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

Citation: *S. W. v. Canada Employment Insurance Commission,* 2016 SSTADEI 522

Tribunal File Number: AD-16-423

BETWEEN:

S. W.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

Corporate Services Branch HR Services Directorate

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shu-Tai Cheng

Date of Decision: October 24, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] On December 9, 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 January 2015, 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 attended the GD hearing, which was held by teleconference on December 7, 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 wrote and sent an email threatening a co-worker;

c) The Applicant's actions were willful and reckless, and she willfully disregarded the affects her actions would have on job performance;

d) The Applicant ought to have known that her actions, in sending a threatening email, was misconduct of such a serious nature that it would lead to termination of employment;

e) Her conduct constitutes misconduct within the meaning of the EI Act; and

f) The evidence before the GD was not "evenly balanced" and weighs heavily against the Appellant.

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

[5] The Applicant filed an application for leave to appeal (Application) with the Appeal Division (AD) of the Tribunal on January 8, 2016.

[6] The Tribunal requested submissions from the Respondent on April 26, 2016 "on whether leave should be granted or refused". The Respondent did not file submissions.

ISSUE

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

LAW AND ANALYSIS

[8] 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.

[9] 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."

[10] 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."

[11] 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

[12] The Applicant's grounds of appeal are that the GD failed to observe a principle of natural justice and based its decision on errors of law and erroneous findings of fact. Her submissions can be summarized as follows:

a) The GD did not use a fair process to decide the appeal;

b) The GD shifted the evidentiary burden on the Applicant when it should have been on the Respondent;

c) The GD Member made remarks during the hearing that demonstrated bias;

d) The GD applied the wrong legal test by misapplying the burden of proof;

e) There were two versions of the facts, the Applicant's and the Respondent's; the GD preferred the Respondent's despite no one on behalf of the Respondent or the employer appearing at the hearing;

f) The GD based its decision on erroneous findings of fact, as follows:

    i. The person in attendance was misstated;

    ii. There was no evidence to find that she sent the email at issue;

    iii. The Commission's agent made notes but did not appear at the hearing; the GD could not assess the agent's credibility;

    iv. The GD found that she "ought to have known" that her conduct was of a serious nature but did not ask her about her knowledge on this point;

    v. At the GD hearing, she denied sending the email but the GD found that she "has not denied sending the email"; and

    vi. The finding that the Applicant "provided no evidence that she is naïve, uneducated or didn't understand what she was doing" was capricious;

[13] The Respondent chose not to file submissions relating to this Application despite having been asked for submissions by the AD.

[14] The arguments related to some of the Applicant's reasons for appeal do not meet the threshold of having a reasonable chance of success. This includes:

a) That the person in attendance was misstated: While the name "D. A." appears to be a typographical error in the GD decision, the GD did not base its decision on this error and it was not a finding of fact;

b) That there was no evidence to find that she had sent the email at issue: The email in question was sent on June 30, 2014 from the Applicant's office computer and there were security measures in place to prevent someone else from sending email from the Applicant's computer and email account. There was evidence upon which to find that the Applicant had sent the email;

c) That the GD could not assess the credibility of the Commission agent who wrote the note at GD3-18: However, the GD was not required to assess the credibility of the agent who wrote the note in order to accept the note as evidence;

d) That no one appeared on behalf of the Commission or the Employer: The Applicant appears to argue that because of this, the GD must accept the version of the facts that she advanced. This is not the case. The GD weighed the evidence which included the documentary evidence (some of which came from the Commission or the Employer). This is a proper role of the GD.

[15] 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 and alleges a breach of natural justice which appear to fall within one of the enumerated grounds.

[16] I need not decide, at this stage, whether the GD based its decision on an error of law or failed to observe a principle of natural justice. I only need to be satisfied that the appeal has a reasonable chance of success on these grounds in order to grant leave to appeal.

[17] In the circumstances, whether the GD erred in law or failed to observe a principle of natural justice in making its decision warrants further review.

[18] On these grounds, I am satisfied that the appeal has a reasonable chance of success.

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

[20] 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*.

[21] The AD hearing is not a new hearing of the matter. It is an appeal as circumscribed by sections 58 and 59 of the DESD Act.

CONCLUSION

[22] The Application is granted but limited as discussed in paragraphs [14] to [21] above.

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

[24] 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