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

Citation: *G. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 487

Tribunal File Number: AD-16-1091

BETWEEN:

G. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: September 23, 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 August 2, 2016, the General Division of the Tribunal determined that the Applicant had lost his employment by reason of his own misconduct pursuant to sections 29 and 30 of the *Employment Insurance Act* (*Act*).

[3] The Applicant requested leave to appeal to the Appeal Division on August 29, 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 at least one of the reasons has a reasonable chance of success, before leave can be granted.

[9] In his application for leave to appeal, the Applicant essentially reiterates the arguments that he made before the General Division. He submits that he was suspended and not fired by his Employer. He pleads that the General Division did not consider the special circumstances of his case and the spirit of the *Act*. He further submits that the General Division imposed upon him a punishment that does not fit the error committed. He respectfully submits that the one-time error committed, in eight years of dutiful service, cannot be classified per se as a misconduct justifying dismissal. The Applicant has also filed two affidavits that reiterate his view of the facts of the case in support of his application for leave.

[10] Unfortunately for the Applicant, an appeal to the Appeal Division of the Tribunal is not a *de novo* hearing, where a party can represent evidence and hope for a new favorable outcome.

[11] The Federal Court of Appeal in the case of *Canada (AG) v. Jean*, 2015 FCA 242, indicated that the mandate of the Appeal Division is conferred to it by sections 55 to 69 of the *DESD Act*. Therefore, the Appeal Division can only intervene if the General Division failed to observe a principle of natural justice, erred in law, 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.

[12] When it dismissed the appeal, the General Division addressed all the above mentioned arguments of the Applicant and concluded that:

> "[36] The Tribunal Member finds that in this case the Claimant clearly should have foreseen that his conduct in trying to bring alcohol into his accommodations against the camp rules would be likely to result in serious disciplinary consequences including his possible suspension or dismissal from his employment.
>
> [37] The Tribunal Member finds that the test for misconduct is whether the act complained of was at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance and while in this case the incident of trying to sneak in a bottle of alcohol was for breaking a campsite rule rather than a worksite rule and not directly related to the Claimant's job performance the fact remains that the Claimant broke a rule which then prevented him from working at the worksite and therefore constituted misconduct.
>
> [38] The Tribunal Member finds that in this case the actions of the Claimant in attempting to bring some alcohol into his accommodations were sufficiently reckless or negligent to amount to wilfulness."

[13] The notion of willful misconduct does not imply that it is necessary that the breach of conduct be the result of a wrongful intent; it is sufficient that the misconduct be conscious, deliberate or intentional. The fact that the Applicant had a momentary lapse of judgment in eight years of dutiful service is of no relevance to whether his conduct constituted misconduct under the *Act – Canada (AG) v. Hastings*, 2007 FCA 372.

[14] Furthermore, the role of the General Division is to determine if the employee's conduct amounted to misconduct within the meaning of the *Act* and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal – *Canada (AG) v. Lemire*,2010 FCA 314.

[15] Unfortunately for the Applicant, he has not identified any errors of jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[16] For the above mentioned reasons and after reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Applicant in support of his request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

[17] The Tribunal refuses leave to appeal.

Pierre Lafontaine
Member, Appeal Division