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

Citation: X *v. Canada Employment Insurance Commission and W. D.*, 2018 SST 894

Tribunal File Number: AD-18-500

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

W. D.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 11, 2018

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Added Party, W. D. (Claimant), was terminated from his employment by the Applicant, X (Employer), because he took a stone and completed a personal fabrication project without proper authorization. The Respondent, the Canada Employment Insurance Commission (Commission), accepted his application for Employment Insurance benefits, but the Employer requested a reconsideration of the approval, arguing that the Claimant had been dismissed for misconduct. The Commission agreed and reversed its approval of the Claimant's reason for separation.

[3] The Claimant appealed to the General Division of the Social Security Tribunal and was successful. The General Division found that the Commission had not established that the Claimant was willfully or deliberately misappropriating property or that he knew or ought to have known that his conduct would result in his dismissal. The Employer now seeks leave to appeal to the Appeal Division.

[4] The Employer has no reasonable chance of success on appeal. The Employer has failed to raise an arguable case that the General Division failed to observe a principle of natural justice, that it erred in law, or that it made an erroneous finding of fact in a perverse or capricious manner or without regard for the evidence before it.

ISSUES

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice by

- accepting unsworn testimony; or
- refusing to admit documentary evidence submitted at the hearing?

[6] Is there an arguable case that the General Division erred in law by finding that the Claimant's actions did not constitute misconduct?

[7] Is there an arguable case that the General Division erred in fact in a perverse or capricious manner or without regard for the material before it by finding that the Claimant was "waiting for a quote from his employer based on the information given to his employer by the production manager"?

ANALYSIS

General Principles

[8] The Appeal Division's task is more restricted than that of the General Division. The General Division is empowered to consider and weigh the evidence that is before it and to make findings of fact. The General Division then applies the law to these facts in order to reach conclusions on the substantive issues raised by the appeal.

[9] By way of contrast, the Appeal Division cannot intervene in a General Division decision unless it finds that the General Division has made one of the types of errors described by the grounds of appeal in s. 58(1) of the *Department of Employment and Social Development Act* (DESD Act) set out below:

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.

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

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

Is there an arguable case that the General Division failed to observe a principle of natural justice by accepting unsworn testimony?

[12] While witnesses are often sworn at oral hearings before the General Division, there is nothing in the DESD Act or the *Social Security Tribunal Regulations* (Regulations) that requires that the testimony of witnesses be sworn. The General Division is master of its own procedure and is not required to adhere to the rules of evidence applied in more formal courts.

[13] In some circumstances, the sworn or unsworn nature of the evidence may affect the weight that is given to that evidence. In this case, no party and no party's witness was sworn, so it is safe to presume that neither party's evidence will be given less weight because the General Division did not receive that evidence under oath or affirmation.

[14] There is no arguable case that the General Division failed to observe a principle of natural justice by receiving unsworn or unaffirmed testimony.

Is there an arguable case that the General Division failed to observe a principle of natural justice by refusing to admit documentary evidence submitted at the hearing?

[15] At the General Division oral hearing, the Employer requested that the General Division receive a letter from the Employer's production manager. The Employer stated that the letter had been written on an earlier date, although it was signed and dated the day of the hearing.

[16] The Claimant objected on the basis that the date for final rebuttals for the Employer had lapsed about four months before the hearing. The Claimant also argued that the production manager was not present and could not be questioned about the contents of the letter or the circumstances surrounding its creation. Even if the Claimant could have time to review and provide post-hearing submissions, this was considered to be insufficient. The Claimant noted that the statement contradicts earlier statements and insisted that the witness (the production

[1] *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41; *Ingram v. Canada (Attorney General)*, 2017 FC 259

manager) should be present to testify and be questioned given that the events had occurred two and a half years earlier.

[17] The Employer argued that it did not know that the Claimant was going to argue that its production manager supposed to have documented everything. The Claimant replied to this by stating that his position was clear from his earlier submissions and that the Employer had already had the opportunity of rebuttal.

[18] The Employer's objection to the General Division's refusal to accept the written statement from the production manager is essentially an argument that it has been denied a full opportunity to be heard.

[19] The General Division refused to consider the written statement because the Employer had been clearly instructed on January 24 to submit rebuttal information by the February 22 deadline. The Employer stated in the hearing that it had not filed the statement earlier because the Employer did not realize that the Claimant would say what he did in the materials he filed, and, therefore, the Employer had not known they would need their production manager's statement to respond. However, the Claimant's position and documentation had all been filed two weeks before the Employer's rebuttal deadline, which was about four and a half months before the oral hearing.

