mother's death effectively made his consumption of alcohol at that time involuntary";

e) The Applicant was not dismissed due to alcohol abuse;

f) The Employer had a progressive discipline program and a very strict absenteeism policy; The Employer was prepared to terminate the Applicant on September 26, 2014, because he was in breach of the company policy and the collective agreement; But because they were aware that he had attended rehabilitation programs in the past for an alcohol dependency, they felt that they would give the Applicant one more chance to correct his attendance;

g) On October 1, 2014 the Applicant and Union signed off on a Settlement in Lieu of Termination agreement, which gave the Applicant a suspension from work from September 19, 2014 to October 21, 2014 and he was explicitly advised in this settlement agreement that the next step would be termination if he breached their attendance policy again;

h) The Applicant was to return to work on December 8, 2014, but did not do so;

i) The Employer stated that the Applicant was terminated based on his breach of the Settlement in Lieu of Termination agreement, being absent without a valid reason under the collective agreement and being absent due to illness without a doctor's note;

j) The Applicant's actions were wilful, conscious and deliberate when he was absent from work without a doctor's note; he had been warned he would be terminated if he breached the employer's attendance policy; he knew or ought to have known that his absenteeism could result in his termination; and

k) Therefore, the Applicant lost his employment as a result of his own misconduct and disqualification from benefits must be imposed pursuant to sections 29 and 30 of the EI Act.

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

[5] The Applicant filed an incomplete application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on February 24, 2016.

[6] The Tribunal notified the Applicant that his application was missing information, and he was given until March 31, 2016 within which to provide the missing information. He retained a Representative who filed a new Application on March 17, 2016.

[7] The Applicant's former employer was sent a letter on March 24, 2016, informing it of this Application and giving to April 11, 2016, to advise if it wished to be added as a party to this proceeding. The former employer did not reply and is not an added party.

[8] The Tribunal requested submissions from the parties on April 4, 2016, and noted:

In particular, the Applicant relies on the ground of error of law and argues that he did not lose his employment due to misconduct but because he was dismissed for absences, due to bereavement, in contravention of the *Employment Standards Act*. This appears to be a new argument which was not raised before the General Division.

[9] On April 5, 2016, the Respondent advised that it would not be providing submissions.

[10] The Applicant's Representative filed submissions on April 26, 2016.

ISSUE

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

LAW AND ANALYSIS

[12] 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.

[13] 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."

[14] 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."

[15] 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.

Leave to Appeal

[16] The Applicant's grounds of appeal are that GD based its decision on errors of law. His submissions can be summarized as follows:

a) Paragraph 58(1)(b) of the DESD Act gives broad rights of appeal to the AD, so long as an error of law is present; and the legal error does not have to exist on the face of the record;

b) The standard of review on an error of law is correctness:

    1) unless there is a privative clause which states otherwise; however, the wording in paragraph 58(1)(b) of the DESD Act is broad and suggests that any error of law should be granted an appeal, even it if is not on the face of the record;

    2) GD Members are not experts on the *Employments Standards Act* (ESA);

    3) the relevant issue is a question of law and not a question of mixed fact and law; and

c) The Applicant was denied his Personal Emergency Leave due to his alcoholism which is a breach of the *Ontario Human Rights Code*;

d) An employee cannot contract out of the ESA provisions except under specific circumstances;

e) The Applicant did not contract out of the Personal Emergency Leave provisions and he was entitled to take a total of 10 days leave;

f) The Collective Agreement only provides for four bereavement days; the employer extended this to five days when the Applicant's mother died;

g) The Collective Agreement states that the employer will also grant statutory leaves of absence as provided for in the ESA;

h) The Applicant missed 10 days of work, which are job protected days under the ESA; and

i) Had the GD considered the Personal Emergency Leave provisions of the ESA, it likely that is would have decided that there was no misconduct by the Applicant.

[17] The Respondent chose not to file submissions relating to this Application.

GD Decision

[18] As the arguments related to the ESA and the *Ontario Human Rights Code* were not raised before the GD, the GD decision did not consider the issues summarized in paragraph [16] above.

[19] 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 a possible error of law that does not appear on the face of the record.

[20] I need not decide, at this stage, whether the GD based its decision on an error of law, but I need to be satisfied that the appeal has a reasonable chance of success on the grounds of error of law in order to grant leave to appeal.

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

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

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

CONCLUSION

[24] The Application is granted but limited to subsection 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, the form of the hearing and, also, on the merits of the appeal.

Shu-Tai Cheng
Member, Appeal Division