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

Citation: *J. A. v Canada Employment Insurance Commission and X*, 2019 SST 132

Tribunal File Number: AD-19-52

BETWEEN:

J. A.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: February 14, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, Mr. A. (Claimant), refused to work in the office when his employer was present, citing concerns about harassment by the employer. The employer told the Claimant that it would consider the Claimant to have abandoned his position if he did not come in to work in the office, but the Claimant still refused to come in when the employer was present. The employer took the position that the Claimant quit.

[3] The Claimant applied for Employment Insurance benefits, indicating that he was dismissed for absenteeism. The Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, finding that he had voluntarily left his job without just cause. The Claimant requested a reconsideration, and the decision was changed to show that he was dismissed for misconduct. This meant that the Claimant was still disqualified from receiving benefits. The Claimant appealed to the General Division, but his appeal was dismissed. He now seeks leave to appeal.

[4] The Claimant has no reasonable chance of success on appeal. He has not made out an arguable case that the General Division failed to observe a principle of natural justice, and he has not shown how the General Division erred in any other way.

ISSUES

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

[6] Is there an arguable case that the General Division erred in law?

[7] Is there an arguable case that the General Division based its decision on an erroneous finding of fact?

ANALYSIS

[8] The Appeal Division may intervene in a decision of the General Division only if it can find that the General Division has made one of the types of errors described by the "grounds of appeal" in section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[9] The grounds of appeal are as follows:

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] To grant this application for leave and allow the appeal process to move forward, I must find that there is a reasonable chance of success based on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case.[1]

Issue 1: Is there an arguable case that the General Division erred by failing to observe a principle of natural justice?

[11] The only ground of appeal selected by the Claimant is the ground that concerns whether the General Division failed to observe a principle of natural justice or made an error of jurisdiction.

[12] Natural justice refers to the fairness of the process and includes such procedural protections as the right to an unbiased decision-maker and the right of a party to be heard and to know the case against him or her. The Claimant's explanation for his application for leave to appeal restates his belief that he was justified in refusing his employer's direction. This suggests that the Claimant disagrees with the General Division's decision or that he feels that the decision was unfair, but the Claimant has not suggested that the General Division process was unfair. He

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

has not expressed a concern with the adequacy of the notice of the General Division hearing, with the pre-hearing exchange or disclosure of documents, with how the General Division hearing was conducted or his understanding of the process, or with any other action or procedure that could have affected his right to be heard or to answer the case. Nor has he suggested that the General Division member was biased or that the member had prejudged the matter.

[13] Therefore, there is no arguable case that the General Division erred under section 58(1)(a) of the DESD Act by failing to observe a principle of natural justice.

Issue 2: Is there an arguable case that the General Division erred in law?

[14] I have considered the Claimant's suggestion that the decision was contrary to Federal Court authority, which would be an error of law under section 58(1)(b) of the DESD Act and not a natural justice error. However, the Claimant did not provide any such authority, and I am uncertain of his meaning.

[15] The General Division was correct that misconduct is based on the actions of the employee and is not dependent on the actions of the employer. The jurisprudence is clear: Where a claimant intentionally or deliberately breaches a duty or obligation owed to an employer,[2] in circumstances in which the claimant know or should know that he or she could be dismissed as a result, this will be misconduct.[3] If a claimant is dismissed as a result of his or her misconduct, the claimant is disqualified from receiving benefits.[4]

[16] The Claimant has not made out an arguable case that the General Division erred under section 58(1)(b) of the DESD Act.

Issue 3: Is there an arguable case that the General Division based its decision on an erroneous finding of fact?

[17] The Claimant did not select the ground of appeal that concerns a possible error of fact at the General Division. However, the Federal Court in *Karadeolian v Canada (Attorney General)*,[2] noted that leave to appeal may still be granted when the General Division arguably overlooked or misunderstood key evidence, even when the applicant has not properly identified such an error

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[2] *Canada (Attorney General) v Cartier*, 2001 FCA 274.
[3] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] *Canada (Attorney General) v Cartier*, 2001 FCA 274.

under the grounds of appeal. Accordingly, I have reviewed the record to determine whether the General Division may have found facts without considering or properly understanding any of the evidence.

[18] I have not discovered such an error. The Claimant does not dispute that the employer directed him to come in to work at the office and that he refused to work there while his employer was also at the office. There is also no dispute that the Claimant was told what the consequences would be if he disobeyed his employer's instruction.

[19] The Claimant disagrees with the General Division's conclusion that his actions were still misconduct even if he believed he would be subject to harassment by his employer. However, the General Division appears to have properly understood the evidence before it, and it is not apparent that the General Division based its decision on any finding that ignored or misunderstood significant and relevant evidence. Therefore, there is no arguable case that the General Division made an error under section 58(1)(c) of the DESD Act.

[20] The Claimant has no reasonable chance of success on appeal.

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	J. A., self-represented