

**[TRANSLATION]**

**Citation: *M. P. v. Canada Employment Insurance Commission*, 2015 SSTAD 1446**

**Date: December 17, 2015**

**File number: AD-15-1154**

**APPEAL DIVISION**

**Between:**

**M. P.**

**Applicant**

**and**

**Canada Employment Insurance Commission**

**Respondent**

**Decision by: Pierre Lafontaine, Member, Appeal Division**

## **REASONS AND DECISION**

### **DECISION**

[1] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

### **INTRODUCTION**

[2] On September 22, 2015, the Tribunal's General Division concluded that:

- The Applicant lost her employment by reason of her own misconduct under sections 29 and 30 of the *Employment Insurance Act* (the Act).

[3] On October 28, 2015, the Applicant filed an application for leave to appeal with the Appeal Division after being notified of the General Division's decision on October 2, 2015.

### **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*, "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 *Department of Employment and Social Development Act* provides that "leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

### **ANALYSIS**

[7] In accordance with subsection 58(1) of the *Department of Employment and Social Development Act*, the only grounds of appeal are that:

(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 or order, whether or not the error appears on the face of the record; or

(c) the General Division based its decision or order 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 a first 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 one of the aforementioned 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 *Department of Employment and Social Development Act*, whether there is a question of law, fact or jurisdiction whose response might justify setting aside the decision under review.

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

[12] In her application for leave to appeal, the Applicant submits that the General Division's decision does not comment on the representative's arguments regarding the facts that led to the dismissal or the related jurisprudence.

[13] The Applicant submitted that, despite the recognition by the employer, the Respondent and even the member of the General Division that the allegation of threats uttered against the Applicant was probably founded, the member concluded that this should not have influenced the Applicant's decision to belatedly report the theft committed by her assistant.

[14] In *Canada (Attorney General) v. Larivée* (2007 FCA 312), the Federal Court of Appeal establishes that the determination of whether a claimant's action constitutes misconduct leading to termination of employment entails a review and determination of facts. The

Applicant submitted that the facts relevant to this case clearly show that her past experiences of being assaulted and threatened had made her vulnerable. The evidence also clearly showed that the Applicant had faced threats from her co-worker, that she had been very afraid of these threats and that the employer's investigation had revealed that the allegation of threats was probably founded because the individual in question had been [translation] "criminalized for assault" and had used his reputation to scare his co-workers.

[15] The Applicant submitted that the General Division refuted the duty to consider these facts despite its reliance on the jurisprudence indicating that it must do so.

[16] The Applicant further submitted that the actions committed by a claimant under duress, threat or fear cannot be considered to be conscious, deliberate or intentional. Given the facts and the jurisprudence, the member should have concluded in light of his own assertions that there had been no misconduct.

[17] Lastly, the Applicant submitted that the General Division had erred with respect to the concept of the employer's burden of proof.

[18] 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 raised several questions of fact and of law whose responses might justify setting aside the decision under review.

## **CONCLUSION**

[19] The Tribunal grants leave to appeal to the Appeal Division of the Social Security Tribunal.

*Pierre Lafontaine*

Member, Appeal Division