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

Citation: *X v Canada Employment Insurance Commission and K. W.*, 2019 SST 445

Tribunal File Number: AD-19-328

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

K. W.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: May 13, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, the X (Employer), terminated the Added Party, K. W.(Claimant), from his employment because it found that he had violated its rules of conduct as well as harassment and workplace violence policy. The Claimant applied for Employment Insurance regular benefits, denying any misconduct. The Respondent, the Canada Employment Insurance Commission (Commission) initially denied the Claimant's request for benefits, but the Claimant argued that he should be entitled to benefits because the provincial employment standards branch had ruled that his Employer had terminated him without just cause. On reconsideration, the Commission decided in the Claimant's favour. The Employer appealed the reconsideration decision to the General Division of the Social Security Tribunal of Canada, but it dismissed the appeal. The Employer is now seeking leave to appeal, on the ground that the General Division erred in law. I must decide whether the appeal has a reasonable chance of success, i.e. whether there is an arguable case.

[3] Because I am not satisfied that the appeal has a reasonable chance of success, the application for leave to appeal is refused.

ISSUE

[4] Is there an arguable case that the General Division erred in law by finding that the Claimant's actions did not constitute misconduct?

ANALYSIS

General Principles

[5] If I am to grant leave to appeal, I need to be satisfied that the reasons for appeal fall within the grounds of appeal set out under subsection 58(1) of the DESDA and that the appeal

has a reasonable chance of success. The grounds of appeal under subsection 58(1) of the DESDA are limited to the following:

(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.

[6] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[1] This is a relatively low bar. At the leave to appeal stage, it is a lower hurdle to meet than the one that must be met on the hearing of the appeal on the merits. Claimants do not have to prove their case; they simply have to establish that the appeal has a reasonable chance of success based on a reviewable error. The Federal Court endorsed this approach in *Joseph v Canada (Attorney General)*.[2]

Is there an arguable case that the General Division erred in law by finding that the Claimant's actions did not constitute misconduct?

[7] As the Employer notes in its application seeking leave to appeal, under subsection 30(1) of the *Employment Insurance Act*, a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct. The Employer accepts that the onus of proof of any misconduct resides with an employer.

[8] The Employer states that it terminated the Claimant's employment because he had had a verbal altercation with another employee in April 2018, which he should have known would result in dismissal. The Employer states that this incident involved harassing and bullying of an employee, and that it caused another employee to leave her employment. The Employer argues that it does not tolerate this behaviour under its rules of conduct and its harassment and

[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] *Joseph v Canada (Attorney General)*, 2017 FC 391.

workplace violence policy, on which the Claimant had signed off. The Employer maintains that the Claimant risked the safety of other employees and, as such, his behaviour should not be tolerated and should be grounds for dismissal.

[9] The General Division noted the Employer's evidence that it had conducted an investigation into an incident in April 2018 in which the Claimant had been involved in a verbal altercation with another employee. The General Division noted that the Employer found that the Claimant's conduct violated its harassment and workplace violence policy, as well as its workplace safety policies. The General Division noted that because the Employer found that the Claimant's conduct amounted to harassment and bullying, it terminated the Claimant from his employment. The General Division also noted that the Claimant acknowledged that he had been involved in a verbal altercation and that he had thrown a file(s).

[10] The General Division then addressed the issue of whether the Claimant's conduct constituted misconduct. It examined some of the jurisprudence on the issue. It noted that while the *Employment Insurance Act* does not define "misconduct," the Federal Court of Appeal has held that "misconduct" under the *Employment Insurance Act* involves acts that are wilful or deliberate, where the claimant knew or ought to have know that their conduct was such that it would result in dismissal. In this case, the General Division determined that the Claimant's actions were deliberate as he had the choice to engage in a verbal altercation and the choice to throw files.

[11] The General Division examined the parties' evidence and submissions. The General Division, citing *Locke v. Canada (Attorney General)*,[3] concluded that while one could consider the Claimant's behaviour reprehensible or inappropriate, it did not necessarily translate into misconduct, as "misconduct is a breach of such scope that its author could normally foresee that it would be likely to result in his dismissal." The General Division found that, although the Claimant was aware of his Employer's employee handbook, safety policy, rules of conduct and harassment and workplace violence policy, he was unclear whether he knew or should have known that his conduct would result in dismissal.

[3] *Locke v. Canada (Attorney General)*, 2003 FCA 262.

[12] The General Division cited the evidence upon which it relied. It noted, for instance, that one witness stated that she saw inappropriate behaviour between March 19, 2018 and April 18, 2018. The General Division noted that because the Employer had not disciplined nor issued any written warnings to the Claimant prior to his dismissal, he could not have anticipated that his actions in April 2018 would lead to his dismissal. As such, the General Division concluded that the Claimant's conduct did not rise to the level of misconduct, as it was unclear that the Claimant knew or should have known that his conduct on April 12, 2018 was such that it would result in dismissal.

[13] Essentially the Employer is arguing that the General Division erred in applying settled law to the facts. However, the Federal Court of Appeal has affirmed that the Appeal Division has no jurisdiction to consider errors that merely involve a disagreement on the application of settled law to the facts.[4] The Appeal Division may intervene under subsection 58(1) of the DESDA where an error of mixed fact and law committed by the General Division discloses an extricable legal issue, but such is not the case here.

[14] The Employer is simply re-arguing its position that it held at the General Division and asserting that I should reassess the evidence and come to a different conclusion based on the same facts before the General Division. However, subsection 58(1) of the DESDA does not allow for a reassessment of the evidence or a rehearing of the matter. Accordingly, I am not satisfied that the appeal has a reasonable chance of success.

CONCLUSION

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

Janet Lew
Member, Appeal Division

APPLICANT:	J. T., for the Applicant

[4] *Cameron v Canada (Attorney General)*, 2018 FCA 100 and *Garvey v Canada (Attorney General)*, 2018 FCA 118.