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

Citation: *R. S. v Canada Employment Insurance Commission*, 2020 SST 369

Tribunal File Number: AD-20-248

BETWEEN:

R. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Janet Lew

Date of Decision: April 28, 2020

Canada

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused because the appeal does not have a reasonable chance of success.

OVERVIEW

[2] The Applicant, R. S. (Claimant), seeks leave to appeal the General Division's decision. Leave to appeal means that applicants have to get permission from the Appeal Division. Applicants have to get this permission before they can move on to the next stage of the appeal process. Applicants have to show that the appeal has a reasonable chance of success. This is the same thing as having an arguable case at law.[1]

[3] The General Division found that the Claimant lost his job because of misconduct. The employer found the Claimant had inappropriately interacted with customers, in breach of its code of conduct. The Claimant's misconduct disqualified him from receiving Employment Insurance benefits.

[4] The Claimant is asking for a review. He argues that the General Division based its decision on factual errors without fully considering all of the evidence.

[5] I have to decide whether the appeal has a reasonable chance of success. I am not satisfied that the appeal has a reasonable chance of success. I am therefore refusing leave to appeal.

ISSUE

[6] Is there an arguable case that the General Division made factual errors, that:

(a) The Claimant's employer was justified in dismissing him,

(b) The Claimant's actions constituted misconduct,

[1] This is what the Federal Court of Appeal said in *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

(c) The Claimant's employer provided coaching to the Claimant on how he should interact with customers, or that

(d) The Claimant breached company policies regarding customer interactions?

ANALYSIS

[7] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that the Claimant's reasons for appeal fall into at least one of the types of errors listed in section 58(1) of the *Department of Employment and Social Development Act* (DESDA). These errors would be where the General Division:

(a) Did not allow for a fair process.

(b) Did not decide an issue that it should have decided, or it decided something that it did not have the power to decide.

(c) Made an error of law when making a decision.

(d) Based its decision on an important error of fact.

[8] The appeal also has to have a reasonable chance of success. This is a relatively low bar because claimants do not have to prove their case at this stage of the appeals process.

[9] The Claimant argues that the General Division made several factual errors.

(a) Is there an arguable case that the General Division made a factual error that the Claimant's employer was justified in dismissing him?

[10] No. I do not find that there is an arguable case that the General Division made a factual error that the Claimant's employer was justified in dismissing him. The General Division did not make any findings, one way or the other, that the employer was justified in dismissing the Claimant. The General Division focused instead on what reason the employer gave in dismissing the Claimant, whether the Claimant committed that act, and whether he knew he could face dismissal if he committed that act.

[11] The General Division wrote that there was no dispute that the Claimant's employer told the Claimant that it was dismissing him because of inappropriate customer interactions. The General Division also wrote that these interactions breached its code of conduct. The General Division found there was "no evidence to dispute this." As a result, it found that the employer dismissed the Claimant because of inappropriate interactions with customers, in breach of the employer's policy.

[12] The Claimant questions how the General Division could have made this finding because he is disputing his employer's termination. He does not agree with the termination. He is of the position that his employer was unjustified in dismissing him from his employment.

[13] However, this a different issue from the one that the General Division decided. The General Division did not make a decision as to whether the Claimant's dismissal was justified. In determining whether there was misconduct, one of the things that the General Division had to examine was what reason the employer gave for dismissing the Claimant. So when the employer said that it dismissed the Claimant because of inappropriate customer interactions, the General Division was not looking to see whether the employer was justified in dismissing the Claimant for this reason. Instead, the General Division was looking to see what reason the employer gave for the dismissal. The General Division did not see any other reason behind the dismissal, and there is no suggestion from the Claimant that there was possibly any other reason the employer dismissed him.

[14] I am not satisfied that there is an arguable case that the General Division made a factual error that the employer said that it dismissed the Claimant because of what they regarded were inappropriate customer interactions.

[15] At the same time, the Claimant disagrees that he breached the code of conduct or that he interacted inappropriately with customers. The General Division turned its mind to this issue too, starting at paragraph 9.

(b) Is there an arguable case that the General Division made a factual error that the Claimant's actions constituted misconduct?

