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

Citation: *BS v Canada Employment Insurance Commission*, 2021 SST 14

Tribunal File Number: AD-20-870

BETWEEN:

B. S.

Applicant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Pierre Lafontaine

Date of Decision: January 22, 2021

Canada

DECISION AND REASONS

DECISION

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

OVERVIEW

[2] The Applicant (Claimant) made an initial claim for employment insurance benefits after losing his job as a truck driver. After reconsideration, the Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant lost his job because he did not record his time correctly, refused assigned work, and violated transportation rules. The Commission decided that the Claimant had lost his job because of his own misconduct. The Claimant appealed the Commission reconsideration decision to the General Division.

[3] The General Division determined that the Claimant engaged in a variety of wilful and/or reckless actions that he knew or reasonably should have known would impair the performance of his duties owed to his employer and that dismissal was a real possibility. The General Division concluded that the Claimant's behavior constituted misconduct within the meaning of the *Employment Insurance Act* (EI Act).

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He puts forward that the General Division disregarded and misconstrued documents, did not understand his position and was very late in re-contact.

[5] I sent a letter to the Claimant requesting that he explain in detail his grounds of appeal under section 58 of the *Department of Employment and Social Development Act* (DESD Act). I explained to the Claimant that it was not enough to make general allegations in support of his application for leave to appeal.

[6] The Claimant replied to my express demand. In his reply, the Claimant essentially reiterates with more details what he mentioned to the General Division. He submits that his employer is the party guilty of misconduct. He also submits that his employer wrongfully dismissed him.

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

[8] I am refusing 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 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 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.

[12] Therefore, before I can grant leave, I need 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.

PRELIMINARY MATTERS

[13] In support of his application for leave to appeal, the Claimant has filed new documents that I will not consider to decide his application because:

(a) The Claimant did not file these documents before the General Division.

(b) An appeal to the Appeal Division is not a new hearing were a party can present new evidence. The powers of the Appeal Division are limited by section 58(1) of the DESD Act.

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

[14] The Claimant, in his application for leave to appeal, essentially reiterates with more details what he mentioned to the General Division. He submits that the employer is the party guilty of misconduct. He also submits that his employer wrongfully dismissed him.

[15] The General Division had to decide whether the Claimant had lost his employment because of his own misconduct in accordance with sections 29 and 30 of the EI Act.

[16] It is important to reiterate that the General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the Claimant in such a way that this dismissal was unjustified, but rather of deciding whether the Claimant was guilty of misconduct and whether this misconduct led to the loss of his employment.[1]

[17] The General Division found that the Claimant wilfully refused to comply with the employer's direction about logging his pre-trip inspection time. It found that the evidence showed that the employer had warned the Claimant six times that he was

[1] *Houle v Canada (Attorney General)*, 2020 CF 115, *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16, *Canada (Attorney General) v Marion*, 2002 FCA 185).

required to log a minimum of 15-minutes for his pre-trip inspection and that he was not meeting this standard. As the Claimant deliberately continued to engage in this conduct, the General Division found his actions were wilful in the sense that they were conscious, deliberate and intentional.

[18] The General Division also found that the Claimant wilfully took an unauthorized route on November 14, 2019. It found that the text message from the employer indicates that it had previously discussed with the Claimant about not driving through Connecticut. Based on this evidence, the General Division found that the Claimant was aware that he had no authorization to travel in Connecticut but deliberately did so.

[19] The General Division further found that the Claimant was aware that the employer had concerns about his work. He also knew the employer was threatening to dismiss him because of his refusal to do assigned work. Despite that, the Claimant did not attend work on November 20, 2019, as directed by the employer.

[20] The General Division determined that the Claimant engaged in a variety of wilful and/or reckless actions that he knew or reasonably should have known would impair the performance of his duties owed to his employer and that he dismissal was a real possibility. The General Division concluded that the Claimant's behavior constituted misconduct within the meaning of the EI Act.

[21] The General Division considered the Claimant's argument that one of the dispatchers discriminated against him based on his race, and that he was dismissed for that reason. It was not satisfied by the Claimant's evidence that he had been targeted for termination because of racial discrimination. It found that the dispatcher D did not start working for the employer until late September 2019, and that the records showed that the Claimant was subject to multiple warnings from the employer before that time.

[22] The General Division further found that the Claimant's letter from the Federal Labour Program did not relate to the circumstances around his dismissal.

[23] The General Division was satisfied that the preponderant evidence before it supported that the Claimant's job performance, his disciplinary history, and his refusal to

attend work, were the essential reasons that led to his dismissal. It found that the reasons given by the employer were not an excuse for the Claimant's dismissal.

[24] Jurisprudence has established that deliberate violations of the employer's instructions and code of conduct constitute misconduct within the meaning of the EI Act.[2]

[25] Jurisprudence has also established that absence from work after being told by the employer to come to work constitutes misconduct under the EI Act.[3]

[26] 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 is not a new hearing, where a party can represent evidence and hope for a new favorable outcome.

[27] In his application for leave to appeal, and after my 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. 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.

[28] 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.

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[2] *B. C. v Canada Employment Insurance Commission and X*, 2019 SST 140 (CanLII), *A. M. v Canada Employment Insurance Commission*, 2017 CanLII 87338 (SST).
[3] *M. C. v Canada Employment Insurance Commission*, 2020 SST 358 (CanLII*), J. L. v Canada Employment Insurance Commission*, 2018 SST 683 (CanLII), *L. B. v Canada Employment Insurance Commission*, 2017 CanLII 26587 (SST).

CONCLUSION

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

Pierre Lafontaine
Member, Appeal Division

REPRESENTATIVE:	B. S., Self-represented