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

Citation: *C. G. v. Canada Employment Insurance Commission,* 2016 SSTADEI 225

Tribunal File Number: AD-16-241

BETWEEN:

C. G.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

The Massey Centre For Women

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division – Leave to appeal decision

DECISION BY:: Pierre Lafontaine

DATE OF DECISION: April 22, 2016

Canada

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On December 28, 2015, the General Division of the Tribunal determined that:

- The Applicant had lost her employment by reason of her 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 4, 2016 after receiving the decision of the General Division on January 5, 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] The Tribunal needs to be satisfied that the reasons for appeal fall within any of the above mentioned grounds of appeal and that a least one of the reasons has a reasonable chance of success, before leave can be granted.

[9] In her application for leave to appeal, the Applicant states the ground of appeal mentioned in section 58(1)(c) of the *DESD Act* and mentions that the General Division disregarded the adjusted documents which were sent in on September 28, 2015 without any attempt to contact her employer for clarification. In a further correspondence dated March 31, 2016, the Applicant raises questions that should be asked to her employer and reiterates that by providing her with an amended record of employment and a glowing employment letter, the employer was admitting that her dismissal was not fully justified.

[10] When it dismissed the appeal of the Applicant, the General Division did consider the amended documents and concluded that:

> "[29] The Member also acknowledges that, as a result of arbitration, the employer has amended the reason for separation indicating that the Claimant was laid off due to shortage of work (GD7). The Member agrees with the Commission however, that the Tribunal must consider the evidence and the conduct of the Claimant within the meaning of the *EI Act* and not the provisions of other legislation and/or any settlement or agreement between the employer and the Claimant. In a similar case as the one at hand, the Member's position is supported by the Federal Court of Appeal decision in the *Attorney General of Canada v. Morris* (A-291-98) that stated:

> "It is the Board's function to assess the evidence and to arrive at its own conclusions. It is not bound by how the employer and employee characterize the grounds on which the employment was terminated. In the present case, there was sufficient documentary evidence available to the Commission and the Board to justify a finding of misconduct.
>
> The fact that the settlement agreement required the employer to withdraw the allegation of dismissal for cause cannot be treated as conclusive of whether there was actually misconduct for purposes of the *Act*. This is particularly true since the settlement agreement did not include an admission by the employer, either express or implicit, that the dismissal for cause was not fully justified."
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> (Application for leave to 'appeal was dismissed by the Supreme Court of Canada: *Canada (AG) v. Morris*, [1999] S.C.C., No. 304).
>
> [30] The Member finds therefore, that by consciously and deliberately deciding to take the unapproved leave, knowing that she was taking a risk of being fired, the Claimant's actions constituted misconduct under the *EI Act*. The Member finds that, on a balance of probabilities, the Claimant lost her employment as result of her own misconduct and an indefinite disqualification must be imposed effective November 16, 2014 pursuant to section 29 and 30 of the *EI Act*."

[11] The undisputed evidence before the General Division shows that the Applicant, consciously and deliberately, decided to take the unapproved leave, knowing that she was taking a risk of being fired.

[12] Jurisprudence is clear that in the case of absence from work, notably without permission, and specifically after being warned that the absence was not authorized by the employer, constitutes misconduct under the *Act*.

[13] The amended documents filed by the Applicant do not contain any retraction from the employer regarding the events that initially led to her dismissal.

[14] Jurisprudence has also constantly held that the reasonableness of the sanction imposed by an employer on an employee is not a deciding factor in determining whether a claimant's behaviour amounts to misconduct within the meaning of the *Act -Canada (AG) v. Marion*, 2002 FCA 185.

[15] After reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Applicant in support of her request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[16] The Application is refused.

Pierre Lafontaine
Member, Appeal Division