



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *R. T. v. Canada Employment Insurance Commission*, 2018 SST 735

Tribunal File Number: AD-18-320

BETWEEN:

R. T.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: July 12, 2018

DECISION AND REASONS

DECISION

[1] The Tribunal grants the extension of time to present the application for permission to appeal but refuses leave to appeal to the Appeal Division.

OVERVIEW

[2] The Applicant, R. T. (Claimant), made an initial claim for Employment Insurance benefits. The Respondent, the Canada Insurance Commission of Canada (Commission), determined that the Claimant had lost his job by reason of his own misconduct. The Commission found that the Claimant was dismissed because he was absent from work without providing a valid reason. The Claimant requested that the Commission reconsider its decision; however, it maintained its original decision. The Claimant appealed the Commission decision to the General Division of the Tribunal.

[3] The General Division found that, despite many written warnings, and the imposition of suspensions as sanctions for his behaviour, the Claimant failed to take the necessary steps to report for work, a duty owed to his employer. The Tribunal concluded that the Claimant knew, or should have known, that his conduct was such that his dismissal was a real possibility given that he had received a letter outlining the employer's concerns, two warning letters, two suspension letters, and a last-chance letter.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He puts forward that he was not present at the hearing and that he had no representative.

[5] Two letters were sent to the Claimant asking that he explain in detail his grounds of appeal. The Claimant replied that he was not present at the hearing and that the employer had been notified of his absence. He further explained that he is waiting for a grievance hearing and that he is waiting for an opening to go to a treatment center.

[6] The Tribunal must decide whether the General Division has committed a reviewable error based on which the appeal might succeed.

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

ISSUES

[8] Did the Claimant file his application for permission to appeal on time?

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

ANALYSIS

[10] Subsection 58(1) of the *Department of Employment and Social Development Act* (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.

[11] 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 based on a reviewable error. In other words, the Claimant must show that there is arguably some reviewable error upon which the appeal might succeed.

[12] 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.

[13] This means that the Tribunal must be in a position to determine, in accordance with subsection 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 1: Did the Claimant file his application for permission to appeal on time?

[14] The Tribunal finds that the Claimant did not file his appeal within the legal delays.

[15] The Claimant states that he used the wrong form to appeal to the Appeal Division. The Tribunal notices that he is only one day late since he received notice of the General Division decision on or about April 9, 2018, and filed his application for appeal on May 10, 2018.

[16] The Tribunal finds, in the present circumstances, that it is in the interest of justice to grant the Claimant's request for an extension of time to file his application for permission to appeal, without prejudice to the Respondent.¹

Issue 2: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error committed by the General Division?

[17] In his application for leave to appeal, the Claimant gives no reason for not attending the General Division hearing despite receiving a proper notice of hearing. He essentially submits that the employer had been notified of his absence but that it did not accept it.

[18] On February 13, 2018, the General Division proceeded in the absence of the Claimant since it was satisfied that he had received the notice of hearing in accordance with section 12 of the *Social Security Tribunal Regulations*.

[19] The General Division file shows that the notice of hearing was in fact sent by courier to the Claimant on January 11, 2018. The Claimant personally received the notice of hearing on January 25, 2018.

[20] The General Division had to decide whether the Claimant had lost his employment by reason of his own misconduct in accordance with subsections 29 and 30 of the *Employment Insurance Act*.

¹ *X (Re)*, 2014 FCA 249; *Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C. 263 (F.C.A.).

[21] The General Division found that the Claimant had failed to report to work for his regularly scheduled shift on May 23, 2017, and that he was fired on his return to work on May 24, 2017. The General Division also found that the Claimant's wife did not report the absence directly to the Claimant's supervisor but instead left a message with another employee to pass on to the supervisor. The General Division concluded that the Claimant made a conscious decision to deliberately not return to his home in time to be able to report to work on May 23, 2017, which constituted misconduct and resulted in the termination of his employment.

[22] It is established in the jurisprudence that being absent from work without properly notifying the employer, or giving it a valid reason for the absence, indicates wilful or wanton disregard for the employer's interests and of the standards of behaviour that the employer has a right to expect of its employees.

[23] In his leave to appeal application, the Applicant would essentially like to re-present his case, after not being present at the hearing before the General Division.

[24] Unfortunately for the Claimant, an appeal to the Tribunal's Appeal Division is not a new hearing, where a party can re-present its evidence and hope for a new favourable outcome.

[25] Furthermore, the Tribunal could not come to the conclusion that a breach of natural justice occurred since the Claimant was aware of the hearing date before the General Division. He could have requested an adjournment of the General Division hearing if he wanted to be represented by counsel but he did not do so.

[26] In his application for leave to appeal, the Claimant has not identified any reviewable errors related to jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor 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, when coming to its decision.

[27] For the above-mentioned reasons and after reviewing the appeal docket and the General Division decision and considering the Claimant's arguments in support of his request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	R. T., Applicant
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