[16] No. I do not find that there is an arguable case that the General Division made a factual error that the Claimant's actions constituted misconduct.

[17] The Claimant argues that the General Division made a factual error when it found that he acted inappropriately in some customer interactions, in breach of the employer's policy. He vigorously denies that he breached his employer's policy.

[18] The Claimant explains that he was part of his employer's client resolution management team. The team was the last line of resolution for customers. The team handled calls differently than a normal non-escalated call. He argues that the General Division failed to recognize this difference.

[19] The Claimant's employer did not attend the General Division hearing, so the Claimant was unable to dispute or question any evidence that his employer provided. From this, I understand that the Claimant is suggesting that, because the employer did not attend the hearing, the General Division should have accepted his evidence instead.

[20] The strict rules of evidence do not apply in hearings before the General Division. The General Division is free to relax the rules of evidence and accept statements and documents from employers, even if they do not attend hearings. The only documentary evidence that the General Division had regarding an employee's appropriate behaviour came from the employer. The employer provided copies of its Customer Experience Code of Conduct. The General Division was entitled to rely on this document, in the absence of other documentary evidence to suggest that the Claimant was governed by another set of policies.

[21] The Code of Conduct required employees to treat customers professionally and courteously. But, if as a member of the client resolution management team, he was exempt from it and governed by a different set of policies, he should have produced evidence to show that the was exempt. Without this evidence, I cannot say that the General Division made a factual error in a perverse or capricious manner or without regard for the evidence before it.

[22] The Claimant also argues that the General Division overlooked the fact that while there may have been complaints against him, his employer also received positive feedback about how he interacted with customers. He argues that those should have formed part of the evidence before the General Division.

[23] Such evidence however would not have been relevant to the issues before the General Division. The General Division had to decide whether the Claimant committed the act that resulted in his dismissal, and, if so, whether that act constituted misconduct for the purposes of the *Employment Insurance Act*. The fact that the Claimant might have been an otherwise outstanding employee was not relevant to whether he had committed the act that led to his dismissal.

[24] I am not satisfied that there is an arguable case that the General Division made a factual error that the Claimant's actions constituted misconduct.

(c) Is there an arguable case that the General Division made a factual error that the Claimant's employer provided coaching to the Claimant on how he should interact with customers?

[25] No. I do not find that there is an arguable case that the General Division made a factual error that the Claimant received coaching on how to interact with customers.

[26] The Claimant questions the General Division's findings regarding training and coaching. The General Division found that the employer provided coaching, whereas the Claimant argued that his employer failed to provide him adequate coaching on how he should interact with customers.

[27] The Claimant questions how the General Division was able to "decide fully that Claimant was coached when no detailed coaching logs were given?" The Claimant continues to maintain that his employer failed to provide adequate coaching.

[28] At paragraph 28, the General Division wrote that there was documentary evidence on file that establishes that the employer provided coaching or support. The Claimant provided notes related to coaching.[2] The coaching notes cover the period from January 4, 2019 to

[2] See Claimant's email dated January 7, 2020, at GD6.

September 16, 2019. When he provided a copy of these notes, the Claimant wrote that there was nothing in the notes about misconduct.

[29] The General Division found that the notes showed that the employer provided adequate coaching about how the Claimant should conduct himself. For instance, the employer coached the Claimant on how to demonstrate empathy and how to gracefully say no.

[30] On top of coaching, the General Division also found that the employer's suspension letters[3] summarized what the employer considered were inappropriate interactions. The letters showed how the Claimant should (or should not) treat customers.

[31] For instance, in the suspension letter dated September 6, 2017, the employer noted that when the Claimant spoke with a dealer, he had made a disparaging comment, made unprofessional general comments, and then proceeded to disconnect the call while the dealer remained on the line.

[32] The employer's letter also referred to the fact that the Claimant had sought guidance. The employer noted that it had previously communicated to him and during training from February 13, 24, 2017, that it expected all team members to:

> Demonstrate a consistent and high level of professionalism and courtesy in dealing with all team and members and with members of the public. You are also strongly encouraged to consider the tone and content of your interaction with others, where the interaction is taking place, and how your actions will be perceived by those either observing or participating in the interaction.

