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

Citation: *G. J. v Canada Employment Insurance Commission and X*, 2019 SST 1326

Tribunal File Number: AD-19-679

BETWEEN:

G. J.

Applicant

and

Canada Employment Insurance Commission

Respondent

and

X

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: November 6, 2019

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] G. J. is the Claimant in this case. He used to work for X (Employer). It is undisputed that the Claimant was involved in a heated confrontation at work on June 22, 2018. A few days later, the Employer wrote to the Claimant saying that his employment has terminated based on his displays of aggression and hostile behaviour.[1]

[3] The Claimant later filed an application for Employment Insurance (EI) regular benefits. At first, the Canada Employment Insurance Commission approved the Claimant's application. The Commission decided that there were conflicting stories about what had happened on June 22, 2018, and that it owed the benefit of the doubt to the Claimant.

[4] However, the Employer asked the Commission to reconsider its decision. Based on new evidence, the Commission then concluded that the Claimant had lost his job because of his own misconduct. As a result, the Commission disqualified the Claimant from receiving EI benefits, and asked that he repay the benefits that he had already received.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division, but it dismissed his appeal. In short, the General Division concluded that the Employer dismissed the Claimant because of his behaviour on June 22, 2018. It also found that the Claimant's actions amounted to misconduct. In other words, the Claimant should have known that his actions would likely result in his dismissal.

[6] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division, but he needs leave (or permission) to appeal for the file to move forward. Unfortunately for the Claimant, I have decided that his appeal has no reasonable chance of success. As a result, I must refuse leave to appeal. These are the reasons for my decision.

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[1] GD3-28 to 29.

ISSUES

[7] I focused on the following issues when reaching this decision:

a) Is it arguable that the General Division committed an error of law by applying the wrong legal test?

b) Is it arguable that the General Division committed an error of law by failing to determine the exact moment when the Claimant was terminated?

c) Is it arguable that the General Division made an error of fact in this case?

ANALYSIS

The Appeal Division's Legal Framework

[8] The Tribunal follows the law and procedures set out in the *Department of Employment and Social Development Act* (DESD Act). As a result, this appeal is following a two-step process: the leave to appeal stage and the merits stage. The appeal will move on to the merits stage unless it has no reasonable chance of success.[2]

[9] The legal test that the Claimant needs to meet at the leave to appeal stage is a low one: Is there any arguable ground on which the appeal might succeed?[3] To decide this question, I will focus on whether the General Division could have committed an error of law or fact, which are two of the three errors (or grounds of appeal) listed in the DESD Act.[4]

Issue 1: Is it arguable that the General Division committed an error of law by applying the wrong legal test?

[10] No, the General Division clearly applied the correct legal test in this case.

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[2] DESD Act, ss 58(2) and 58(3).
[3] *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12; *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.
[4] Section 58(1) of the DESD Act defines the three errors (or grounds of appeal) that I am able to consider.

[11] According to the Claimant, the Federal Court of Appeal has established the legal test that the General Division should have applied in this case:[5]

> Thus, there will be misconduct where the conduct of a claimant was wilful, i.e. in the sense that the acts which led to the dismissal were conscious, deliberate or intentional. Put another way, 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.

[12] However, the Claimant argues that the General Division applied a different, and less stringent, legal test. In particular, the General Division wrote this: "I find that the Claimant's actions were so aggressive and so far outside of workplace norms that anyone would know that it would be likely to end in dismissal."[6]

[13] According to the Claimant, therefore, the General Division concluded that he could be found guilty of misconduct so long as there was a single person who would know that his conduct created a real possibility of dismissal.

[14] I interpret the General Division decision very differently. I read the General Division decision as saying that the Claimant's actions were so aggressive and fell so far outside the bounds of acceptable behaviour that anybody—including the Claimant—would know that his actions would likely result in dismissal. If anything, therefore, the General Division applied a more stringent test than what the law requires.

