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

Citation: *N. R. v. Canada Employment Insurance Commission*, 2018 SST 34

Tribunal File Number: AD-17-206

BETWEEN:

N. R.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Shirley Netten

Date of Decision: January 12, 2018

Canada

REASONS AND DECISION

[1] The Applicant's application for regular Employment Insurance (EI) benefits was refused by the Canada Employment Insurance Commission (Commission), on the basis that she had voluntarily left her employment in April 2016 without just cause. The Commission's decision was unchanged on reconsideration.

[2] The Applicant appealed to the General Division of the Social Security Tribunal of Canada (Tribunal). On February 27, 2017, the General Division dismissed the Applicant's appeal, finding that she had voluntarily left her employment without just cause. The Applicant now seeks leave to appeal the General Division's decision to the Tribunal's Appeal Division.

Is The Application For Leave To Appeal Late?

[3] Pursuant to s. 57(1)(*a*) of the *Department of Employment and Social Development Act* (DESDA), an application for leave to appeal an EI decision must be made to the Appeal Division "in the prescribed form and manner," within 30 days after the General Division decision is communicated. Sections 39 and 40 of the *Social Security Tribunal Regulations* (Regulations) outline the form and manner for such applications. Pursuant to s. 40(1)(*c*) of the Regulations, the contents of the application must include (among other things) "the grounds for the application."

[4] The General Division decision was dated February 27, 2017, and the Applicant filed an application requesting leave to appeal to the Appeal Division on March 7, 2017. This application contained the Applicant's detailed reasons for appeal, but these reasons did not cite, nor were they obviously connected to, the statutory grounds of appeal found in s. 58(1) of the DESDA.

[5] On March 10, 2017, and again on March 27, 2017, the Tribunal informed the Applicant (who is self-represented) that her application was incomplete, only with respect to "reasons for your appeal." In March 2017 the Applicant expressed to the Tribunal some confusion as to what was required, and it was not until September 28, 2017, that she submitted a revised application requesting leave to appeal, which claimed an error of fact (one of the statutory grounds of appeal). The application was considered complete at that time.

[6] In my view, the Applicant provided "the grounds for the application" in her initial application of March 7, 2017. The grounds given at that time may have been weak or ill-formed, but it is not a requirement of s. 40(1)(*c*) of the Regulations that the grounds be well-written, comprehensive or correctly based on the law. In order to meet the time limit to appeal under s. 57(1)(*a*) of the DESDA, it is sufficient, in my view, for the grounds to be articulated in the manner the applicant sees fit, so long as a reason for the appeal is provided. It is not necessary, or appropriate, to conduct a qualitative assessment of an applicant's grounds of appeal to establish whether the time limit has been met. Accordingly, I conclude that the Applicant's application was filed in the prescribed form and manner on March 7, 2017, which was within the 30-day statutory deadline. The application was not late, and consequently an extension of time need not be considered.

[7] I wish to emphasize that it is often necessary (as in this case) for the Tribunal to seek from an applicant more specific and detailed reasons, linked to the statutory grounds of appeal, prior to deciding the leave application (see *Bossé v. Canada (Attorney General)*, 2015 FC 1142). This, however, is for the purpose of ensuring that the applicant has had ample opportunity to present his or her case and that the decision on leave to appeal is fully informed; it is not for the purpose of meeting the application deadlines.

Leave to Appeal

[8] Pursuant to s. 56(1) of the 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.

[9] 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.

[10] 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.

[11] By way of background, the Applicant, employed as a site plan designer, learned on March 10, 2016 that she would no longer be working on projects for her current client. Following a meeting on March 14, 2016, the employer drafted a Voluntary Separation Agreement on March 16, 2016 which set out terms of retirement and confirmed, among other things, that: the Applicant's "employment is not being terminated"; entering into the agreement was "entirely your choice"; and if not signed then the employer "will instead assign you to work on one of our other teams as we discussed." The Applicant signed the agreement on March 18, 2016. Conflicting evidence, from the Applicant and the employer, was provided to the Commission with respect to who initiated the separation discussion and whether alternative work was actually offered to the Applicant. The Applicant conceded to the Commission that she was not being fired by the employer.

