



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Crestwood Dental Clinic. v. Canada Employment Insurance Commission*, 2016 SSTADEI 319

Tribunal File Number: AD-16-752

BETWEEN:

Crestwood Dental Clinic

Applicant

and

Canada Employment Insurance Commission

Respondent

and

J. R.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division– Leave to Appeal Decision

DECISION BY: Pierre Lafontaine

DATE OF DECISION: June 20, 2016

REASONS AND DECISION

DECISION

[1] The Tribunal grants leave to appeal.

INTRODUCTION

[2] On April 28, 2016, the General Division of the Tribunal determined that:

- The claimant did not lose 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 May 27, 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 pleads that 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. The Applicant submits examples in support of its position that the General Division would have ignored evidence. The Applicant states, for example, that the claimant was overpaid in excess of 300 hours when the next closest employee was only overpaid by 4 hours, that she was not submitting request for time-off forms which resulted in unauthorized vacations and lying about having to work on Sundays. The Applicant pleads that the General Division did not address the evidence that showed that the claimant was overpaid for an exorbitant amount of hours and that the only reasonable explanation was that she deliberately falsified time records.

[10] The Applicant also submits that the General Division erred by improperly applying a higher standard to the claimant. The test is not whether the claimant consciously, deliberately or intentionally tried to deceive her employer (GE-15-228, para 69). The Applicant submits that in *Canada (AG) v. Secours*, [1995] CarswellNat 122 (Fed. C.A.) at paragraph 3, Justice Letourneau held that it is not necessary for behaviour under the *Unemployment Insurance Act* to have a wrongful intent. It is sufficient that the reprehensible act or omission complained of be made "wilfully", i.e. consciously, deliberately or intentionally.

[11] The Applicant submits that the correct test which should have been applied in finding misconduct is whether the claimant's acts, which were wilful or deliberate, caused the claimant to know or ought to have known that her conduct would result in her dismissal (*Lemire v. Canada (AG)*, 2010 FCA 314).

[12] The Applicant finally submits that the correct application of the test to the facts of the case would lead to the conclusion that the claimant deliberately signed off on falsified time records, which was directly linked to her employment, and either knew or ought to have known that this misconduct would lead to her dismissal. The claimant's misconduct breached her implied duty of good faith and her position of trust to her employer, which was irreparable.

[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.

Pierre Lafontaine
Member, Appeal Division