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

Citation: *K. S. v. Canada Employment Insurance Commission*, 2018 SST 495

Tribunal File Number: AD-18-195

BETWEEN:

K. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: May 3, 2018

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] The Applicant (Claimant) was dismissed from his employment and applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim on the basis that his employment had been terminated because of misconduct, and it maintained this decision after the Claimant applied for reconsideration. The Claimant's appeal to the Social Security Tribunal's General Division was also dismissed and he now seeks leave to appeal to the Appeal Division.

[3] The appeal has no reasonable chance of success. The Claimant has not made an arguable case that the General Division failed to observe a principle of natural justice or erred in jurisdiction, that it erred in law, or that 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.

ISSUES

[4] Is there an arguable case that the General Division failed to observe a principle of natural justice or that it exceeded or refused to exercise its jurisdiction?

[5] Is there an arguable case that the General Division applied the wrong legal test for misconduct, or failed to apply the legal test correctly?

[6] Is there an arguable case that 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?

ANALYSIS

General Principles

[7] The General Division is required to consider and weigh the evidence before it and to make findings of fact. It is also required to apply the law. The law includes the statutory provisions of the *Employment Insurance Act* (Act) and the *Employment Insurance Regulations* (Regulations) that are relevant to the issues under consideration, and could also include court decisions that have interpreted the statutory provisions. Finally, the General Division must reach conclusions on the issues that it has to decide, based on an application of the law to the facts.

[8] The application for leave now comes before the Appeal Division. The Appeal Division is permitted to interfere with a decision of the General Division only if the General Division has made certain types of errors, which are called "grounds of appeal."

[9] Subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal:

> (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.

[10] Unless the General Division erred in one of these ways in its decision, a further appeal of the General Division decision cannot succeed, even if the Appeal Division disagrees with the General Division's conclusion and the result.

[11] At this stage, I must find that there is a reasonable chance of success of appeal, on one or more grounds of appeal, in order that I might grant leave and allow that appeal to go forward. A reasonable chance of success has been equated to an arguable case.[1]

Natural justice and jurisdiction

[12] One of the grounds of appeal selected by the Claimant on his application for leave is that the General Division failed to observe a principle of natural justice or exceeded or refused to exercise its jurisdiction. However, he did not explain how he felt the General Division had failed to observe a principle of natural justice or had erred in jurisdiction.

[13] Natural justice refers to fairness of process and includes procedural protections such as the right to an unbiased decision maker and the right of a party to be heard and to know the case against him or her. The Claimant has not suggested that the General Division member was biased or that he had prejudged the matter. Nor has he raised a concern with the adequacy of notice of the hearing, with pre-hearing disclosure of documents, with the manner in which the hearing was conducted, his understanding of the process, or with any other action or procedure that could have affected his right to be heard or to answer the case.

[14] Likewise, the Claimant did not raise an argument that the General Division had exceeded or refused to exercise its discretion.

[15] As a result, I find no arguable case that the General Division failed to observe a principle of natural justice or erred in jurisdiction.

Error of Law

[16] The Claimant also claimed that the General Division erred under s. 58(1)(b) of the DESD Act in its application of the test for misconduct. In support of his position, he cites the Federal Court of Appeal cases of *Mishibinijima*[2] and *Tucker*.[3]

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[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259
[2] *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36
[3] *Tucker v. Canada (Attorney General)*, A-381-85

[17] *Tucker* stands for the proposition that conduct must be willful or reckless to be considered misconduct. The analysis in *Mishibinijima* focused on whether the claimant's conduct amounted to misconduct, and whether the claimant lost his employment because of misconduct. Similar to *Tucker*, the *Mishibinijima* decision reinforces that conduct will be found to be misconduct where the claimant knew or ought to have known that the conduct was such as to impair the performance of the duties owed to the employer and that, as a result, dismissal was a real possibility. Both are good law, meaning that both set forth principles that are still followed. The *Lemire*[4] decision applied by the General Division says much the same thing, and is also good law.

