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

Citation: *D. M. v. Canada Employment Insurance Commission*, 2016 SSTADEI 568

Tribunal File Number: AD-16-1172

BETWEEN:

D. M.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

GOtraffic Management Inc.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: December 13, 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 her employment by reason of her 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 September 28, 2016 after receiving communication of the General Division decision on September 7, 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 her application for leave to appeal, the Applicant states that the General Division failed to consider that the Employer offered to pay nine days compensation for "wrongful dismissal". Because the Employer was offering nine days, the General Division could not contradict that evidence. She submits that the General Division just wanted to "rubber stamp" the decision of the Respondent.

[10] On November 21, 2016, a correspondence was sent to the Applicant by the Tribunal requesting that she give in details her grounds of appeal. The Applicant replied on November 27, 2016.

[11] In her reply, the Applicant states that the General Division failed to consider the letter from the union manager offering nine days of compensation for wrongful dismissal. She pleads that the key reason for her termination was how she reacted to the foreman's treatment of a co-worker being harassed and intimidated. She states she has already submitted everything along with the details of the June 29, 2015 incident which lead to her dismissal. She feels that she should not have to rewrite and resubmit everything over and over again.

[12] 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.

[13] As stated by the General Division, it's role 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.

[14] It is for the General Division to assess the evidence and come to a decision. It is not bound by how the employer and employee or a third party might characterize the grounds on which an employment has been terminated – *Canada (AG) v. Boulton*, A-45- 96.

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

> "[98] The Respondent presents the argument that the employer is given credibility in this instance because there is hard evidence supporting the fact the claimant was warned several times for the same issue, namely her attitude and use of profanity, as well, there is witness and co-worker statement further supporting the fact the claimant's general attitude is aggressive;
>
> [99] The Tribunal is entitled to accept hearsay evidence, as we are not bound by the same strict rules of evidence as are the Courts (*Canada v. Mills*, A-1873-83 FCA). In this case the Tribunal finds the evidence of the employer to be credible and the employer provided documentary evidence of discipline warnings and the signed documentation to support that the Appellant was aware of the company polices and expectations.
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> [100] In (*Locke v. Canada (A.G.)* FCA 262) the Court stated that for the alleged action to constitute misconduct, the claimant must have known that she would likely be dismissed as a result of her action.
>
> [101] The Tribunal notes that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction (*Caul* 2006 FCA 251).
>
> [102] Determining whether dismissing the Appellant was a proper sanction is an error. The Tribunal must consider whether the misconduct it found was the real cause of the Appellant's dismissal from employment (*Macdonald* A-152-96).

> [103] The Tribunal has determined that the Appellant did breach the employer's policy and a disentitlement be imposed as per the *Act*…"

[16] 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.

[17] The Applicant has not identified any errors of jurisdiction or any failure by the General Division to observe a principle of natural justice. She 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.

[18] 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

[19] The Application is refused.

Pierre Lafontaine
Member, Appeal Division