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

Citation: *R. L. v. Canada Employment Insurance Commission*, 2016 SSTADEI 518

Tribunal File Number: AD-15-970

BETWEEN:

R. L.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: October 21, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On July 30, 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 voluntarily left his employment without just cause.

[2] The GD decision was sent to the Applicant under cover of a letter dated August 5, 2015.

[3] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on August 31, 2015.

[4] With the Application, the Applicant attached a typed text describing his "wish to appeal the decision of the General Division", a letter from his Member of Parliament, and a copy of the GD decision with handwritten annotations made by him.

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 was biased in favour of the Commission;

b) The GD based its decision on assumptions and erroneous findings of fact, specifically:

   i. The Commission believed that the Applicant contradicted himself in some of his statements;

   ii. Transfer was not possible because there was no permanent position available for which he was qualified or had the physical capabilities;

   iii. The "second in charge" was not in favour of transferring an employee from one site to another, if that employee previously had a problem at his original site;

   iv. He did follow "the chain of commands";

   v. He did seek medical attention for his osteoarthritis; and

c) He made handwritten annotations throughout a copy of the GD decision where he disputes what was written by the GD.

[11] The issue before the GD was a disqualification from EI benefits due to voluntary leaving.

[12] A hearing before the GD was held in person. The Applicant and a witness testified at the hearing. A representative of the Employer also testified at the hearing and was accompanied by a human resources person from the Employer. The Commission did not attend, but it had filed written submissions prior to the hearing.

[13] 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 12. The Applicant's submissions before the GD were summarized on pages 12 to 14 and discussed at pages 12 to 31; they included many of the points in support of the Application and noted in paragraph [10] above.

GD Decision

[14] The GD stated the correct legislative basis and legal tests for voluntary leaving in its decision.

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

a) The Applicant attested that he left his employment due to harassment and his medical condition (osteoarthritis);

b) His last day of work was July 4, 2014;

c) The Employer confirmed that he quit his job because he was unhappy;

d) He filed a claim for regular employment insurance benefits in August 2014;

e) The Commission denied his claim on the basis that the Applicant voluntarily left his employment; and

f) The Applicant requested reconsideration, and the Commission maintained its initial decision.

[16] The conclusions of the GD were:

a) On voluntary leaving:

> [79] The Tribunal finds that the reasons for the Appellant's decision to leave his employment are disputed.
>
> [80] The Tribunal weighted the arguments presented by the parties, and found in favor of the Commission. The Tribunal finds that the facts on file demonstrate that the Appellant left his employment.
>
> [81] The Tribunal finds that the Commission discharged its onus of proof to show that the Appellant voluntarily left his employment.
>
> [82] The Tribunal finds that the Appellant voluntarily left his employment because he took the initiative to sever the employer/employee relationship.

b) On the Applicant's statements changing over time:

> [94] The Tribunal finds that the Appellant's most credible and reliable statements are those that were made in the initial application, Quit Questionnaire, and written statements (GD3-3 to GD3-18). These statements were made in the absence of the Commission's intrusive interview questions, and were written within a few weeks after he quit his employment.

c) On just cause:

> [106] The Tribunal finds that the frequent disciplinary discussions, and resulting Employer's hypervigilance may have been a source of stress, and contributed to the Appellant's feelings of discomfort. However, the Tribunal finds that the investigative performance, held in June 2014 addressing the Appellant's failure to notify the Employer of his absence from a prescribed mandatory course of training, was a disciplinary measure resulting in the recommendation of the Appellant's lateral transfer to another site.
>
> [107] The Tribunal finds that a performance review, performance investigation, and the implementation of progressive disciplinary actions and recommendations is not harassment.
>
> …

[110] The Tribunal finds that none of these serious harassment allegations were made at the initial disclosure of harassment, in which he clearly specified that the primary source of the harassment was with L.K. In addition, while the Appellant stated that the incidents occurred on a daily basis, neither the Appellant nor his witness could provide any specific details of when the incidents occurred.

[111] The Tribunal finds that the Appellant did not meet the test under paragraph 29(c)(i) of the EI Act: sexual or other harassment.

…

[118] The Tribunal finds, on the balance of probabilities that the Appellant was in part responsible for the conflict which arose because he failed in his obligation to promptly report his absence.

[119] The Tribunal finds that, while the Appellant may have believed that his efforts would have been futile, the Appellant had a responsibility to address the conflictual relationship.

[120] The Tribunal finds that the Appellant made conflicting statements about whether he talked with his employers to resolve his conflictual relationship.

[121] The Tribunal finds, on the balance of probabilities, that the Appellant did not report the conflictual relationship to his employer because he expressed the futility of this behavior several times at the hearing.

[122] The Tribunal finds that the Appellant does not meet the conditions listed in paragraph 29(c)(x) of the EI Act: antagonism with a supervisor if the claimant is not primarily responsible for the antagonism.

…

[130] The Tribunal finds that the evidence does not show that the Appellant would be dismissed.

[131] The Tribunal finds that the Appellant, on the balance of probabilities, based his decision to leave his employment on an unfounded assumption that he would be dismissed.

