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

Citation: *J. A. v. Canada Employment Insurance Commission,* 2016 SSTADEI 392

Tribunal File Number: AD-15-921

BETWEEN:

J. 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 22, 2016

REASONS AND DECISION

INTRODUCTION

[1] On July 23, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal on a disqualification pursuant to sections 29 and 30 of the *Employment Insurance Act* (EI Act). The Canada Employment Insurance Commission (Commission) had determined that the Applicant had lost his employment due to his own misconduct.

[2] The GD decision was sent to the Applicant under cover of a letter dated July 23, 2015.

[3] The Applicant filed an incomplete application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 20, 2015.

[4] The Tribunal advised the Applicant that his file was incomplete, by letter dated December 2, 2015. He was given until January 4, 2016 to provide the missing information. He sent a response on January 4, 2016. On this basis, the Application was treated as complete and filed on time.

ISSUES

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

LAW AND ANALYSIS

[6] Pursuant to subsections 57(1) and (2) of the *Department of Employment and Social Development Act* (DESD Act), an application for leave to appeal must be made to the AD within 30 days after the day on which the decision appealed from was communicated to the appellant. Further, "the AD may allow further time within which an application for leave is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant."

[7] 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."

[8] 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."

[9] 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

[10] The Applicant's reasons for appeal can be summarized as follows:

a) The GD failed to observe a principle of natural justice in that:

(a) It was biased in finding the employer's statements more credible than his;

(b) It did not base its decision on evidence but speculation or suspicion;

b) The GD based its decision on erroneous findings of fact in that it:

(a) It referred to documents from the Supplementary Record of Claim as evidence but the documents contained many errors;

(b) The Applicant disagrees with many of the statements in these documents and maintains that some of the content is wrong; and

c) These documents "rehash" misinformation of two Commission agents who "disregarded facts for fiction".

[11] The issues before the GD were a disqualification from EI benefits due to misconduct and his request for antedate of his claim.

[12] During the GD hearing, the Applicant advanced similar arguments to those in the Application. The Applicant's evidence was included, in detail, in the GD decision on pages 5 to 9. The Applicant's submissions before the GD were summarized on pages 10 and 11 and discussed at pages 12 to 24; they included many of the points in support of the Application and noted in paragraph [10] above.

GD Decision

[13] The GD stated the correct legislative basis and legal tests for misconduct and antedate in its decision.

[14] The GD decision summarized the background of the Applicant's separation from employment and his application for employment insurance benefits as follows:

> [16] The Appellant, a general welder, filed a renewal claim for regular benefits on October 30, 2014 (GD3-16). He declared that his last day of work was September 19, 2014 (GD3-6). Simultaneously, the Appellant filed an application to antedate his claim for benefits beginning on September 19, 2014 (GD3-18). He explained that his application was delayed because he was expecting to return to work following the imposed work suspension, but instead he was dismissed.
>
> […]
>
> [24] The Appellant stated that he did not apply for benefits on September 19, 2014, at his suspension, because he believed that he would be called back to work as had been the previous practice. He delayed his claim because he was waiting for the Employer's decision, a response from the Union, and the outcome of the union elections. The Appellant confirmed that he did not contact the Commission to inquire about applying for Employment Insurance (EI) benefits because he was not concerned about EI (GD3-25). He was preoccupied with his employment.
>
> [25] On December 12, 2014, the Appellant was told that his antedate request was denied because he had failed to show good cause for being late. Furthermore, he was informed that regular benefits could not be paid from the claim reactivation date of October 26, 2014 because he lost his employment due to misconduct (GD3-29).

[29] The Appellant was informed, in a letter dated January 20, 2015, that the antedate decision was unchanged. However the Commission changed their decision to reflect a voluntary leaving the employment (GD3-45).

[30] The Appellant filed his Notice of Appeal to the Social Security Tribunal – General Division on February 06, 2015. He stated that he did not voluntarily leave his employment, but was dismissed without just cause.

[15] The conclusions of the GD were:

a) On voluntary departure versus dismissal:

[50] The facts on file are undisputed. The Appellant was dismissed from his employment.

[51] The Tribunal finds that the Appellant was initially suspended without pay on September 19, 2014, and later dismissed with an effective date of September 19, 2014.

b) On misconduct:

[60] Given the information on file while some details of the events are disputed at the hearing, the facts foundational to the Commission's findings are undisputed. Both parties agree that a safety violation occurred when the Appellant arbitrarily decided to use a 5- inch grinder to expedite the completion of his task.

[…]

[66] The Tribunal finds that the shifting statements cast significant doubt about the trustworthiness of the Appellant statements.

[67] The Tribunal finds that the evidence is not equally balanced because the Appellant's arguments lack internal and external consistency. The lack of consistency cast doubt to the Appellant credibility. Given the Appellant's financial interest in the outcome of the appeal, the Tribunal finds on the balance of probabilities that the Employer's statements are more credible. The Appellant has failed to persuade the Tribunal of the merit of his case.

[68] The Tribunal attributed more weight to the initial declarations (prior to the disqualification) because the bulk of his statements were more consistent to those given by his Employer.

[79] The Tribunal finds that the Appellant ought to have known that his actions would result in a suspension and/or dismissal, especially given the numerous past safety violation warnings and suspensions.

