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

Citation: *R. F. v Canada Employment Insurance Commission*, 2020 SST 295

Tribunal File Number: AD-19-593

BETWEEN:

R. F.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: April 8, 2020

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, R. F. (Claimant), made an initial claim for employment insurance benefits. The Respondent, the Canada Insurance Commission of Canada (Commission), determined that the Claimant lost her job by reason of her own misconduct.

[3] The Commission found that the Claimant was dismissed for being insubordinate, not adhering to direction, and being disrespectful and refusing to perform duties. 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.

[4] The General Division concluded that the Claimant's behavior constituted misconduct within the meaning of the *Employment Insurance Act* (EI Act) because she did act in an insubordinate, disruptive and disrespectful manner, and she knew that this conduct would result in dismissal.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. She puts forward that the General Division failed to recognize that she was on break when being harassed to work and that she was working hand in hand with her supervisor at the time of her dismissal. She also puts forward that she was unrepresented when she was dismissed.

[6] The Tribunal sent a letter to the Claimant requesting that she explain in detail her grounds of appeal under section 58 of the *Department of Employment and Social Development Act* (DESD Act). The Claimant requested an extension of the delay to provide her grounds of appeal. The Tribunal granted the Claimant an extension of delay until March 23, 2020. The Claimant did not reply to this date to the Tribunal's express demand.

[7] The Tribunal must decide whether there is some reviewable error of the General Division upon which the appeal might succeed.

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

ISSUE

[9] Does the Claimant raise some reviewable error of the General Division upon which the appeal might arguably succeed?

ANALYSIS

[10] Section 58(1) of the DESD Act specifies the only grounds of appeal of a General Division decision. These reviewable errors are that:

> (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 had made in a perverse or capricious manner or without regard for the material before it.

[11] 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 her 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.

[12] 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.

Does the Claimant raise some reviewable error of the General Division upon which the appeal might succeed?

[13] The Claimant, in her application for leave to appeal, submits that the General Division failed to recognize that she was on break when being harassed to work and that she was working hand in hand with her supervisor at the time of her dismissal. She also puts forward that she was unrepresented when she was dismissed.

[14] The General Division had to decide if the Claimant had lost her employment by reason of her own misconduct in accordance with sections 29 and 30 of the EI Act.

[15] The General Division's role is to determine if the employee's conduct amounted to misconduct within the meaning of the EI Act and not whether the severity of the penalty imposed by the Employer was justified or whether the employee's conduct was a valid ground for dismissal.[1]

[16] The General Division concluded that the Claimant's behavior constituted misconduct within the meaning of the EI Act because she did act in an insubordinate, disruptive and disrespectful manner, and she knew that this conduct would result in dismissal.

[17] The preponderant evidence before the General Division shows that the Claimant was demoted in September of 2018 due to her declining performance in the role and ability to appropriately manage her crew. Upon demotion, she began displaying insubordinate and undermining behavior.

[18] The preponderant evidence also shows that Employer worked with the Claimant to correct her behavior, as she was a high performing worker when she focused on the task. Ultimately, after several warnings and many statements from her co-workers, it became evident for the Employer that the Claimant was not willing to be a participating team member and was exhibiting frequent disruptive and insubordinate behavior that led to her final termination.

[1] *Canada (Attorney general) v Lemire*, 2010 FCA 314.

[19] The Claimant signed the Employee Bulletin on June 19, 2018, thereby, acknowledging that she had read, understood, and agreed to the employer's site rules and procedures listed in the Employee Bulletin. One of the 17 site rules indicated that a violation of the Employer's Respectful Workplace Policy would be subject to discipline up to and including dismissal.

[20] The Federal Court of Appeal has stated several times that deliberate violations of the Employer's code of conduct constitutes misconduct within the meaning of the EI Act.[2]

[21] The Claimant, in her leave to appeal application, would essentially like to represent her case. 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.

[22] In her application for leave to appeal, and after the Tribunal's express demand, 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. She 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.

[23] 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 her request for leave to appeal, The Tribunal finds that the appeal has no reasonable chance of success.

CONCLUSION

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

---

[2] *Canada (Attorney general) v Bellavance*, 2005 FCA 87; *Canada (Attorney general) v Gagnon*, 2002 FCA 460.

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	Andrew Spence, Representative of the Applicant