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

[TRANSLATION]

Citation: *F. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 273

Tribunal File Number: AD-17-495

BETWEEN:

F. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: July 17, 2017

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On May 29, 2017, the Tribunal's General Division found that the Applicant had lost his employment by reason of his misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] The Applicant filed an application for leave to appeal to the Appeal Division on July 3, 2017, after receiving the General Division's decision on June 2, 2017.

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* (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."

[6] Subsection 58(2) of the DESD Act 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] According to subsection 58(1) of DESD Act 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.

[8] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial and lower hurdle for the Applicant to meet than the one that must be met on the hearing of the appeal on the merits. At the leave to appeal stage, the Applicant does not have to prove his or her case.

[9] The Tribunal will grant leave to appeal if the Applicant shows that one of the above-mentioned grounds of appeal has a reasonable chance of success.

[10] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the DESD Act, whether there is a question of law, fact or jurisdiction, the answer to which might lead to the setting aside of the decision under review.

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

[12] In his application for leave to appeal, the Applicant submits that:

- The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction in accordance with paragraph 58(1)(*a*) of the Act by not accounting for medical evidence establishing the Appellant's particular medical condition, namely, a diagnosis of paranoid schizophrenia. This condition has decisive impacts on several levels, the first of which is the assessment of the Appellant's credibility and the coherence of his testimony.

- The General Division erred in law in accordance with paragraph 58(1)(*b*) and thereby tainted its decision by rejecting, in paragraph 19, the Appellant's medical evidence establishing a diagnosis of paranoid schizophrenia. It erred in law by relying on a ruling by the Federal Court in *McEwing v. Canada (Attorney General)*, 2013 FC 183, which deals with the admissibility of new evidence in the context of a redress in the form of a judicial review to the Federal Court.

- The General Division erred in law and in fact in accordance with paragraphs 58(1)(*b*) and 58(1)(*c*), thereby tainting their decision, in neglecting to respect the case law of the Federal Court of Appeal with respect the constitutive criteria for misconduct, as they are stated in *Lemire*, A-51-10. To be deemed misconduct, the behaviour must constitute a breach of an express or implied duty of the contract of employment. The General Division therefore erred in law in paragraph 50 and in the following paragraphs by not accounting for the fact that, given that *An Act respecting Labour Standards* is a public order, the right to be absent in cases of illness was implicitly part of his labour contract and that it could not have been misconduct in those circumstances.

- The General Division's decision is unreasonable and does not consider all the evidence brought before it in accordance with section 58(1)(*c*) [*sic*] of the Act, especially the major effects of his medical condition on his dealings at the time of the end of his employment, as well as in his subsequent statements.

[13] After reviewing the appeal docket, the General Division's decision and the arguments made in support of the application for leave to appeal, the Tribunal concludes that the appeal has a reasonable chance of success. The Applicant raises a question, the answer to which may lead to the setting aside of the decision under review.

CONCLUSION

[14] The Tribunal grants leave to appeal to Social Security Tribunal's Appeal Division.

Pierre Lafontaine
Member, Appeal Division