



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation

Citation: *O. R. v Canada Employment Insurance Commission and X*, 2019 SST 314

Tribunal File Number: AD-19-193

BETWEEN:

**O. R.**

Applicant

and

**Canada Employment Insurance Commission**

Respondent

and

**X**

Added Party

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**SOCIAL SECURITY TRIBUNAL DECISION**

**Appeal Division**

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Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: April 1, 2019

## **DECISION AND REASONS**

### **DECISION**

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

### **OVERVIEW**

[2] The Applicant, R. R. (Claimant), made an initial claim for employment insurance benefits. The Respondent, the Canada Insurance Commission of Canada determined that the Claimant had lost his job because of his own misconduct. The Commission found that the Claimant was dismissed on the grounds of sexual harassment against a co-worker. The Claimant requested that the Commission reconsider its decision; however, it maintained its original decision. The Claimant appealed the Commission decision to the General Division of the Tribunal.

[3] The General Division found that the Claimant could not rely on his alcohol addiction to show that he was not aware that sending sexually explicit texts to a co-worker would violate the company's policy. It found that the Claimant had breached his duty to his employer by contravening its zero tolerance policy on sexual harassment. The General Division concluded that the Claimant knew, or ought to have known, that his conduct was such that his dismissal was a real possibility since he had received training on the employer's policy.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. In his application for leave to appeal, the Claimant requests a second review with respect to his claim.

[5] A letter was sent to the Claimant asking that he explain in detail his grounds of appeal. The Claimant reiterated that due to his depression and addiction to alcohol, he was not in the right frame of mind when he sent the texts. He states that he is currently under doctors care to treat mental health issues. He asks that his claim be reviewed.

[6] The Tribunal must decide whether the Claimant raised some reviewable error of the General Division upon which the appeal might succeed.

[7] The Tribunal refuses leave to appeal because the Claimant's appeal has no reasonable chance of success.

## **ISSUE**

[8] Does the Claimant raise some reviewable error of the General Division on which the appeal might succeed?

## **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; it erred in law in making its decision, whether or not the error appears on the face of the record; or it based its decision on an erroneous finding of fact that it had 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. 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 leave to appeal stage, the Claimant does not have to prove his case but must establish that the appeal has a reasonable chance of success based on a reviewable error. In other words, that there is arguably some reviewable error upon which the appeal might succeed.

[11] Therefore, before leave can be granted, the Tribunal needs to be satisfied that the reasons for appeal fall within any of the above-mentioned grounds of appeal and that at least one of the reasons has a reasonable chance of success.

[12] This means that the Tribunal must be in a position to determine, in accordance with subsection 58(1) of the DESD Act, whether there is a question of natural justice, jurisdiction, law, or fact, the answer to which may lead to the setting aside of the General Division decision under review.

**Issue: Does the Claimant raise some reviewable error of the General Division on which the appeal might succeed?**

[13] The Claimant, in his application for leave to appeal, reiterates that due to depression and addiction to alcohol, he was not in the right frame of mind when he sent the texts. He states that he is currently under doctors care to treat mental health issues. He asks that his claim be reviewed.

[14] The General Division had to decide if the Claimant had lost his employment because of his own misconduct in accordance with ss. 29 and 30 of the *Employment Insurance Act*.

[15] The General Division found that the Claimant could not rely on his alcohol addiction to show that he was not aware that sending sexually explicit texts to a co-worker would violate the company's policy. It found that the Claimant had breached his duty to his employer by contravening its zero tolerance policy on sexual harassment. The General Division concluded that the Claimant knew, or ought to have known, that his conduct was such that his dismissal was a real possibility since he had received training on the employer's policy.

[16] During an interview by the Commission, the Claimant recognized that he was aware of the employer's policy and that he knew his conduct was not acceptable.<sup>1</sup>

[17] In the present case, there was sufficient evidence available to the General Division to justify a finding of misconduct, the Claimant having admitted sending the texts to his co-worker contrary to the known company policy. The Claimant's medical evidence submitted before the General Division simply does not support an argument that his conduct was not willful.<sup>2</sup>

[18] The Claimant, in his leave to appeal application, would essentially like the Appeal Division to review his case.

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<sup>1</sup> GD3-27.

<sup>2</sup> GD3-44.

[19] Unfortunately, for the Claimant, an appeal to the Appeal Division of the Tribunal is not a new hearing, where a party can represent its evidence and hope for a new favorable outcome.

[20] In his application for leave to appeal, and in his reply to the Tribunal's request, the Claimant has not identified any reviewable errors such as jurisdiction or any failure by the General Division to observe a principle of natural justice. He has not identified errors in law nor identified any erroneous findings of fact, which the General Division may have made in a perverse or capricious manner or without regard for the material before it, in coming to its decision.

[21] For the above-mentioned reasons and after reviewing the docket of appeal, the decision of the General Division and considering the arguments of the Claimant in support of his request for leave to appeal, The Tribunal finds that the appeal has no reasonable chance of success.

## **CONCLUSION**

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

Pierre Lafontaine  
Member, Appeal Division

REPRESENTATIVE:	R. R., Applicant, Self-represented
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