



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v. B. Y.*, 2016 SSTADEI 138

Tribunal File Number: AD-16-351

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

B. Y.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division– Leave to Appeal decision

DECISION BY:: Pierre Lafontaine

DATE OF DECISION: March 11, 2016

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On February 15, 2016, the General Division of the Tribunal determined that:

- The Applicant did not lose his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (the “Act”).

[3] The Applicant requested leave to appeal to the Appeal Division on February 25, 2016.

ISSUE

[4] The Tribunal must decide if 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* (the “*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 “leave 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 *DESD Act* states that 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] In regards to the application for permission to appeal, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success, before leave can be granted.

[9] The Applicant submits that the General Division correctly found that the Respondent's actions were inappropriate but then erred in determining that because the employer was not clear in its warning and did not articulate what actions could result in dismissal, misconduct had not been proven.

[10] The Applicant argues that the role of the General Division is not to focus on the conduct of the employer leading up to the dismissal, but to resolve whether the Respondent was guilty of the alleged actions and whether or not these actions led to dismissal.

[11] The Applicant further submits that a proper application of the legislation and jurisprudence to the facts of this case leads to the reasonable conclusion that an employee accessing inappropriate material on a work computer, whether downloading, accessing via the employer hard drive or bringing material in on a memory stick, is a breach of behavior which an employer should expect from an employee. It is wilful and whether or not one is warned or advised and constitutes a breach of such scope that an employee should expect it could lead to dismissal.

[12] The Applicant pleads that the only reasonable conclusion based on legislation and jurisprudence is that the Respondent lost his employment due to misconduct and should be disqualified from receiving benefits pursuant to section 30 of the *Act*.

[13] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Applicant in support of its request for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant has set out reasons which fall into the above enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

CONCLUSION

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

Pierre Lafontaine

Member, Appeal Division