[18] The conduct that was alleged to have occurred in this case was that the Claimant contacted the employer's administration directly, contrary to company policy; that he directly contacted a third-party payroll provider engaged by his employer; and that he misrepresented himself as the employer for the purpose of obtaining information from the payroll provider. The General Division's analysis involved, first; a consideration of whether the conduct occurred and whether it resulted in the Claimant's dismissal and, second; whether the conduct was "misconduct" within the meaning of the Act. The General Division found that the Claimant had contacted his employer's administration (paragraph 56), and that he had also contacted the payroll provider directly and represented himself as an agent of the employer to the payroll provider (paragraph 44). It also found that he was dismissed for contacting the payroll provider, and for misrepresenting himself as the employer (paragraph 53).

[19] In assessing whether the Claimant's conduct was misconduct, the General Division determined that his contact with the payroll provider and his misrepresentation of himself to the payroll provider were deliberate (paragraph 55). The General Division also concluded that the Claimant knew or ought to have known that impersonating the employer in contacting the payroll provider was a breach of the conditions of his employment, and that it would cause irreparable harm to the employment relationship and result in his dismissal (paragraph 59).

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

[20] The Claimant has not identified any legal error. The General Division referenced and applied the applicable law and appropriate legal authority. I therefore find that the Claimant has not made an arguable case that the General Division erred in law.

Erroneous finding of fact – Circumstances of dismissal

[21] The Claimant appears to take the position that the evidence before the General Division did not support its findings, or that the evidence was not sufficient to support its findings. This would be an argument, under s. 58(1)(c) of the DESD Act, that 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.

[22] In support of his argument, the Claimant reiterates a number of points that were considered by the General Division and that were specifically relevant to whether his direct contact with his employer's *administration* could be considered misconduct. I note that the General Division actually found that the Claimant's contact with his employer's administration did **not** amount to misconduct (paragraph 58). Rather, the General Division found misconduct on the basis that the Claimant had contacted the payroll provider directly and that he had misrepresented himself as the employer.

[23] The Claimant's broader concern appears to be with the General Division's assessment of the evidence that was before it. There was evidence before the General Division that the Claimant had contacted the payroll provider, that he had held himself out as an agent of the employer in seeking information, that he was fired for contacting the payroll provider and for representing himself as an agent of the employer, that his actions were intentional or deliberate, and that the Claimant had breached the conditions of his employment.

[24] The Claimant's testimony is also evidence that was before the General Division. The Claimant denied in his testimony that he had represented himself as an agent of the employer to the payroll provider. The General Division considered the Claimant's testimony, but it also considered that the Claimant's direct contact with the payroll provider was undisputed (paragraph 44). Notwithstanding the Claimant's denial, there was other evidence on which the General Division could find that the Claimant had represented himself as an agent of the

employer to the payroll provider. The General Division supported its finding with reference to this evidence in paragraphs 48–52.

[25] The Claimant also stated that he had no reason to believe his employment would be terminated because of his actions. Regardless of whether the Claimant had actual knowledge that he would be dismissed, the General Division found his conduct in impersonating his employer to the payroll provider was such that he *ought to have known* it would result in dismissal.

[26] The Claimant has not identified any evidence that the General Division ignored or explained how any evidence was misunderstood in the General Division's analysis. Nor has the Claimant explained how the General Division's conclusions on the evidence might be considered perverse or capricious.

[27] Following the direction of the Federal Court in cases such as *Karadeolian*,[5] I have reviewed the record for other evidence that may have been overlooked or misunderstood, but I am unable to discover an arguable case in relation to such an error.

[28] An appeal before the Appeal Division is not an appeal where a *de novo* hearing is held, i.e. where a party can resubmit its evidence and hope for a different decision.[6] Similarly, the Claimant has no reasonable chance of success in arguing that the General Division should have weighed the evidence differently to reach a different conclusion.[7] I understand that the Claimant disagrees with the General Division's findings, but simply disagreeing with the findings does not disclose a valid ground under s. 58(1) of the DESD Act.[8]

[29] I find that the Claimant has failed to make an arguable case that 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. The appeal has no reasonable chance of success.

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[5] *Karadeolian v. Canada (Attorney General)*, 2016 FC 615
[6] *Bergeron v. Canada (Attorney General*), 2016 FC 220
[7] *Tracey v. Canada (Attorney General)*, 2015 FC 1300
[8] *Griffin v. Canada (Attorney General)*, 2016 FC 874

CONCLUSION

[30] The application for leave to appeal is refused.

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	K. S., self-represented