



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

[TRANSLATION]

Citation: *B. C. v. Canada Employment Insurance Commission and X*, 2019 SST 140

Tribunal File Number: AD-19-104

BETWEEN:

B. C.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: February 18, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, B. C. (Claimant), made an initial claim for benefits. The Canada Employment Insurance Commission reviewed the file and found that the Claimant had not lost his employment because of his misconduct. This decision was upheld after the employer requested an administrative review of the file. The employer appealed that decision to the Tribunal's General Division.

[3] The General Division found that, by taking garden ornaments without his employer's permission and by using the organization's truck for personal reasons, the Claimant had committed wilful and deliberate acts of such scope that he knew or should have known that dismissal was a real possibility. It found that the Claimant had lost his employment because of his misconduct.

[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 disputes the General Division's findings about the reason for his termination of employment. He argues that his employer used an excuse to dismiss him. He submits that the General Division failed to consider his testimony and that it should have asked him for evidence supporting his position rather than making a decision that was not in his favour. The Claimant also submits that the interpreter did not do his job properly.

[6] The Tribunal must decide whether there is an arguable case that the General Division made a reviewable error based on which the appeal has a reasonable chance of success.

[7] The Tribunal refuses leave to appeal because the Claimant has not raised any ground of appeal based on which the appeal has a reasonable chance of success.

ISSUE

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

ANALYSIS

[9] Section 58(1) of the 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, the Claimant must show that there is some reviewable error based on which the appeal might succeed.

[11] The Tribunal will grant leave to appeal if it is satisfied that the Claimant has raised at least one ground of appeal based on which the appeal 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 decision under review.

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

[13] In support of his application for leave to appeal, the Claimant disputes the General Division's findings about the reason for his termination of employment. He argues that his employer used an excuse to dismiss him. He submits that the General Division failed to consider his testimony and that it should have asked him for evidence supporting his position rather than making a decision that was not in his favour. The Claimant also submits that the interpreter did not do his job properly.

[14] The role of the General Division was not to judge the severity of the disciplinary measure, but rather to decide whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act* (EI Act).¹

[15] 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 it could be said that the employee wilfully disregarded the effects their actions would have on their performance.²

[16] Based on the evidence, the General Division found that the Claimant had been dismissed for taking garden ornaments without his employer's permission and for using the organization's truck for personal reasons. It found that the Claimant had lost his employment because he had not complied with his employer's instructions. The General Division found that the Claimant had lost his employment because of his misconduct.

[17] The Tribunal notes that the Claimant had previously received a letter from his employer stating that he had to follow all of the organization's policies and procedures and that failure to do so could result in the immediate termination of his employment.³

¹ *Canada (Attorney General) v Marion*, 2002 FCA 185.

² *Canada (Attorney General) v Hastings*, 2007 FCA 372; *Tucker*, A-381-85; *Mishibinijima*, A-85-06.

³ GD3-37 and GD3-38.

[18] The Applicant admitted to taking garden ornaments without his employer's permission. He also acknowledged that he was aware of the employer's policy.⁴

[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.⁵

[20] The Tribunal is also of the view that the General Division considered the Claimant's testimony about the reasons for his termination of employment. However, it did not make any error when, based on the evidence before it, it found that the employer had indeed dismissed the Claimant for having breached company policy. The Claimant committed acts in breach of one of the employer's policies and was dismissed almost immediately after.

[21] The Claimant alleges that the General Division did not request additional evidence about the reasons for his dismissal before making a decision that was not in his favour. He submits that the member should have adjourned the case to allow him to supplement his evidence.

[22] The Tribunal notes that the Claimant received the appeal file and that he had plenty of time to prepare his defence before the General Division hearing.

[23] It was appropriate for the General Division member to explain to the Claimant how the proceeding would be conducted and to inform him of the issue he had to decide—that is, whether the Claimant had committed misconduct within the meaning of sections 29 and 30 of the EI Act—but his duty did not extend so far as to act as the Claimant's representative.

⁴ GD3-28.

⁵ *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[24] It was up to the Claimant to present evidence that he considered necessary at the General Division hearing or to ask for an adjournment of the hearing, if he wanted to supplement his evidence on file, before the General Division made its decision.

[25] The Claimant also submits that the interpreter did not do his job properly during the hearing. However, he did not explain how the General Division might have erred following the interpreter's alleged failure. Furthermore, the Tribunal notes that the General Division based its decision on the facts brought before it by each of the parties.

[26] Unfortunately for the Claimant, an appeal to the Appeal Division is not an appeal in which there is a new hearing where a party can present their evidence again and hope for a favourable decision.

[27] The Tribunal finds that the Claimant has not raised any issue of law, fact, or natural justice that may lead to the setting aside of the decision under review.

[28] 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

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	R. Brady Subedar, for the Applicant
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