



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *Canada Employment Insurance Commission v. Y. B.*, 2017 SSTADEI 138

Tribunal File Number: AD-17-97

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

Y. B.

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: April 3, 2017

REASONS AND DECISION

DECISION

[1] The Social Security Tribunal of Canada (Tribunal) grants leave to appeal to the Tribunal's Appeal Division.

INTRODUCTION

[2] On February 8, 2016, the Tribunal's General Division found that the Respondent had not lost her employment by reason of her own misconduct within the meaning of sections 29 and 30 of the *Employment Insurance Act* (Act).

[3] On July 11, 2016, the Appeal Division refused the Respondent's application for leave to appeal.

[4] On January 31, 2017, the Federal Court of Appeal allowed the Respondent's application for judicial review and sent the file back to the Appeal Division so that it could determine, based on the supporting grounds, whether the allegation of an error of law committed by the General Division over the notion of misconduct had a reasonable chance of success.

ISSUE

[5] The Tribunal must decide whether the appeal has a reasonable chance of success.

THE LAW

[6] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), "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."

[7] Subsection 58(2) of the DESDA provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success."

ANALYSIS

[8] According to subsection 58(1) of the DESDA, 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.

[9] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

[10] The Tribunal will grant leave to appeal if it is satisfied that any of the above grounds of appeal has a reasonable chance of success.

[11] In this particular case, the Federal Court sent the file back to the Appeal Division so that it could determine, based on the supporting grounds, whether the Applicant's allegation of an error of law committed by the General Division regarding the notion of misconduct had a reasonable chance of success on appeal.

[12] In light of the foregoing, does the Applicant's appeal have a reasonable chance of success?

[13] The Applicant argues that the General Division's decision contains an error of law given that the Respondent had lost her employment by reason of her own misconduct under section 30 of the Act.

[14] The Applicant maintains that the employer's code of conduct is very clear. An employee is prohibited from forming a relationship outside of work with anyone who is presently, or has ever been, under their supervision. The Respondent was not allowed to have a relationship, albeit platonic, with an offender. The Applicant argues that the facts before the General Division are uncontested and that the Respondent herself admitted to having committed a professional misstep or an error in judgment.

[15] The Applicant maintains that the General Division accepted the Respondent's testimony that she had not expected to lose her job. The Applicant also maintains that, rather than apply an objective test, the General Division had mistakenly applied a subjective test based on the Respondent's beliefs. The General Division should have instead considered whether, based on the proven facts, the Respondent was likely to lose her job. It is not sufficient to conclude that the Respondent was not expecting to lose her job.

[16] In support of her opposition to the application for leave to appeal, the Respondent maintains that a lapse in judgment or a professional misstep does not automatically constitute misconduct; the decision-maker must take into account any extenuating circumstances. This, she argues, is exactly what the General Division had done in her case.

[17] The Respondent maintains that the General Division had accepted her explanations to the effect that she did not believe that she would be dismissed and that she had not acted deliberately. She states that the General Division had applied an objective test when it assessed the evidence as a whole. She had violated the rules; however, it was an isolated incident. She maintains that the General Division had applied the correct legal test by taking the specific circumstances and context into consideration.

[18] At this stage, the Tribunal must determine simply whether the appeal has a reasonable chance of success. It does not have to render a decision on the merits of the case. A reasonable chance of success has been determined to equate to an arguable case at law.

[19] There is misconduct when a claimant's conduct was wilful, meaning that the acts that led to the dismissal were conscious, deliberate, or intentional. In other words, there is misconduct when a claimant knew or ought to have known that their conduct was such as to

impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility – *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[20] The Tribunal is of the opinion that the Applicant raises an arguable question of law regarding the General Division's interpretation of misconduct. Did the General Division err in finding that there had been no misconduct because the Respondent was not aware that the breach was of such scope that she could normally foresee it leading to her dismissal? Should the General Division have considered whether, based on the proven facts, the Respondent was likely to lose her job?

[21] Upon review of the appeal file, the General Division's decision, and the arguments in support of and against the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success. The Applicant raised a question of law, the response to which could lead to the setting aside of the contested decision.

CONCLUSION

[22] Leave to appeal is granted.

Pierre Lafontaine
Member, Appeal Division