[15] As a result, I have concluded that this argument has no reasonable chance of success on appeal.

Issue 2: Is it arguable that the General Division committed an error of law by failing to determine the exact moment when the Claimant was terminated?

[16] No, this argument does not give rise to an arguable case on appeal.

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[5] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.
[6] General Division decision at para 32.

[17] The Claimant argues that the timing of his termination is critical to the application of the test for misconduct in this case. Nevertheless, he claims that the General Division failed to decide this issue.

[18] To support its decision, the General Division relied on a video recording that captured part of the dispute that happened on June 22, 2018. However, the Claimant argues that the video is largely irrelevant because he had already been fired before the start of the recording. According to the Claimant, his employer had effectively terminated him just a bit earlier, when his supervisor hit or shoved him.

[19] In my view, the General Division was aware of this issue and made the findings that it needed to make to reach its conclusion.[7] The General Division preferred the Employer's evidence to that of the Claimant. Indeed, the General Division concluded that the Claimant had initiated the conflict on June 22, 2018, and did not accept that the Claimant's supervisor had hit him before the start of the video recording.[8]

[20] Similarly, the General Division noted several times that the Employer dismissed the Claimant because of the aggressive behaviour and foul language that he displayed towards several employees on June 22, 2018.[9] It follows, therefore, that the Employer could not have dismissed the Claimant before these events had occurred.

[21] As a result, I have concluded that this argument has no reasonable chance of success on appeal.

Issue 3: Is it arguable that the General Division made an error of fact in this case?

[22] No, the Claimant has not raised an arguable error of fact in this case.

[23] First, the Claimant argues that the General Division made an error of fact when it wrote this in paragraph 13 of its decision: "The Claimant acknowledges that the Employer dismissed him after the disagreement about the safety goggles." According to the Claimant, this shows that

[7] The General Division acknowledged this issue, for example, in paragraph 18 of its decision.
[8] General Division decision at paras 15, 28, and 29.
[9] See, for example, General Division decision at paras 10 and 14.

the General Division misunderstood one of his key arguments: the Employer had effectively dismissed him before the start of the video recording.

[24] I cannot accept the Claimant's arguments on this point. It is clear that there were a series of events on June 22, 2018, and that they all started over a dispute about safety goggles. While the parties disagree as to whether the Claimant was terminated in the middle or after the end of this dispute, it was certainly after the dispute first arose.[10] While the General Division might have chosen its words a bit more carefully, this could not amount to a factual error that it made perversely, capriciously, or without regard for the evidence.

[25] Second, the Claimant argues that the General Division made an error of fact by rejecting his evidence that his supervisor had hit him before the start of the video.[11] In particular, the Claimant argues that the General Division made this credibility finding without regard for his prior consistent statements and the Employer's prior inconsistent statements.

[26] I disagree. The General Division did consider the Employer's prior statements and did not find them to be as inconsistent as the Claimant had suggested. Instead, the General Division questioned the Claimant's credibility.

[27] The General Division had to decide between two competing version of events: the one advanced by the Claimant and the one advanced by the Employer. The Claimant has not truly pointed to any error in the way that the General Division resolved this conflict.

[28] Overall, therefore, I have concluded that none of the Claimant's arguments has a reasonable chance of success.

[29] In addition to the Claimant's arguments, I also reviewed the documentary record, examined the decision under appeal, and satisfied myself that the General Division did not misinterpret or fail to properly consider any relevant evidence.[12]

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[10] General Division decision at paras 16-17.
[11] The General Division rejected this part of the Claimant's evidence in para 28 of its decision.
[12] *Griffin v Canada (Attorney General)*, 2016 FC 874 at para 20; *Karadeolian v Canada (Attorney General)*, 2016 FC 615 at para 10.

CONCLUSION

[30] I have concluded that the Claimant's appeal has no reasonable chance of success. As a result, I have no choice but to refuse leave to appeal.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	Steven Barker, for the Applicant