[…]

[84] The Tribunal finds, on the balance of probabilities, that the Appellant was fully cognizant of his decision to use the 5-inch grinder because he did an environmental scan of the work site; he assessed the perceived risk, and given the results of his assessment decided to use the tool without a hot work permit to expedite the removal of paint to even out a welding seam.

[85] The Tribunal finds that the Appellant consciously and intentionally used the 5- inch grinder.

[…]

[94] The Tribunal finds that safety policies and procedures are in place for the protection of all workers. Hence the Tribunal finds, on the balance of probabilities, that the Appellant's violation of the safety procedures showed a failure to abide by the Employer/Government Occupations Health [&] Safety Policy. His failure to abide to the safety policy is misconduct.

[…]

[99] The Tribunal finds as fact that the September 19, 2014 safety violation was the last straw that caused his dismissal. The Tribunal is satisfied that the misconduct was the reason for the dismissal, and not the excuse for it. The Commission has met its onus of proof.

c) On wrongful dismissal:

[102] The Appellant vehemently maintained that […] he was wrongfully dismissed because the safety violation was minor. He opined that the incident did not result in injury or damage to the property. Hence the minor incident should not have resulted in a dismissal.

[103] The Tribunal finds that it is beyond its jurisdiction to determine whether a dismissal was justified.

d) On antedate:

[119] The Tribunal finds, on the balance of probabilities that the Appellant was told by his union steward to wait for the outcome of the safety investigation until further actions was taken. While he may have been misinformed by his union, the Tribunal finds that a reasonable person would have verified the information with a qualified agent at the Commission.

[…]

[122] The Tribunal finds that waiting for the outcome, of the safety violation investigation outcome, from his union representative may have been a good reason for

his delay. However there is no evidence to show that he verified his rights and obligations during the entire period of the delay.

[123] The Tribunal finds that given the circumstances the Appellant did not act a reasonable person and prudent person would have to ascertain his rights and obligations.

e) Summary of conclusions:

[124] The Tribunal finds that the Appellant's unauthorized use of a 5 inch grinder without a hot work permit was deliberate, willful, and reckless. The Tribunal finds that the authorized use of the power tool was in direct violation of the Employer's health and safety policy, and caused the unpaid suspension, and eventual dismissal. The disqualification to benefits is maintained in accordance with section 30 of the Act.

[125] The Tribunal finds that the Appellant delayed renewing his claim for the period of September 19, 2014 to October 30, 2014. The Tribunal finds that the Appellant did not discharge his onus to show good cause for his delay in accordance with subsection 10(5) of the EI Act, and section 26 of the Regulations.

[126] The appeal is dismissed on both issues.

Grounds and Reasons for Appeal

[16] The Applicant suggests that the GD failed to observe a principle of natural justice and was biased, because it found the employer's statements more credible than his and because there was not sufficient expertise on the part of the GD Member to understand the issues.

[17] The GD heard the Applicant's appeal and rendered a written decision that was understandable, sufficiently detailed and provided a logical basis for the decision. The GD weighed the documentary and oral evidence and gave reasons for giving more weight to some evidence and less to other evidence. These are proper roles of the GD, and the GD did not act beyond its jurisdiction in so doing.

[18] The Applicant suggests that the GD Member did not have the expertise to understand the issues, in particular the use of a 5 inch grinder and safety violations in his former workplace. This reason for appeal does not have a reasonable chance of success. The GD certainly has sufficient expertise to understand employment insurance claims and their associated issues (voluntary leaving, misconduct, antedate, etc.) It is not the Tribunal's role to adjudicate conflicts between an employee and his or her employer in relation to the employer's workplace policies or whether use of specific tool in a certain manner is a safety violation. It is not

necessary for the GD Member to be an expert in the use of tools in the Applicant's workplace to have the sufficient expertise to make a decision in relation to the Applicant's claim for employment insurance benefits.

[19] The Applicant also argues that the GD failed to observe a principle of natural justice because it was biased. This allegation is based on the GD finding the employer's statements in the appeal record more credible than the Applicant's and weighing the evidence in a manner denied by the Applicant. In essence, the Applicant argues a breach of natural justice because the GD Member did not concur with his arguments. This falls far short of what is needed to form an allegation of prejudice or bias.

[20] 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, and that "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.

[21] The Applicant's arguments are insufficient to show that the GD did not give the Applicant a sufficient opportunity to be heard or that the GD was prejudiced or biased.

[22] For the most part, the Application repeats the Applicant's evidence and submissions before the GD. The remainder of the submissions in the Application reargues his case before the AD.

[23] Once leave to appeal has been granted, the role of the AD is to determine if a reviewable error set out in subsection 58(1) of the DESD Act has been made by the GD and, if so, to provide a remedy for that error. In the absence of such a reviewable error, the law does not permit the AD to intervene. It is not the role of the AD to re-hear the case *de novo*. It is in this context that the AD must determine, at the leave to appeal stage, whether the appeal has a reasonable chance of success.

[24] 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.

[25] 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. The Application is deficient in this regard, and I am satisfied that the appeal has no reasonable chance of success.

CONCLUSION

[26] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division