[20] The General Division also rejected the statement because there was an inconsistency between the date given on the face of the statement and the date that it was said to have been created and because it was concerned that it was not possible, in the absence of the production manager, to clarify the timeline and the other circumstances surrounding the creation of the statement.

[21] It is clear from the audio recording that the General Division made an effort to balance the prejudice to the Claimant (of proceeding without the opportunity to fully test a documentary statement of admittedly questionable origin) against the prejudice to the Employer (of proceeding in the absence of the statement). Ultimately, the General Division was more concerned about the prejudice arising from the Claimant's difficulty in challenging the statement

evidence, given that the Employer could have submitted its statement evidence significantly earlier.

[22] The Employer has failed to raise an arguable case that the General Division failed to observe the Employer's natural justice right to be heard.

Is there an arguable case that the General Division erred in law by finding that the Claimant's actions did not constitute misconduct?

[23] Section 30 of the *Employment Insurance Act* states that The Employer argues that the General Division erred in law by not considering the Claimant's actions to be misconduct.

[24] However, the Employer did not identify in what way the General Division misapplied the law. The General Division considered whether the Claimant actually carried out the actions in question. These actions consisted of selecting a piece of granite, fabricating it for a personal project, and not following procedure in logging the work and paying for the item. The General Division found that the Claimant had carried out the actions.

[25] The General Division also considered whether these actions were wilful or deliberate—that is, whether the Claimant knew or should have known that his actions would result in his dismissal. In addition, the General Division considered that wilful misconduct must be conscious, deliberate, or intentional and that any actions will still constitute misconduct if they are so reckless as to approach willfulness. This manner of defining misconduct is drawn from other decisions of the Federal Court of Appeal, which the General Division is required to follow.

[26] The General Division found that the Claimant was aware of the proper procedure to follow in undertaking a personal project but that his actions did not rise to the level of misconduct. It accepted that the Claimant took steps to avoid giving the impression that his actions were improper, but it stated that his actions were not of such a careless nature as to give the impression that he willfully disregarded the effects of his actions.

[27] There is no arguable case that the General Division failed to consider whether the Claimant engaged in the actions in question or failed to consider whether the actions constituted misconduct within the meaning of the act, or that it misapplied the applicable case law interpreting misconduct.

[28] I suspect that the Employer's real dispute is that the General Division did not find the Claimant's actions to be misconduct as defined by settled law. As confirmed by the Federal Court of appeal in *Quadir v. Canada (Attorney General)*[2], any error in the application of settled law to the facts is a mixed error of fact and law. *Quadir* confirmed that the Appeal Division has no jurisdiction to consider such errors.

[29] Therefore, there is no arguable case that the General Division erred in law under s. 58(1)(*b*) of the DESD Act.

Is there an arguable case that the General Division erred in fact by finding that the Claimant was "waiting for a quote from his employer based on the information given to his employer by the Production Manager"?

[30] To obtain leave to appeal relating to a finding of fact, an employer must raise an arguable case that the General Division made the finding in a perverse or capricious manner or without regard for the evidence before it. It is not sufficient that an employer disagrees with the finding or that it believes the General Division should have weighed the evidence differently to reach that finding.

[31] The Employer had testified that they had a final say and that everyone comes to them to ask for a quote before a work order is made up. The Employer acknowledged that the Claimant had shown them a drawing of his intended project. Furthermore, the Employer appeared to agree that the production manager did not speak to them about the project because he had forgotten about it; this would confirm that the production manager was aware of the project. The Claimant testified that he got the Employer's permission to do the project and that he was relying on the production manager to document everything so that the Employer could come back with a cost.

[32] The General Division's finding was in relation to the Claimant's **understanding** of events and to his intention. This is not a finding that the production manager told the Employer that the Claimant was waiting for a quote or that the Employer agreed to provide a quote. The Claimant's understanding may have been faulty, but the Employer has failed to point to any evidence that was overlooked or misunderstood that would suggest the Claimant was not waiting for a quote.

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[2] *Quadir v. Canada (Attorney General)* 2018 FCA 21

[33] I do not find that the Employer has raised an arguable case that the General Division's finding was either perverse or capricious or that it was made without regard for the material before it under s. 58(1)(*c*) of the DESD Act.

[34] There is no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	K. U., Representative for the Applicant Halley Carcasole, for the Added Party