



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. H. v. Canada Employment Insurance Commission*, 2017 SSTADEI 79

Tribunal File Number: AD-17-142

BETWEEN:

S. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 1, 2017

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On January 4, 2017, 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 February 10, 2017 after receiving communication of the decision of the General Division on January 16, 2017.

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* (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 submits that the General Division did not examine and study his file very carefully. He pleads that many things have been ignored and disregarded by the General Division. He finds justice has not been done in his file.

[10] The employer stated that the Applicant was dismissed for downloading pornography on the company phone. Someone saw it on his phone and reported it. The employer further stated that he went on the Applicant's phone and launched the browser and everything came up. The employer also stated that the Applicant admitted it but said it was the employer's fault because he could access it.

[11] The Applicant admitted that he would google on his lunch or when he was not busy but he only viewed things. He further admitted having viewed material depicting naked people (GD3-35). The Applicant repeated at length that if this was so important, the employer should have blocked the internet or required a password or he should have been given a warning.

[12] The General Division found that the Applicant had signed the company policy regarding computer use and that he had read and understood that he was not to use the mobile phone for personal use. It found that the Applicant admitted that during his breaks or

when he was bored, he would use Google to find personal information and /or pornographic images.

[13] The General Division concluded from the undisputed evidence that the Applicant was inappropriately using his mobile phone which is against company policy and that his actions constituted misconduct within the meaning of the Act because he failed to carry out the obligations in his employment contract.

[14] The Applicant pleads that the employer should have talked to him about the issue. He believes the employer should have given him a verbal or written notice. In support of his position, he filed the decision of the Employment Standards that determined that he was dismissed without cause.

[15] It is well established that 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. This said, the Reviewing Officer of Employment Standards also concluded that the Applicant's actions constituted misconduct.

[16] 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 (A.G.) v. Marion*, 2002 FCA 185.

[17] 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

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

Pierre Lafontaine
Member, Appeal Division