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

Citation: *X v Canada Employment Insurance Commission and A. S.*, 2019 SST 1231

Tribunal File Number: AD-19-632

BETWEEN:

X

Applicant

and

Canada Employment Insurance Commission

Respondent

and

A. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Stephen Bergen

Date of Decision: September 23, 2019

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] After A. S. (Claimant) was dismissed from her employment, she applied for Employment Insurance benefits. The Respondent, the Canada Employment Insurance Commission (Commission) originally found that she had been dismissed for misconduct within the meaning of the *Employment Insurance Act* and was therefore disqualified from receiving benefits. However, the Commission reconsidered its decision at the request of the Claimant and instead found that she had not been dismissed for misconduct and should not be disqualified from receiving benefits.

[3] The Applicant, X (the Employer), appealed to the General Division of the Social Security Tribunal but its appeal was dismissed. The Employer now seeks leave to appeal to the Appeal Division.

[4] There is no reasonable chance of success. The Employer has not made an arguable case that the General Division failed to observe a principle of natural justice, erred in law, or based its decision on any erroneous finding of fact.

ISSUE

[5] Is there an arguable case that the General Division failed to observe a principle of natural justice as follows:

a) By not holding an in-person hearing as requested by the Employer;
b) By failing to disclose information necessary for the Employer to make its case, or;
c) By conduct that produced a reasonable apprehension of bias?

[6] Is there an arguable case that the General Division made an error of jurisdiction or of law by considering matters within provincial jurisdiction or by not otherwise applying the correct law?

[7] Is there an arguable case that the General Division erroneously found that the reason the Employer dismissed the Claimant was that she had asked the Employer to confirm its intention to retain her as an employee?

ANALYSIS

General Principles

[8] 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 s.58(1) of the *Department of Employment and Social Development Act* (DESD Act).

[9] The only grounds of appeal are described below:

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.

[10] 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 on one or more grounds of appeal. A reasonable chance of success has been equated to an arguable case[1].

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

Issue 1: Did the General Division fail to observe a principle of natural justice?

By not holding an in-person hearing as requested.

[11] Section 21 of the Social Security Tribunal Regulations (SST Regulations) gives the Tribunal discretion to determine whether to grant an in-person hearing, to proceed by telephone or video-conference, or to make its decision based on written questions and answers. The only mandatory requirement direction to the Tribunal on hearing method is described in section 3 of the SST Regulations. The Tribunal must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

[12] The Employer requested an in-person hearing but the General Division proceeded by video conference. Video-conference hearings are approved as a method of hearing under the SST Regulation and may therefore be presumed to afford the parties an effective opportunity to be heard. The Employer did not explain how his circumstances were exceptional such that it would be unfair to him or breach his natural justice right to be heard if the General Division held the hearing by video-conference, rather than in-person.

[13] There is no arguable case that the General Division breached the employer's natural justice right to be heard by holding the hearing by video-conference.

By failing to disclose information necessary for the employer to make its case

[14] The Employer argued that the Commission file was confusing and misleading, and that this interfered with his ability to prepare for the hearing.

[15] Regardless of whether the Employer is correct about the quality of the Commission file, the General Division disclosed the file to the Employer before the hearing. Like the Claimant, the Employer had the ability to dispute the truth of any of the information contained in that file at the hearing. If the information in the file was so confusing that the Employer could not prepare for the hearing, it did not raise this as a concern at the General Division before or at the hearing, and the Employer did not have any obvious difficulty with presenting its case.

[16] There is no arguable case that the General Division failed to observe a principle of natural justice because the Employer disagreed with information in the Commission file or found it unclear.

By conduct that produced a reasonable apprehension of bias

[17] The Employer's representative suggested he had a "strong feeling" that the General Division was biased. The Employer did not provide examples of any instance in which the General Division member said or did something that might lead a reasonable person to reasonably believe that the member was biased.[2] In fact, the Employer appears to be basing its allegation of bias on its representative's perception that all government agencies, the General Division included, hold an institutional bias against employers.

