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

[TRANSLATION]

Citation: *F. H. v Canada Employment Insurance Commission*, 2019 SST 137

Tribunal File Number: AD-19-105

BETWEEN:

F. H.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 15, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, F. H. (Claimant), worked for X as X until November 3, 2017, when he was dismissed from his job. The employer alleges that he made inappropriate and offensive remarks toward another employee. After reviewing the claim for benefits, the Canada Employment Insurance Commission determined that the Claimant had lost his job because of his misconduct. The Claimant was therefore disqualified from receiving benefits for this reason. The Claimant requested a reconsideration of that decision, but the Commission upheld its initial decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division.

[3] The General Division determined that the Claimant lost his job because of acts the employer alleges he committed. It found that the Claimant committed a wilful and deliberate act of such scope that he knew or should have known that it would put him at a real risk of being dismissed.

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

[5] In support of his application for leave to appeal, the Claimant argues that the General Division erred in law by not following the Federal Court of Appeal's teachings on misconduct. He alleges that the General Division did not consider the fact that he had no disciplinary record and that the employer did not comply with the penalty scale. The Claimant argues that he was instead dismissed because his employer lost a contract.

[6] The Tribunal must determine whether there is an arguable case that the General Division made a reviewable error that gives the appeal a reasonable chance of success.

[7] The Tribunal refuses leave to appeal because the appeal does not have a reasonable chance of success based on any of the grounds of appeal raised by the Claimant.

ISSUE

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

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 of the case. It is an initial hurdle for the Claimant to meet, but it is lower than the one that must be met at the hearing of the appeal on the merits. At the 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, he must establish that there is an arguable case that there is a reviewable error based on which the appeal might succeed.

[11] The Tribunal will grant leave to appeal if it is satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal 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 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?

[13] In support of his application for leave to appeal, the Claimant argues that the General Division erred in law by not following the Federal Court of Appeal's teachings on misconduct. He alleges that the General Division did not consider the fact that he had no disciplinary record and that the employer did not comply with the penalty scale. The Claimant argues that he was instead dismissed because his employer lost a contract.

[14] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.[1]

[15] It is well established that the General Division must focus on the claimant's conduct and not on the employer's conduct. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in their losing their employment.[2]

[16] Based on the evidence, the General Division concluded that the Claimant was dismissed for uttering inappropriate words to a co-worker and for basically uttering the same words again when he met with his employer to talk about the complaint filed against him. It found that, by acting in this way, the Claimant knew or should have known that his conduct was such as to lead to his dismissal.

[17] The Applicant admitted to making inappropriate remarks toward a co-worker, but he submitted before the General Division that he acted out of frustration and that his actions were therefore not conscious or deliberate.

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[1] *Canada (Attorney General) v Hastings*, 2007 FCA 372; *Tucker*, A-381-85; *Mishibinijima*, A-85-06.
[2] *Canada (Attorney General) v Lemire*, 2010 FCA 314.

[18] The fact that the Claimant had a momentary lapse of judgment and that he apologized to his co-worker shortly after is of no relevance to whether his conduct constitutes misconduct under the EI Act.[3]

[19] Furthermore, it was entirely open to the General Division to find that the Claimant engaged in misconduct by uttering inappropriate words to a co-worker, even if there was no employer policy.

[20] It is well established in case law that aggressive or violent behaviour at work constitutes misconduct under the EI Act.

[21] The Tribunal is also of the view that the General Division made no error in finding from the evidence before it that the employer had indeed dismissed the Claimant for being verbally abusive at work.

[22] After reviewing the appeal file, the General Division decision, and the arguments in support of the application for leave to appeal, the Tribunal has no choice but to find that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine

Member, Appeal Division

REPRESENTATIVE:	Philippe Thériault, for the Applicant

[3] *Canada (Attorney General) v Hastings*, 2007 FCA 372.