[132] The Tribunal finds that the Appellant, on the balance of probabilities, was not pressured to leave his employment by his Employer. The Employer demonstrated the following: a willingness to meet with the Appellant to discuss the performance issues; he was counselled the Appellant to reconsider his decision on his resignation day, and

he was advised to file a formal harassment complaint to [sic] that the issues could be fully addressed. The Employer's actions do not show any force or pressure to resign. Rather, the Employer's actions show a willingness to engage the Appellant in various problem solving initiatives.

[133] The Tribunal finds that the Appellant does not meet the paragraph 29(c)(xiii) of the EI Act: undue pressure by an employer on the claimant to leave their employment.

d) On reasonable alternatives to leaving:

[112] The Tribunal finds several reasonable alternatives to his leaving the employment including: requesting a transfer to an alternative shift rotation; filing a formal harassment complaint in accordance with the Employer's well-advertised policy; filing a grievance with the union, in the absence of appropriate resolution of the complaint the Appellant ought to have filed a complaint with the BC Labour Board and or the Human Rights Commission prior to leaving his employment. The evidence on file does not show that the Appellant took any action to resolve this issue.

…

[123] The Tribunal finds that a reasonable alternative to leaving his employment would have been to attend the scheduled July 9th, 2014 interview, file a grievance with his union, and await the outcome of the Employer's inquiry and decision.

…

[134] The Tribunal finds that the Appellant had reasonable alternatives, given his circumstances, to his departure including: clarifying his assumptions about the possibility of dismissal with his Employer, reconsidering his resignation, filing a grievance, and filing a formal harassment complaint in accordance with the Employer's policy.

…

[141] The Tribunal finds that a reasonable alternative to his departure would have been for the Appellant to seek medical attention for his osteoarthritis in July 2014 so a treatment plan could be established, and a referral to an arthritis specialist could be initiated.

[142] The Tribunal finds that the available evidence does not show that the Appellant requested a workplace accommodation which would have been a reasonable alternative to leaving his employment.

e) In summary:

> [143] The Tribunal finds that the Commission discharged its onus to show the Appellant voluntarily left his employment. In addition, the Tribunal finds that the Appellant failed to demonstrate just cause for his departure because he failed to explore all reasonable alternatives, in his circumstances, prior to his departure. Hence the disqualification is maintained.
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> [144] The appeal is dismissed

Grounds and Reasons for Appeal

Natural Justice and Bias

[17] The Applicant suggests that the GD was biased in favour of the Commission, because the GD Member allowed the Employer's representative to participate in the hearing despite arriving 45 minutes late and allowed him to interrupt, and because the testimony of the Employer's witness was "given 100% credibility" while his credibility was "put in doubt".

[18] 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.

[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 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] As for the allegation of bias due to the GD Member allowing the Employer's witness to participate in the hearing despite being late and asking for time to add money to his parking meter, the GD decision noted specifically:

> [65] The Appellant and his witness arrived well in advance of the prescheduled hearing. At 10:00 they were escorted to the hearing room. The added party, the Employer, was not in attendance.
>
> [66] The evidence on file by way of the Canada Post Tracking Delivery Xpresspost Item No: X was successfully delivered on July 7, 2015.
>
> [67] The Member waited until 10:10 to begin the hearing. The Member proceeded with the hearing.
>
> [68] However file evidence demonstrated that the Employer contacted the Tribunal at 10:24 am, and indicated that he was having difficulties connecting to the teleconference hearing. The Employer received instructions and arrived at the hearing at 10:45 am.
>
> [69] For the Employer's benefit, all introductory prehearing information was shared. The Member, with the Employer and the Appellant's approbation, summarized the content of the Appellant's submissions. The Appellant was given the opportunity to elaborate or clarify the accuracy of the Member's summary.
>
> [70] The hearing lasted a period of 2 hours and 45 minutes. During the hearing, the Appellant objected to a postponement of the proceedings on the basis that the Employer had to insert money in the parking meter. The Appellant was concerned that any further delay would be detrimental to his appeal.
>
> [71] The Tribunal instructed the Observer to insert monies into the parking meter. The Tribunal allowed a five minute break to allow the Appellant a break. The Employer did not object to the delay.

[21] 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.

[22] The Applicant gave two examples to support his allegations that the GD Member was biased (described in paragraph [17] above).

[23] The Applicant's concerns about the two issues were described and discussed in the GD decision (see paragraph [20] above). The record and the Applicant's allegations, taken together,

do not demonstrate conduct of the GD that derogates from the standard. His 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.

[24] It is also noted that the GD hearing was recorded. The audio recording was made in three parts and is available upon request. After a review of the audio recordings with particular attention to the specific allegations of the Applicant, I find that there is no evidence that the GD Member demonstrated a bias in favour of the Commission.

Erroneous Findings of Fact

[25] 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.

[26] 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.

Summary on Applicant's Grounds of Appeal

[27] 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.

[28] 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

[29] The Application is refused.

Shu-Tai Cheng
Member, Appeal Division