[18] The Employer's strong feeling does not amount to an arguable case that the General Division was biased.

[19] There is no arguable case that the General Division failed to observe a principle of natural justice under section 58(1)(a) of the DESD Act.

Issue 2: Is there an arguable case that the General Division made an error of jurisdiction or of law by considering matters within provincial jurisdiction, or by not otherwise applying the correct law?

[20] This appeal concerns the Claimant's entitlement to Employment Insurance benefits, which is governed exclusively by the federal Employment Insurance Act. The General Division determined that the Claimant was not dismissed because of misconduct within the meaning of the Employment Insurance Act. It did not consider the entirely separate question of whether the Employer may have wrongfully dismissed the Claimant under provincial employment standards or labour legislation, over which it had no jurisdiction.

[21] There is no arguable case that the General Division exceeded its jurisdiction or that it relied on any inapplicable legislative provision.

[2] See R. v. S. (R.D.), [1997] 3 SCR 484 for the Supreme Court of Canada definition of bias

[22] The Employer also suggested that the General Division erred in law by failing to consider evidence of events subsequent to the dismissal. The General Division stated that the evidence about the Claimant's behaviour at work after she had been terminated and the performance of the employee that replaced her were not relevant to the reason that she was dismissed.

[23] There is no arguable case that the General Division erred in law by refusing to consider evidence of subsequent events. The General Division did not *exclude* the evidence presented by or on behalf of the Employer that related to the Claimant's behaviour that was discovered after her dismissal or evidence of events after her dismissal. Rather, it found that this evidence was not relevant. This means that the evidence was at least considered.[3]

[24] Therefore, there is no arguable case that the General Division erred in law under section 58(1)(b) of the DESD Act.

[25] I will address the General Division's view that this evidence was irrelevant when I turn to whether the General Division erred in finding that the Employer dismissed the Claimant because she asked the Employer to confirm its intention to retain her as an employee.

Issue 3: Is there an arguable case that the General Division erroneously found that the Employer dismissed the Claimant because she asked that the Employer confirm its intention to retain her as an employee?

[26] The Employer argued that the General Division failed to take into consideration that the final meeting was meant to be a performance review, and that the General Division did not understand that the Claimant triggered (but did not cause) her dismissal by questioning of the security of her employment. According to the Employer, the General Division should have also considered the Employer's evidence of events that occurred, or that the Employer discovered, subsequent to the Claimant's dismissal.

[27] There is no arguable case that the General Division erred by not understanding the final meeting to be a performance review. when this was not evidence that was before it. I can only find that the General Division made an error based on the information that was before it. I cannot find that the General Division ignored evidence that was not in front of it, or that it

[3] General Division decision, para. 10

misunderstood other evidence in the light of evidence that was not in front of it. I am not authorized to consider new evidence for the purpose of determining whether the General Division made an error.[4]

[28] The General Division clearly understood the testimony of the Employer's representative that the Employer had spoken to the Claimant about performance issues previously and that its goal in meeting with the Claimant was to speak to her about improving her performance.[5] The Employer says that it considered the final meeting to be a performance review, but that it did not realize that the "point was not made" until after the General Division hearing.

[29] However, the General Division understood the Employer's position that the final meeting was a performance review. It took note of the Commission's records that the Employer had mentioned to a Commission agent that it was in a performance review with the Claimant and that it would be seeking another employee.[6] The Employer's representative may feel that he did not argue this point as forcefully as he would have liked at the General Division, but he is not entitled to a do-over. I am only interested in the Employer's arguments to the extent that they help me to understand how the General Division may have made one of the errors described in section 58(1) of the DESD Act.