[12] The General Division decision outlined the Applicant's and the employer's statements to the Commission, the written materials provided by the employer (including meeting notes, e-mail communications, and the separation agreement), and the Applicant's testimony. The General Division found that the Applicant had been offered continued employment with her employer, and that continuing with that employment was a reasonable alternative to leaving. The General Division concluded that the Applicant had voluntarily left her employment without just cause, within the meaning of s. 29 of the *Employment Insurance Act* (Act).

[13] In her reasons for requesting leave to appeal, the Applicant asserts that the General Division made an important error regarding the facts, with respect to whether the employer had offered her "work with the other teams in the company." She points to paragraph 24 of the

decision, which is a recitation of the employer's statement to the Commission, and to sub-paragraph 28(e) of the decision, which sets out the Commission's submissions. Neither of these is a finding of fact made by the General Division and thus cannot be considered an erroneous finding of fact. However, given the Applicant's further statements that she "was not offered any alternatives" and that she would have worked for a lower salary if she had been offered work on site plan designs, I understand that she disputes the General Division's finding of fact that she "was offered continued employment" (paragraphs 34, 36 and 40).

[14] A reviewable error of fact is one that is made in a perverse or capricious manner, or without regard for the evidence. As has been recognized by the Applicant, in this case there was evidence before the General Division that supported a finding of continued employment (including a written agreement signed by the Applicant), and there was evidence from the Applicant that she had not been offered other work after being taken off her regular assignment. The General Division decision referenced the Applicant's testimony and prior statements, but ultimately concluded that there was continuous employment available to the Applicant in March 2016.

[15] While this was not the finding that the Applicant preferred, it is readily apparent that the General Division reached its finding of fact on the availability of continued employment after consideration of the evidence, both for and against. This is not a situation in which the evidence before the General Division could not possibly have supported its finding of fact, such that it might be considered perverse or capricious. Weighing the evidence and making findings of fact upon consideration of the evidence is the responsibility of the General Division. An appeal to the Appeal Division is not an opportunity to reargue 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. With respect to the General Division's conclusion on continued employment, I see no reasonable chance of success on the grounds of an erroneous finding of fact made in a perverse or capricious manner, or without regard to the evidence.

[16] In her reasons for leave to appeal, the Applicant also wrote, "Over and above I had an obligation at that time to take care of my 90-years old mother who had an advanced Alzheimer

disease and needed my constant attention." The General Division did not address the impact of the Applicant's mother's illness in its decision, but my review of the record indicates that this was not mentioned by the Applicant as a reason for leaving her employment, to the Commission or to the General Division. As such, the Applicant's need to care for her mother does not raise the possibility of an error falling within the enumerated grounds of appeal having been made at the General Division.

[17] I note that the issue of the Applicant's entitlement to compassionate care benefits under section 23.1 of the Act is not before me, nor was it before the General Division. The Commission advised the Applicant in June 2016 that, despite the decision on voluntarily leaving without just cause, she may be able to receive special benefits (including compassionate care benefits) if these situations applied to her. It is unclear to me whether the Applicant claimed special benefits in relation to palliative care given to her mother prior to her death, or whether she was focused solely upon appealing the decision on regular benefits. I am unable to comment upon any potential entitlement to such benefits at this late stage; the Applicant may wish to review the eligibility criteria found in s. 23.1 of the Act, as well as the requirements of ss. 49(1), 50(4), 10(5) and 10(5.1) of the Act.

[18] Having reviewed the record and the General Division decision, and having considered the Applicant's arguments in support of her request for leave to appeal, I conclude that the appeal has no reasonable chance of success.

DISPOSITION

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

Shirley Netten
Member, Appeal Division