[33] Similarly, in the suspension letter dated January 23, 2019, the employer pointed out to the Claimant that it was inappropriate for him to have been antagonistic towards a customer, to use a threatening tone at the beginning of the call and to make inappropriate comments.

[34] In the suspension letter dated July 3, 2019, the employer pointed out other inappropriate behaviour. The Claimant had raised his voice, interrupted customers and argued with them. The

[3] See suspension letters dated September 6, 2017 (GD3-23), January 23, 2019 (GD3-24), and July 3, 2019 (GD3-25).

employer made it clear that it would not tolerate this kind of customer interaction because it had a negative impact on the company's image.

[35] The General Division did not find that it was limited to considering coaching notes to address the Claimant's argument that he did not receive adequate training or coaching on how he should conduct himself. It found that there was other evidence that showed that the Claimant received training and should have been aware that his employer expected him to exhibit a certain level of professionalism and courtesy towards customers and members of the public.

[36] Based on this evidence, the General Division was entitled to conclude that the Claimant's employer had in fact provided training and coaching on how he should interact with customers and others.

[37] I am not satisfied that there is an arguable case that the General Division made a factual error that he received training about how he should interact with customers.

(d) Is there an arguable case that the General Division made a factual error that the Claimant breached company policies regarding customer interactions?

[38] No. I do not find that there is an arguable case that the General Division made a factual error that the Claimant breached company policies regarding customer interactions.

[39] The Claimant argues that the General Division also made a factual error when it found that he was in breach of his employer's policy. The Claimant argues that there was no way the General Division could have drawn this conclusion. As a member of the employer's client resolution management team, he argues that the General Division should have had a copy of the training materials for his team. Otherwise, he argues that it could not make any findings that he had breached the employer's policy.

[40] The Commission asked the employer if it had a copy of the company policy relating to professionalism and respectful behaviours.[4] The employer responded that it had "many of them" and that it had a code of conduct specific to the Claimant's line of business. The employer

[4] See Supplementary Record of Claim dated November 28, 2019, at GD3-36 to GD3-37.

provided a "Customer Experience Code of Conduct" policy.[5] The employer also provided its code of ethics and conduct.[6]

[41] Under "Section 1: Respecting our Customers" of the Customer Experience Code of Conduct policy, the employer indicated that it expected that all employees to be professional and courteous in all customer interactions. Under "Section 4: Other Misconduct," the employer listed what it considered unacceptable behaviours. They included "hanging up on an abusive customer."

[42] Because the employer provided these policies in direct response to the Commission's enquiry, the General Division accepted that they applied to the Claimant. The General Division found that the Claimant breached these policies.

[43] The Claimant suggests that his team's training materials provided another set of policies that governed customer interaction, but he did not produce any evidence to suggest that the Customer Experience Code of Conduct policy did not apply to him. The General Division could not speculate about any evidence that it did not have.

[44] Based on the evidence that was before the General Division, it was entitled to conclude that the Customer Experience Code of Conduct applied. It was also entitled to determine whether the Claimant complied with the code of conduct.

[45] Besides, the General Division found that the employer also clearly set out its expectations in the suspension letters to the Claimant. The employer defined what it considered unacceptable behaviour and how it expected the Claimant to conduct himself with customers. It clearly described those behaviours as misconduct and it warned that any future incidents of misconduct would result in further discipline, "up to and including termination [of the Claimant's] employment."

[46] I am not satisfied that there is an arguable case that the General Division made a factual error that the Claimant breached company policies regarding customer interactions.

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[5] See Customer Experience Code of Conduct policy, at GD3-52.
[6] See Code of Ethics and Conduct, February 2019, at GD3-53 to GD3-90.

[47] Finally, I acknowledge that the Claimant is asking for a reassessment. In his application to the Appeal Division, he wrote that he wants a "true fair review." He is asking that the Appeal Division review the evidence and come to a different conclusion than the General Division. However, I am limited to examining whether the General Division erred under section 58(1) of the DESDA. I do not have any authority to conduct a review or reassessment.

CONCLUSION

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

Janet Lew
Member, Appeal Division

REPRESENTATIVE:	R. S., Self-represented