[30] The Employer has also argued that the General Division did not appreciate the distinction between the cause and the trigger for the Claimant's dismissal. However, it is clear that the General Division considered the Employer's evidence related to the Claimant's performance, as well as its evidence that it discussed the Claimant's performance with her. It also understood the Claimant to have acknowledged that Employer discussed had discussed her job duties with her, but that it did not warn her she was in any kind of jeopardy. Both the Employer and the Claimant agreed that the Employer had given the Claimant a raise, but they disagreed as to the motivation for the raise. The Employer's evidence suggested that he had other reasons for wanting to dismiss the Claimant but the General Division accepted that the Claimant would not have been dismissed if she had not asked for certainty. It was persuaded that the Claimant was dismissed for asking for certainty, because of the Employer's own evidence when its representative said

[4] Mette v Canada(Attorney General) 2016 FCA 276.
[5] General Division decision, para. 13
[6] General Division, para. 24; GD3-23.

that the Employer had not planned to fire her until it called the (final) meeting and that it only decided to fire her when she raised the certainty issue.[7] The General Division stated that it relied on the Employer's testimony that it would not have dismissed her if she had not raised that issue.[8]

[31] There is no arguable case that the General Division ignored or misunderstood the circumstances leading up to the Claimant's dismissal. It is apparent that the General Division considered the evidence related to the Claimant's performance as well as the evidence related to the final meeting before determining that the Claimant was dismissed for asking for certainty. I am not the trier of fact and it is not my role to second-guess how the General Division evaluated the evidence. The Claimant may disagree with how the General Division weighed the evidence or its conclusion, but this does not make out a ground of appeal.[9]

[32] I understand that the Employer is also arguing that the General Division ignored evidence that the Employer discovered the Claimant had been using company time to look for other work, that her replacement was meeting the Employer's expectations, and that the Claimant has since obtained a job in the area in which she expressed interest while working for the employer. All of this evidence involved events that occurred after the Claimant's dismissal, or concerned revelations of the Claimant's conduct that only surfaced after the Claimant's dismissal. The Employer could not possibly have had any of this in mind at the time that it dismissed the Claimant.

[33] For the Employer to prove that the Claimant was dismissed for misconduct, it must prove that the Claimant intentionally engaged in conduct that was a breach of her duty to the employer that she knew or ought to have known she could be dismissed for that conduct, and **that she was actually dismissed for that conduct**. The General Division did not find that the Claimant was dismissed because of the Employer's concerns with her performance. The General Division rested its decision on a finding that the Claimant was dismissed for asking for certainty or that she could not have known that asking for certainty would lead to her dismissal. The evidence that the General Division found to be irrelevant could not have helped the Employer

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[7] General Division decision, para. 30.
[8] General Division decision, para. 29.
[9] *Tracey v Canada (Attorney General),* 2015 FC 1300, *Rouleau v Canada(Attorney General)*, 2017 FC 534.

prove that it *dismissed* the Claimant for not meeting performance expectations, and it could not challenge the conclusion that the Claimant was dismissed because she asked for certainty in her employment.

[34] There is no arguable case that the General Division made an error under section 58(1)(c) of the DESD Act by finding that the Claimant was dismissed for asking for certainty without regard to evidence of events that occurred after the Claimant's dismissal or evidence of events during her employment that were not known prior to her dismissal.

[35] I broadened my review of the record to search for any other evidence that the General Division might have missed or misunderstood and which might raise an arguable case that the General Division based its decision on an erroneous finding of fact. This is consistent with the Federal Court's decision in *Karadeolian v Canada (Attorney General)*,[10] where the Court said that the Appeal Division can grant leave to appeal where the General Division has arguably overlooked or misunderstood key evidence, even though the applicant may not have properly identified such an error under the grounds of appeal.

[36] However, I have not discovered any other significant evidence on the record that may have been ignored or misunderstood by the General Division in making any finding of fact. Therefore, there is no arguable case that the General Division erred under section 58(1)(c) of the DESD Act.

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

CONCLUSION

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

Stephen Bergen
Member, Appeal Division

REPRESENTATIVES:	K. S., representative for Pinnacle Private Capital Corp.

[10] *Karadeolian v Canada (Attorney General),* 2016 FC 615.