



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Canada Employment Insurance Commission v P. C. and X*, 2019 SST 40

Tribunal File Number: AD-19-7

BETWEEN:

Canada Employment Insurance Commission

Applicant

and

P. C.

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: January 21, 2019

Canada⁺

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Respondent, P. C. (Claimant), was a probationary employee who was required to pay union dues to work on-site but was not yet a member of the union because he could not become one until 45 calendar days after the date he was hired. Before that date, the collective agreement did not apply to the Claimant, and, within those 45 days, the company could decide whether it would keep the Claimant employed. The employer was engaged in negotiations with the union, and, the same day the union was taking its strike vote, the employer terminated the Claimant's employment at the end of his shift, citing a shortage of work as reasons for the termination on the Claimant's Record of Employment. The union completed its strike vote and went on strike effective the day after the Claimant's employment ended.

[3] The Applicant, the Canada Employment Insurance Commission (Commission), found that the Claimant was disentitled from Employment Insurance benefits because it determined the Claimant had "lost his employment as a result of a work stoppage attributable to a labour dispute."¹ The Claimant requested a reconsideration of the Commission's decision, and the Commission upheld its original decision. The Claimant appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant's loss of employment was not a result of a work stoppage attributable to a labour dispute. The Claimant was laid off before the work stoppage. As a result, the Tribunal found that the Claimant was unemployed before the work stoppage that was caused by a labour dispute and that he was not disentitled to benefits under the provisions of section 36 of the *Employment Insurance Act* (EI Act).

[5] The Commission now seeks leave to appeal the General Division's decision to the Appeal Division.

¹ General Division decision at para 2.

[6] The Tribunal must decide whether the Commission raised some reviewable error of the General Division on which the appeal might arguably succeed.

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

ISSUE

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

ANALYSIS

[9] Section 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 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 the claimant must meet on the hearing of the appeal on the merits. At the leave to appeal stage, the claimant does not have to prove their case, but they must 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 on which the appeal might succeed.

[11] Therefore, before the Tribunal can grant leave, it needs to 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 section 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 Commission's appeal have a reasonable chance of success based on a reviewable error made by the General Division?

[13] The Commission submits that the General Division erred in law under section 58(1)(b) of the DESD Act and misapplied jurisprudence by finding that the Claimant did not lose his employment because of a work stoppage attributable to a labour dispute.

[14] The undisputed evidence shows that the Claimant was not a member of the union and did not participate in the vote to take strike action. He was required to pay dues to be able to work on site but could not become a member of the union until 45 days after he was hired. He was told before the end of his shift on March 26, 2018, that he had been laid off, and he stopped working at the end of his shift at 5:00 p.m. on March 26, 2018. He had been hired on March 5, 2018, and the 45 days had not passed when he was laid off. He testified that, when he left the site, he was told he could not come back to work. The strike began at 12:30 a.m. on March 27, 2018.

[15] The General Division found that the Claimant's loss of employment was not a result of a work stoppage attributable to a labour dispute because the Claimant was laid off before the work stoppage. As a result, the General Division found that the Claimant was unemployed before the work stoppage that was caused by a labour dispute and that he was not disentitled to benefits under the provisions of section 36 of the EI Act.

[16] The evidence clearly supports the General Division conclusion that the Claimant lost his employment because he was laid off in anticipation of a work stoppage, not because of a work stoppage attributable to a labour dispute. He was not a member of the union when the strike began and, because he was laid off, he was not part of the strike.

[17] In accordance with the Federal Court of Appeal decisions the General Division cited, employees who are laid off in anticipation of a strike cannot be denied benefits under section 36 of the EI Act.²

[18] After reviewing the appeal file and the General Division decision and after considering the Commission's arguments in support of its request for leave to appeal, the Tribunal finds that the appeal has no reasonable chance of success. The Commission has not set out reasons that fall

² *White v Canada*, A-1036-92; *Gionest v Canada (Unemployment Insurance Commission)*, A-787-81.

within the grounds of appeal mentioned above and that could possibly lead to the reversal of the disputed decision.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	Louise LaViolette, Representative of the Applicant
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