



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

[TRANSLATION]

Citation: *C. B. v Canada Employment Insurance Commission*, 2019 SST 99

Tribunal File Number: AD-19-16

BETWEEN:

**C. B.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 8, 2019

## DECISION AND REASONS

### DECISION

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

### OVERVIEW

[2] The Applicant, C. B. (Claimant), had a position as a representative at X, from which he was dismissed. The Canada Employment Insurance Commission [(Commission)] informed him that he was not entitled to Employment Insurance benefits because he had lost his employment because of his misconduct. The Commission found that the Claimant had consumed alcohol during work hours and that this constituted misconduct within the meaning of the *Employment Insurance Act* (EI Act) because the employer had a zero-tolerance policy concerning alcohol consumption. The Claimant requested a reconsideration of that decision because he had consumed alcohol after his work hours, but the Commission maintained its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[3] The General Division found that the Claimant had consumed alcohol during his work hours contrary to the employer's zero-tolerance policy. It found that the act complained of constituted misconduct because it was wilful or was at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his actions would have on his performance.

[4] The Claimant now seeks leave from the Tribunal to appeal the General Division decision.

[5] In support of his application for leave to appeal, the Claimant argued that the General Division did not consider the fact that he had consumed alcohol after his work hours.

[6] On January 7, 2019, the Tribunal sent the Claimant a letter asking him to explain in detail the reasons for his appeal. The Claimant repeated that the General Division had failed to consider the fact that he had consumed alcohol outside of his work hours.

[7] The Tribunal must decide whether there is an arguable case that the General Division made a reviewable error that may give the appeal a reasonable chance of success.

[8] The Tribunal refuses leave to appeal because none of the grounds of appeal that the Claimant has raised give the appeal a reasonable chance of success.

## **ISSUE**

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

## **ANALYSIS**

[10] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal for 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.

[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 application for leave to appeal stage, the Claimant does not have to prove his case; instead, he must establish that his appeal has a reasonable chance of success. In other words, it must show that there is arguably some reviewable error based on which the appeal might succeed.

[12] The Tribunal will grant leave if it is satisfied that the appeal has a reasonable chance of success based on at least one of the grounds of appeal the Claimant has raised.

[13] 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 decision under review.

**Issue: Does the Claimant's appeal have a reasonable chance of success based on a reviewable error the General Division may have made?**

[14] In support of his application for leave to appeal, the Claimant argued that the General Division had failed to consider the fact that he had consumed alcohol outside of his work hours.

[15] As the General Division noted, it is not for the Tribunal to judge the severity of the penalty imposed by the employer. Instead, it must ask whether the employee's action constituted misconduct within the meaning of the EI Act.

[16] The General Division found, based on the evidence, that the Claimant was aware of the employer's zero-tolerance policy concerning alcohol consumption during work hours. It found that the Claimant had been dismissed for consuming alcohol during work hours and that the action constituted misconduct within the meaning of the EI Act.

[17] Contrary to the Claimant's position, the General Division did indeed consider his testimony that he consumed alcohol only after his work hours. However, it assigned more credibility to the employer's version.

[18] The General Division found that the Claimant was still on the job when he consumed alcohol and that his work day was not finished because he had confirmed he returned to the office to hand in some [translation] "paperwork" after consuming alcohol. It also considered his email to the employer in which he said he would consume alcohol after his work hours the next time.<sup>1</sup>

[19] The Federal Court of Appeal has stated on several occasions that deliberately violating an employer's code of conduct is considered misconduct within the meaning of the EI Act.<sup>2</sup>

[20] After reviewing the appeal file, the General Division's decision, and the arguments in support of the application for leave to appeal, the Tribunal finds that the appeal does not have a reasonable chance of success. The Claimant has not raised an issue that may lead to the setting aside of the decision under review.

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<sup>1</sup> GD3-25.

<sup>2</sup> *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

**CONCLUSION**

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

Pierre Lafontaine  
Member, Appeal Division

REPRESENTATIVE:	C. B., self-represented
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