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

Citation: *S. C. v. Canada Employment Insurance Commission,* 2017 SSTADEI 342

Tribunal File Number: AD-17-584

BETWEEN:

S. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: September 19, 2017

Canada

REASONS AND DECISION

[1] The Applicant applied for Employment Insurance (EI) benefits in October 2016. The Respondent denied the Applicant's claim, initially and upon reconsideration, on the basis that he had lost his employment as a result of his misconduct.

[2] The Applicant's appeal to the Social Security Tribunal of Canada (Tribunal) on the issue of misconduct was dismissed by the Tribunal's General Division on August 1, 2017. The General Division member found that the Applicant (then Appellant) had been dismissed from employment due to "continued inappropriate behavior and insubordination." The member found that, in light of the admitted conflicts and previous warnings regarding insubordinate behavior, the Applicant's "actions were willful to the point that he would/could assume they would lead to his dismissal." The member thus concluded that the Applicant had lost his employment as a result of his own misconduct.

[3] The Applicant has now filed an application for leave to appeal to the Appeal Division of the Tribunal.

[4] Pursuant to s. 56(1) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the Appeal Division is not automatic, but rather "may only be brought if leave to appeal is granted." As set out in s. 58(2) of the DESDA, leave to appeal is refused "if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success means having some arguable ground upon which the proposed appeal may succeed: *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41. The Applicant does not have to prove the case at the leave stage.

[5] The only grounds of appeal to the Appeal Division are those identified in s. 58(1) of the DESDA:

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.

[6] Consequently, before leave to appeal can be granted, I must be satisfied that the reasons for appeal fall within the enumerated grounds of appeal, and that at least one of these has a reasonable chance of success.

[7] In his reasons for appeal, the Applicant first asserts that the General Division failed to observe a principle of natural justice, because there "should have been other witnesses brought into investigation." It is not clear to me whether he is suggesting that the employer, the Respondent or the General Division ought to have brought in these witnesses, but, in any case, the grounds of appeal to the Appeal Division relate only to errors made by the General Division. The rules of natural justice flow from two fundamental principles: the right to be heard, and the right to an impartial decision-maker. These principles do not extend to an obligation on the part of the decision-maker to solicit or collect evidence beyond that which has been presented by the parties. Moreover, the General Division does not have investigative powers under the DESDA; rather, it must decide appeals by considering the written evidence filed by the parties, testimony from witnesses, and submissions of the parties. There is no suggestion here that the Applicant was denied the opportunity to present evidence, including witness testimony, to the General Division; I note that the record includes written material submitted by the Applicant, and the Notice of Hearing asks the parties to advise of witnesses attending the hearing. Accordingly, on the first ground of appeal, I find that the Applicant has not raised an arguable case since his claim, even if proven, would not constitute a breach of natural justice. In other words, the argument is bound to fail.

[8] Secondly, the Applicant submits that the General Division made an error of law because he "must be proven guilty [of misconduct] in a court of law." This is not an accurate statement. Subsection 48(3) of the *Employment Insurance Act* (Act) directs that "the Commission shall decide whether the claimant is qualified to receive benefits…", and s. 30(1) of the Act provides for disqualification from benefits if "the claimant lost any employment because of their

misconduct…" Subsection 64(1) of the DESDA gives the Tribunal the power to "decide any question of law or fact" necessary for the disposition of an appeal. Accordingly, the Respondent (on the initial application) and the General Division (on appeal) have, by law, the power to make findings of misconduct. I find that the Applicant has not raised an arguable case with respect to a possible error of law regarding the authority of the Respondent or the General Division to determine misconduct; this argument, too, is bound to fail.

[9] Thirdly, the Applicant submitted that there was an important error of fact in that an electronic card system would show his records, in relation to absenteeism. However, the General Division determined that the Applicant had lost his employment due to inappropriate behaviour and insubordination, and that this was the willful misconduct that disqualified him from EI benefits. As such, the General Division did not base its decision on evidence of absenteeism, and any possible error of fact regarding the Applicant's absenteeism would not change that decision. I find that the Applicant has not raised an arguable case with respect to an appealable error of fact, since he has not identified a potentially erroneous finding of fact upon which the General Division "based its decision…" (as required by s. 58(1)(*c*)). In light of the limited types of factual errors that may be appealed to the Appeal Division, the Applicant's claim with respect to his absenteeism is bound to fail.

[10] The Applicant also noted that he had paid more than his share into EI. Under the Act, however, disqualification for misconduct cannot be overcome by any number of insurable hours prior to the loss of employment. While this may seem unfair to the Applicant, it does not raise the possibility of an appealable error of fact or law by the General Division, under the DESDA. Similarly, the Applicant's final assertion that "a conflict between 2 or 3 people shouldn't prove misconduct" does not raise an arguable case on one of the grounds of appeal found in the DESDA. A review of the General Division decision indicates that the member considered the evidence and submissions before him, and found on a balance of probabilities that the Applicant had lost his employment due to misconduct, as that term has been interpreted by the courts. I note that weighing the evidence is the responsibility of the General Division as the trier of fact. An appeal to the Appeal Division is not an opportunity to re-argue one's case or to have the evidence broadly reconsidered; rather, as outlined above, the Appeal Division may only consider potential errors that fall within the grounds of appeal listed in s. 58(1) of the DESDA.

[11] Since the Applicant has not raised an arguable case on any of the statutory grounds of appeal, I find that his appeal does not have a reasonable chance of success. Consequently, leave to appeal is refused.

CONCLUSION

[12] The application for leave to appeal is refused.

Shirley Netten
Member, Appeal Division