



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *J. V. v. Canada Employment Insurance Commission*, 2018 SST 429

Tribunal File Number: AD-18-230

BETWEEN:

**J. V.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: April 19, 2018

## DECISION AND REASONS

### DECISION

[1] The Tribunal grants leave to appeal to the Appeal Division.

### OVERVIEW

[2] The Applicant, J. V. (Claimant), was terminated by his employer for sleeping while on duty, which the employer considered unacceptable since he was a security guard. The Respondent (Commission) found that the Claimant lost his employment because of his misconduct. The Claimant requested a reconsideration of this decision. However, the Commission maintained the initial decision. The Claimant appealed that decision to the Tribunal's General Division.

[3] The General Division found that the Claimant lost his employment because of his misconduct. It did not accept the argument of accidental sleep. The General Division finds that the Claimant's action was wilful or so reckless as to approach wilfulness.

[4] The Claimant now seeks leave from the Tribunal to appeal the General Division decision.

[5] In support of his application for leave to appeal, the Claimant states that the General Division erred in law in its interpretation of the notion of misconduct under the *Employment Insurance Act*. He also argues that the General Division overlooked certain evidence and that it erred in its credibility assessment.

[6] The Tribunal must decide whether it is arguable that the General Division made a reviewable error based on which the appeal could succeed.

[7] The Tribunal grants leave to appeal because there is a reasonable chance of success based on at least one of the grounds of appeal raised by the Claimant.

## ISSUE

[8] Does the Claimant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?

## ANALYSIS

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal of a General Division decision. These reviewable errors are that the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction; it erred in law in making its decision, whether or not the error appears on the face of the record; or it 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.

[10] An application for leave to appeal is a preliminary step to a hearing on the merits. It is an initial hurdle for the Claimant 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 to appeal stage, the Claimant does not have to prove his case; he must instead establish that the appeal has a reasonable chance of success. In other words, the Claimant must show that there is arguably some reviewable error based on which the appeal might succeed.

[11] The Tribunal will grant leave to appeal if it is satisfied that at least one of the grounds of appeal raised by the Claimant has a reasonable chance of success.

[12] This means that the Tribunal must be in a position to determine whether there is an issue of natural justice, jurisdiction, law or fact that may lead to the setting aside of the decision under review, in accordance with s. 58(1) of the DESDA.

**Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?**

[13] In support of his application for leave to appeal, the Claimant invokes paragraphs 58(1)(b) and 58(1)(c) of the DESD Act.

[14] The Claimant argues that the General Division erred by excluding his undisputed medical evidence based solely on the fact that he had not disclosed his medical condition to his employer. He argues that it is a right protected by the *Charter of Rights and Freedoms*. The Claimant maintains that the General Division could not set aside the medical evidence about his diabetes in its analysis of the wilful or reckless nature of his action.

[15] The Claimant also argues that the General Division erred in fact by not considering evidence before it, specifically the chain of events leading up to his feeling of faintness—two shifts without advance notice, no meals, and the fact that his co-worker never came to help him.

[16] The Tribunal is of the opinion that the Claimant has raised an arguable issue of law regarding the General Division's interpretation of the notion of misconduct.

[17] On reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal has a reasonable chance of success.

## **CONCLUSION**

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

Pierre Lafontaine  
Member, Appeal Division

REPRESENTATIVE:	Jérémie Dhavernas, Representative for the Applicant
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