



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *S. V. v Canada Employment Insurance Commission*, 2020 SST 801

Tribunal File Number: AD-20-781

BETWEEN:

S. V.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: September 22, 2020

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant, S. V. (Claimant), made an initial claim for employment insurance benefits after losing his job as a chief financial officer. The Respondent, the Canada Insurance Commission of Canada (Commission), initially allowed the claim for regular benefits, but later accepted the employer's reasons for the dismissal during the reconsideration process.

[3] The Commission determined that the Claimant lost his job with the employer because he requested a commission in exchange for providing the name of a potential investor and this led to a breach of trust. It decided that the Claimant lost his job because of misconduct, and disqualified him from being paid benefits. The Claimant appealed this decision to the General Division of the Tribunal.

[4] The General Division found that the preponderant evidence showed that he spoke with two potential investors and would not provide their names to the employer's broker without a commission for the information. It found that the Claimant knew or ought to have known that this would impair his employment relationship and could lead to his dismissal because of the breach of trust. The General Division disqualified the Claimant from receiving benefits.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He puts forward that the General Division erred in law and 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.

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

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

ISSUE

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

ANALYSIS

[9] Section 58(1) of the *Department of Employment and Social Development 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.

[10] 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 his 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.

[11] Therefore, before granting leave, 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?

[12] The Claimant submits that the General Division erred when it concluded that there had been a breach of trust because if he had complied with the employer's request to "find" or "solicit" potential investors to invest in the company, he would have been in breach of Quebec securities law and would have put himself in a position of conflict of interest due to the terms of his employment contract. He puts forward that given that he is not a registered/licensed securities broker in Quebec, he could not legally have solicited capital nor earned or received any form of commission/payment from such activity.

[13] The Claimant also submits that the General Division made an important error of fact in its decision. He puts forward that he never asked his employer for a Commission in exchange for raising capital.

[14] The Claimant submits that the email in support of the General Division's decision must be taken in its proper context. The email is a response by the Claimant to one of the two licensed securities brokers hired by the employer to solicit/raise capital on its behalf. He puts forward that the response was following one of several attempts by his employer to pressure him to assist in the soliciting of capital once it had become clear that the hired securities brokers were running out of leads for potential investors.

[15] The General Division had to decide whether the Claimant lost his employment by reason of his own misconduct in accordance with sections 29 and 30 of the *Employment Insurance Act* (EI Act). Its role was not to judge the severity of the penalty imposed by the employer, but rather, whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.

[16] The General Division found that while the Claimant disputed that he asked for a commission, and testified multiple times that he was not allowed to solicit investors because he is not a broker, the preponderant evidence showed that the Claimant spoke with two potential investors and would not provide their names to the employer's broker without a commission for the information. It found that the Claimant knew or ought to

have known that this would impair his employment relationship and could lead to his dismissal because of the breach of trust. The General Division concluded that the Claimant's behavior constituted misconduct within the meaning of the EI Act.

[17] The General Division gave more weight to the content of the email of January 9, 2019, than to the Claimant's testimony. It found that the Claimant initially denied writing the email when speaking with the Commission and that, at the hearing, he admitted that he wrote it but submitted it did not mean what it appeared to mean.

[18] The General Division was unconvinced by the Claimant's argument and found it was more likely than not that the email spoke for itself and showed that the Claimant sought a commission in exchange for providing the names of potential investors to the employer, through its broker.

[19] The Commission spoke to the employer on July 29, 2020, who stated the Claimant declared he had identified potential investors, but wanted a commission before giving their names. The employer was concerned that the Claimant may have been working for his own interests instead of the employer's interests. The employer fired the Claimant for breach of trust.

[20] The email sent to the Claimant on January 8, 2019, reads as follows:

« Bonne Année S.,

(...)

J. nous a informé que tu pourrais amener des « friends & family » à investir en équité et que tu souhaitais recevoir une commission pour ce faire.

SVP me confirmer ce que tu désires comme contrepartie (%) afin que je fasse ce qui s'impose dans une telle situation. »

[Underlined by the undersigned]

[21] The email addressed to the Claimant clearly indicates that the broker was made aware that the Claimant had potential investors and that he wanted a commission for it. In

said email, the broker specifically asked the Claimant what commission he was looking for in exchange for the information.

[22] The preponderant evidence before the General Division supports its conclusion that the Claimant's behavior constituted misconduct within the meaning of the EI Act.

[23] The Claimant, in his leave to appeal application, would essentially like to represent his case to obtain a different outcome. 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 favorable outcome.

[24] In his application for leave to appeal, 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. He 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.

[25] 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 his request for leave to appeal, I find that the appeal has no reasonable chance of success.

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	S. V., Self-represented
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