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

[TRANSLATION]

Citation: *L. G. v. Canada Employment Insurance Commission*, 2017 SSTADEI 108

Tribunal File Number: AD-17-33

BETWEEN:

**L. G.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 16, 2017

## REASONS AND DECISION

### DECISION

[1] The Social Security Tribunal of Canada (Tribunal) refuses leave to appeal to the Appeal Division of the Tribunal.

### INTRODUCTION

[2] On December 2, 2016, the General Division of the Tribunal found that the Applicant had voluntarily left his job without just cause within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On January 11, 2017, the Applicant filed an application for leave to appeal with the Appeal Division after he was notified of the General Division's decision on December 11, 2016.

### ISSUE

[4] The Tribunal must decide whether the appeal has a reasonable chance of success.

### THE LAW

[5] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[6] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

### ANALYSIS

[7] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to 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.

[8] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the applicant does not have to prove the case.

[9] The Tribunal will grant leave to appeal if it is satisfied that any of the above-mentioned grounds of appeal has a reasonable chance of success.

[10] To do so, the Tribunal must, in accordance with subsection 58(1) of the DESDA, be able to see a question of law, fact or jurisdiction, the answer to which might justify setting aside the decision under review.

[11] In view of the above, does the Applicant's appeal have a reasonable chance of success?

[12] In his application requesting leave to appeal, the Applicant submits that the General Division did not take into account the fact that the employer considered him to be unsuitable for the job he had been hired to do. He believes that the employer contradicted itself with respect to his qualifications and opportunities for advancement within the company. He alleges that the General Division did not consider his argument that he had been prepared to remain in the position to allow for a transition period—the time required to find someone to replace him—but the employer had refused this offer.

[13] He also argues that the General Division did not consider his argument and the cited case law that would grant him time to determine whether an accepted employment was suitable.

[14] When it dismissed the Applicant’s appeal, the General Division concluded the following:

> [translation]
>
> [24] The Tribunal finds that in this case, the Appellant's termination was voluntary, within the meaning of the Act, even if he submitted at the hearing that it was a trial period, that he didn't actually work, and that it was a "half-dismissal" in his case.
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> [25] The Tribunal finds the Appellant's statements regarding the circumstances that led to the termination of his employment contradictory.
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> [26] In many of his statements, the Appellant clearly indicated that he had voluntarily left the job that he had with the employer Alutrec Inc. because it did not correspond to the skills and experience that he had developed over the years, and that he had made his decision after much consideration (Exhibits GD3-21, GD3-22, GD3-28 and GD3-32).
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> [27] The Appellant also stated several times that he had left his job because of his choice of career and that he was optimistic that he would find another job (Exhibits GD3-16, GD3-28 and GD3-32).
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> [28] In the letter that he sent to the employer on March 15, 2016, entitled "Resignation," the Appellant indicated that he was resigning from his position as production equipment designer (Exhibit GD3-33).
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> [29] In that letter, the Appellant explained that the position he held was production-oriented and that it was less related to the skills and experience that he had acquired over the last 15 years in research and development (Exhibit GD3-33).
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> [30] In this context, the Tribunal finds that the Appellant would have been able to continue his employment with the employer Alutrec Inc., but that he took the initiative of terminating that employment on March 15, 2016, by leaving voluntarily.
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> [31] The Tribunal does not accept the Appellant's argument that the employer considered him to be unsuitable for the job that he had been hired to do (Exhibits GD3-12 and GD3-14).
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> [32] The employer explained that the termination of the Appellant's employment was not mutually agreed upon, but that he had chosen to leave (Exhibits GD3-15 and GD3-29).

> [33] The employer indicated that the Appellant had the qualifications necessary for doing the job required of him and for advancing within the company (Exhibits GD3-15 and GD3-29).
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> [34] On this point, the Tribunal notes that the Appellant stated that even though his skills were better suited to research and development, he had the qualifications necessary to do the job required of him.
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> [35] The employer pointed out that it in no way wanted to divest itself of the Appellant's services and that it could see the Appellant working for the company long-term (GD3-15 and GD3-29).
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> [36] Even though the Appellant argued that he had been worried about a lay-off given his work experience, the nature of the position that he had accepted, and the direction taken by the company, nothing in the evidence on file supports such a finding. The employer gave no indication that it was going to lay off the Appellant.
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> [Emphasis added by the undersigned.]

[15] Based on the General Division's decision, it effectively considered the Applicant's argument that the employer considered him to be unsuitable for the position that he had been hired for, but clearly did not accept it. The evidence before the General Division demonstrates rather that the employer gave no indication that it was going to lay off the Applicant. It was the Applicant himself who took the initiative of terminating his employment.

[16] Federal Court of Appeal jurisprudence clearly states that an employee who advises their employer that they are less available than previously is for all intents and purposes asking the employer to terminate the employment contract if the employer cannot accommodate the employee's reduced availability—*Canada (A.G.) v. Côté*, 2006 FCA 219.

[17] Furthermore, it is of the essence of the Employment Insurance program "that the assured shall not deliberately create or increase the risk"—*Tanguay v. Unemployment Insurance Commission*, A-1458-84.

[18] The Tribunal is also of the view that the General Division was correct in applying the Federal Court of Appeal's case law that states that suitability of employment does not constitute just cause for leaving within the meaning of section 30 of the Act. Thus, the good

cause for failing to accept suitable employment under section 27 of the Act is not necessarily just cause for leaving under section 30—*Campeau v. Canada (A.G.)*, 2006 FCA 376.

[19] Upon review of the appeal docket, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal does not have a reasonable chance of success.

## CONCLUSION

[20] The Tribunal refuses leave to appeal to the Appeal Division of the Tribunal.

Pierre Lafontaine

Member, Appeal Division