



Citation: *ML v Canada Employment Insurance Commission*, 2021 SST 384

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. L.
Representative: Colleen Evans
Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated June 15, 2021 GE-21-253

Tribunal member: Pierre Lafontaine
Decision date: July 28, 2021
File number: AD-21-242

Decision

[1] Leave to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant (Claimant) lost his job. The employer stated that he was involved in a workplace altercation that breached their no violence policy. The Canada Employment Insurance Commission (Commission) considered the information submitted and initially decided that the Claimant did not lose his employment due to misconduct. The Commission started paying the Claimant regular EI benefits.

[3] The Commission notified the employer of its decision. The employer requested reconsideration and submitted a video recording of the altercation and more documents to the Commission. The Commission conducted a review and changed its decision. It concluded the Claimant had lost his job due to his own misconduct. The Commission imposed a retroactive disqualification. This resulted in the Claimant having an overpayment of benefits. The Claimant appealed the Commission reconsideration decision to the General Division.

[4] The General Division determined that the Claimant lost his job because he was involved in a physical altercation with a co-worker, in breach of the employer's Non-Discrimination: Respectful Workplace Policy. It found that the Claimant knew or should have known that his conduct would result in his dismissal. The General Division concluded that the Claimant's behavior constituted misconduct.

[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 based its decision on numerous erroneous finding of fact that it had made in a perverse or capricious manner or without regard for the material before it.

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

[7] I am refusing 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:

1. The General Division hearing process was not fair in some way.
2. The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide.
3. The General Division based its decision on an important error of fact.
4. The General Division made an error of law when making its decision.

[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 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.

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

[12] The Claimant, in his application for leave to appeal, submits that the General Division made important errors of fact and did not follow procedural fairness.¹

[13] I am not satisfied that at least one of the Claimant's reasons for appeal has a reasonable chance of success.

[14] The General Division had to decide whether the Claimant had lost his employment because of his own misconduct.²

[15] The notion of misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.³

[16] 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.⁴

¹ See AD1-9 and AD1-10.

² Sections 29 and 30 of the EI Act.

³ *Canada (Attorney General) v Hastings*, 2007 FCA 372; *Tucker*, A-381-85; *Mishibinijima*, A-85-06.

⁴ *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.

[17] Based on the evidence, the General Division determined that the Claimant lost his job because he was involved in a physical altercation with a co-worker, in breach of the employer's Non-Discrimination: Respectful Workplace Policy. It further determined that the employer had explained the policy to the Claimant prior to the altercation.

[18] The General Division found that, by acting in this way, the Claimant knew or should have known that his conduct was such as to lead to his dismissal.

[19] The General Division was also convinced that the employer fired the Claimant for that reason. The employer sent him home the same day. The Claimant lost his job the following day.

[20] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct under the EI Act.

[21] The Claimant admitted that he shoved his co-worker by placing his open hand on his co-worker's face shield and pushing him. However, he stated that he acted out of frustration and that his involvement in the altercation was an automatic reaction to "multiple provocative and incendiary actions initiated by his co-worker." He submitted that his actions were therefore not conscious or deliberate.

[22] The fact that the Claimant had a momentary lapse of judgment because of the co-worker's reprehensible behavior is of no relevance to decide whether his own conduct constitutes misconduct under the EI Act.⁵

[23] The General Division found that the Claimant intentionally walked towards his co-worker to continue the interaction, instead of leaving the work area and reporting his co-worker's behaviour to his supervisor, as soon as his co-worker started the interaction by pulling a tool out of his hand.

⁵ *G. G. v Canada Employment Insurance Commission*, 2018 SST 527, *Canada (Attorney General) v Hastings*, 2007 FCA 372.

[24] The General Division further found that the Claimant had a second opportunity to walk away but chose to walk towards his co-worker and continue to engage with him until it turned into a physical altercation.

[25] Aggressive or violent behaviour at work constitutes misconduct under the EI Act.⁶

[26] A deliberate violation of the employer's instructions and code of conduct also constitutes misconduct within the meaning of the EI Act.⁷

[27] 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, which would affect its decision.

[28] 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

[29] Leave to appeal is refused. The appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division

⁶ *F. H. v Canada Employment Insurance Commission*, 2019 SST 137; *G. G. v Canada Employment Insurance Commission*, 2018 SST 527 (CanLII), *Canada Employment Insurance Commission v N. K.*, 2016 CanLII 59144 (SST).

⁷ *B. C. v Canada Employment Insurance Commission and X*, 2019 SST 140 (CanLII), *A. M. v Canada Employment Insurance Commission*, 2017 CanLII 87338 (SST).