



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. B. v. Canada Employment Insurance Commission*, 2017 SSTADEI 105

Tribunal File Number: AD-17-197

BETWEEN:

L. B.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: March 16, 2017

REASONS AND DECISION

DECISION

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

INTRODUCTION

[2] On January 23, 2017, the General Division of the Tribunal determined that the Applicant 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 March 6, 2017, after receiving the decision of the General Division on February 6, 2017.

ISSUE

[4] The Tribunal must decide whether 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 “[l]eave 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] Regarding 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, in support of her leave to appeal application, submits that an employer cannot end an employee's employment if any part of the reason for the termination is based on the employee exercising her/his rights under *The Employment Standards Act* or the law.

[10] The Applicant pleads that she was employed with the employer for some fifteen months and was entitled at the time of her termination to ten earned vacation days from the employer. She exercised her right and requested in writing to the employer some three months in advance, to be allowed to take six days of her ten days earned vacation time. She was verbally denied her request for vacation time by her employer.

[11] She submits that she followed the process put in place by the employer to request her owed vacation time, which she was legally entitled to. She pleads that the employer showed a total lack of respect and failed to follow their own process of responding to the employee's written request for her vacation time. She was also subsequently refused a leave of absence. She argues that she was seen as a good employee by the employer right up to the time she

requested her vacation time and made the decision to take such vacation time against the unfair and unjust actions of the employer. The employer then penalized her by terminating her employment.

[12] She finally submits that if there was any form of "misconduct," it is such that should be placed on the employer in this case—not on the employee.

[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—*Canada (Attorney General) v. Hastings*, 2007 FCA 372.

[14] 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 (Attorney General) v. Lemire*, 2010 FCA 314.

[15] The undisputed evidence before the General Division demonstrates that the Applicant was never authorized by her employer to take her vacation time or to take a leave of absence. She made the decision to take such vacation time against the instructions of her employer.

[16] Jurisprudence is clear that absence from work, notably without permission, and after specifically being told by the employer to be present at work, constitutes misconduct under the Act. The proper recourse for the Applicant would have been to file a complaint to the appropriate authority instead of taking an authorized leave of absence at the risk of losing her employment.

[17] After reviewing the docket of appeal and 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

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

Pierre Lafontaine
Member, Appeal Division