



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *N. K. v. Canada Employment Insurance Commission*, 2018 SST 521

Tribunal File Number: AD-18-161

BETWEEN:

N. K.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: May 10, 2018

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, N. K. (Claimant), filed an application for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission), denied her claim because she had lost her employment because of her own misconduct. The employer dismissed the Claimant because she had arrived at work under the influence of alcohol on two occasions. The Claimant requested a reconsideration of this decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the General Division.

[3] The General Division found that the Claimant knew or ought to have known that dismissal was a real, possible result of her being under the influence of alcohol at work. The General Division found that the Claimant lost her employment because of her own misconduct.

[4] The Claimant now seeks leave to appeal the General Division decision to the Appeal Division. The Claimant puts forward that the employer has now deemed the dismissal to be a “special leave of absence without pay” and that she is returning to work. She disputes the General Division’s conclusions and reiterates her version of the events that led to her dismissal.

[5] The Tribunal sent a letter to the Claimant requesting that she file her grounds of appeal in accordance with s. 58 of the *Department of Employment and Social Development Act* (DESD Act). She was informed that it was insufficient to simply repeat what she had said before the General Division.

[6] In her reply to the Tribunal, the Claimant informed the Tribunal that the employer issued a revised Record of Employment (ROE) that states that the reason for dismissal was “special leave without pay.” She later filed said ROE in support of her leave application.

[7] The Tribunal must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might arguably succeed.

[8] The Tribunal refuses leave to appeal because the Claimant's appeal has no reasonable chance of success.

ISSUE

Does the Claimant raise some reviewable error committed by the General Division upon which the appeal might arguably succeed?

ANALYSIS

[9] Subsection 58(1) of the DESD Act specifies 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; erred in law in making its decision, whether or not the error appears on the face of the record; or based its decision on an erroneous finding of fact that it had 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 her case, but rather must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, she must establish that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before leave can be granted, the Tribunal must 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.

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

Issue: Does the Claimant raise some reviewable error committed by the General Division upon which the appeal might arguably succeed?

[13] In this case, the General Division had to decide whether the Claimant had lost her employment because of her own misconduct.

[14] In her application for leave, the Claimant states that the employer has now deemed her dismissal to be a “special leave of absence without pay”. She has filed the employer’s revised ROE in support of her application for leave to appeal.

[15] The revised ROE filed by the Claimant is insufficient to be used to contradict the General Division’s finding of misconduct. It neither expressly nor implicitly includes admissions that the facts on file initially reported by the employer involving the Claimant were erroneous or did not accurately reflect the events as they had occurred. The document does not contain any retraction from the employer regarding the events that had initially led to the Claimant’s dismissal.

[16] Furthermore, the General Division is not bound by how the employer and employee may characterize the grounds on which an employment has been terminated. It is for the General Division to assess the evidence and come to a decision.

[17] The General Division gave more weight to the evidence of the employer, who stated that the Claimant was sent home on May 6, 2017, because she showed up to work clearly intoxicated and that the employer waited for her to complete another treatment program before deciding to terminate her employment. Because the Claimant confirmed that it was against the employer’s policy to be intoxicated at work, the General Division concluded that being under the influence of alcohol at work constituted misconduct within the meaning of the *Employment Insurance Act*.

[18] The evidence also showed that the Claimant had previous incidents involving alcohol prior to her dismissal that resulted in her serving a period of suspension for drinking on the job.

[19] In her application for leave to appeal, although she was requested to do so, the Claimant has not identified any reviewable errors, such as issues of jurisdiction or any failure by the General Division to observe a principle of natural justice. She has not identified any errors in law, nor has she identified any erroneous findings of fact that the General Division may have made in a perverse or capricious manner or without regard for the material before it in coming to its decision.

[20] After consideration of the appeal docket, the General Division decision, and the Claimant's submissions in support of her application for leave to appeal, the Tribunal is not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	N. K., self-represented
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