Citation: *CW v Canada Employment Insurance Commission*, 2022 SST 123

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. W.
Representative:	N. C.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated January 11, 2022 (GE-21-2524)

Tribunal member:	Pierre Lafontaine
Decision date:	March 8, 2022
File number:	AD-22-102

Decision

[1] Leave to appeal is refused. This means the appeal will not proceed.

Overview

[2] The Applicant (Claimant) worked as a truck driver. He lost his job. The Claimant's employer said that he was let go because he was insubordinate to his supervisor by making threatening statements to him.

[3] The Respondent (Commission) accepted the employer's reason for dismissal. It decided that the Claimant lost his job because of misconduct and disqualified him from receiving EI benefits. The Claimant requested reconsideration but the Commission maintained its original decision. The Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost his job after he sent his supervisor an inappropriate text containing expletives. It found that the Claimant should have known that the employer was likely to dismiss him in these circumstances. The General Division concluded that the Claimant lost his job because of his misconduct.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division did not follow procedural fairness and erred in fact or in law in its interpretation of sections 29 and 30 of the *Employment Insurance Act* (EI Act).

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

[7] I refuse 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 to appeal, 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 seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the General Division did not follow procedural fairness and erred in fact or in law in its interpretation of sections 29 and 30 of the EI Act.

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

[14] 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.

[15] 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.

[16] Based on the evidence, the General Division determined that the Claimant lost his job on December 18, 2020. There is no dispute that he texted his supervisor "F… you. F… you." The Claimant knew that the employer had a zero tolerance policy regarding inappropriate behavior towards a superior. The Claimant declared that he later realized sending the text was not the best option but stated that he was provoked by his supervisor.[1]

[1] See GD3-9.

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

[18] The General Division was convinced that the employer fired the Claimant for that reason. The employer sent him home the same day. The Claimant lost his job following the text incident. The General Division gave no weight to the Claimant's position that the text was only an excuse for termination following his complaints about safety and pay changes. It found that he had not faced any prior discipline despite his previous safety complaints. Furthermore, the employer had agreed not to change the way the Claimant was paid.

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

[20] The Claimant admitted that he texted his supervisor. However, he stated that he acted out of frustration because the employer disregarded his safety issues, and the harassment by his co-workers. He had a regretful moment in which he addressed his supervisor in a disrespectful way. He submitted that his actions were therefore not conscious or deliberate.

[21] As stated by the General Division, the fact that the Claimant had a momentary lapse of judgment or was provoked is of no relevance to decide whether his own conduct constitutes misconduct under the EI Act.[2]

[22] The General Division found that the text was sent after a phone call with the supervisor in which they had a disagreement. The Claimant admitted that he sent the text while the supervisor was on his way to work. While the Claimant may have been frustrated and upset at his supervisor due to the culmination of problems, and may have acted impulsively, that does not negate his wilfulness. At the very least, his actions were so reckless that they amount to wilfulness. No

[2] See *Canada (Attorney General) v Hastings*, A-592-06; *The Attorney General of Canada v Kaba* 2013 FCA 208.

broader investigation would have change these findings leading to a conclusion of misconduct under the EI Act.

[23] It is well established that aggressive or violent behaviour at work constitutes misconduct under the EI Act. Furthermore, a deliberate violation of the employer's instructions and code of conduct is also considered misconduct within the meaning of the EI Act.[3]

[24] The Claimant, in his leave to appeal application, would essentially like to represent his case to obtain a different outcome on the issue of misconduct. Unfortunately, for the Claimant, an appeal to the Appeal Division of the Tribunal is not a new hearing, where a party can re-present evidence and hope for a new favorable outcome.

[25] The Claimant further raises the argument that the General Division did not follow procedural fairness when it decided that he would present the majority of his evidence and not his representative.

[26] The principle of natural justice refers to the fundamental rules of procedure exercised by persons and tribunals with judicial or quasi-judicial jurisdiction. The principle exists to ensure that everyone who falls under the jurisdiction of a judicial or quasi-judicial forum receives adequate notice to appear and that their allowed every reasonable opportunity to present their case.

[27] I note that the Claimant had every opportunity to present his case. He gave his detailed version of events in his application to appeal to the General Division. Furthermore, the Claimant and his representative had every opportunity to present the Claimant's case and the General Division listened to their arguments for almost two (2) hours and provided all the details of their position in its decision. I cannot find that the hearing process was not fair in some way.

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[3] *The Attorney General of Canada v Kaba* 2013 FCA 208; *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[28] 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.

[29] 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

[30] Leave to appeal is refused. This means the appeal will not proceed.

Pierre Lafontaine
Member, Appeal Division