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

Citation: *S. H. v Canada Employment Insurance Commission and X*, 2019 SST 145

Tribunal File Number: AD-19-51

BETWEEN:

S. H.

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 19, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. H. (Claimant), was terminated for "time theft" because he and his co-workers left work before the end of their shifts and because he misled his employer into thinking that they had completed their shifts. The Claimant applied for Employment Insurance benefits, but the Respondent, the Canada Employment Insurance Commission (Commission), denied his claim, finding that he had been dismissed for misconduct. The Claimant requested a reconsideration, but the Commission maintained its original decision. The Claimant next appealed to the General Division of the Social Security Tribunal, which dismissed his appeal. He now seeks leave to appeal to the Appeal Division.

[3] The Claimant has no reasonable chance of success on appeal. The Claimant has not made out an arguable case that the General Division ignored or misunderstood the evidence or that it otherwise made an error under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act).

ISSUE

[4] Is there an arguable case that the General Division based its decision on an erroneous finding of fact that it made without regard for the Claimant's evidence?

ANALYSIS

[5] 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 DESD Act.

[6] 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.

[7] To grant this application for leave and permit 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 based its decision on an erroneous finding of fact that it made without regard for the Claimant's evidence?

[8] The Claimant did not select a ground of appeal on his application for leave to appeal. However, the Federal Court in *Karadeolian v Canada (Attorney General)*,[2] determined that leave to appeal may still be granted where the General Division arguably overlooked or misunderstood key evidence, even where an applicant has not properly identified such an error under the grounds of appeal.

[9] In the section of the leave to appeal application in which the Claimant was invited to explain his grounds of appeal, the Claimant appears to have argued that the General Division did not take into account his testimony about the employer and unfairly preferred the employer's version of events.

[10] In his testimony to the General Division, the Claimant made the following admissions:

- He was responsible for communicating between the plant manager and the rest of his crew.

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[1] *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[2] *Karadeolian v Canada (Attorney General)*, 2016 FC 615.

- He left work before his shift was over and allowed the crew with which he was working to leave early as well, but he arranged for another employee to remain behind to clock them out at the time that their shifts were supposed to have finished.

- This was not the first time that the Claimant had arranged for him and his crew to be clocked out after they had left, but the employer was not aware that he did this.

- The Claimant understood that the purpose of the delayed clock-out was to mislead the employer into believing that the Claimant and the crew had not left until the end of their scheduled shifts, so that they would still be paid for full shifts.

- The Claimant knew the practice was wrong and that it violated the employer's policy.

[11] In his defence, the Claimant told the General Division that his plant manager had introduced him to the practice and that the plant manager had clocked him out in the same way on previous occasions. On previous occasions, the plant manager had given the Claimant permission to follow the same practice so that the Claimant and his crew could leave early.

[12] The Claimant testified that he did not have the plant manager's permission on this particular occasion. However, this was not the first time that he arranged for himself or his crew to clock out early without specific permission from the plant manager to do so. He had informed his plant manager about these occasions after the fact, and the plant manager did not object. The Claimant also stated that the plant manger told him that he used this type of clock-out practice to leave early, rather than making a note on the employee timecards, because the plant manger did not want the employer's human resources staff or senior management to be aware that employees were leaving early.

[13] The General Division specifically considered the actions of the plant manager and found that the plant manager was not the Claimant's employer and that the employer was unaware of the plant manager's conduct. The General Division noted that the Claimant had admitted that he knew the clock-out practice in which he engaged was intended to hide from the employer the fact that employees were leaving early. The General Division determined that the Claimant engaged

in the conduct that is said to be misconduct, that the conduct was deliberate or intentional, and that it was a breach of a duty or obligation owed to the employer.

[14] The Claimant may not agree with the General Division's conclusions, but there is no arguable case that the General Division ignored or misunderstood his evidence to find that the Claimant knew he was breaching an obligation owed to the employer. The General Division based its conclusions on unchallenged evidence, much of it from the Claimant himself.

[15] The final requirement to establish misconduct for the purposes of section 30 of the *Employment Insurance Act* is the requirement that a claimant knows, or ought to know, that he or she could be dismissed for the conduct. The test developed in the courts does not require proof that a claimant knows that he or she will actually be dismissed, but rather it asks whether the claimant knows *or should know* that he or she could be dismissed. As noted in *Mishibinijima v Attorney General of Canada*,[3] "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility."

[16] The General Division recognized that the Claimant believed that he would be protected by the actions of his superior, but it found that it was reckless of the Claimant to act on that belief. The General Division applied the law to the facts to determine that the Claimant ought to have known that the conduct could lead to the loss of his employment.[4]

[17] The application of settled law to the facts is what is termed a question of "mixed fact and law". The Federal Court of Appeal has confirmed that the Appeal Division has no jurisdiction to consider questions of mixed fact and law.[5]

[18] There is therefore no arguable case that the General Division ignored or misunderstood the evidence when it found that the Claimant ought to have known dismissal was a real possibility. The Claimant has not made out an arguable case that the General Division made any error under section 58(1)(c) of the DESD Act.

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[3] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] General Division decision at para 20.
[5] *Quadir v Canada (Attorney General)*, 2018 FCA 21.

[19] The Claimant also suggested in his application for leave to appeal that he believes that there was some problem with the fact that the employer did not appear at the hearing. If this were an error, it would be considered under section 58(1)(a) of the DESD Act as an error in relation to natural justice. However, the General Division has no power to compel the testimony of a witness. Furthermore, the Claimant did not raise any concern at the hearing that he could not be heard properly or answer the case against him without the presence of an employer representative.

[20] There is no arguable case that the General Division failed to observe a principle of natural justice.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVE:	S. H., self-represented