Citation: *NB v Canada Employment Insurance Commission*, 2022 SST 151

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	N. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated February 2, 2022 (GE-21-2578)

Tribunal member:	Pierre Lafontaine
Decision date:	March 9, 2022
File number:	AD-22-107

Decision

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

Overview

[2] The Applicant (Claimant) worked as a security guard and lost his job. The Claimant's employer said that he was fired because he fell asleep on the job. The Respondent (Commission) accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct and disqualified him from receiving EI benefits. After reconsideration, the Claimant appealed to the General Division.

[3] The General Division found that the Claimant was fired for falling asleep on duty. It found that the Claimant should have known that the employer was likely to fire him considering its known policy. The General Division concluded that the Claimant lost his job because of misconduct.

[4] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. He submits that the fault that lead to his dismissal was out of his control and did not cause the employer any prejudice. He argues that the dismissal is illegal and that the employer put him in that situation. The Claimant submits that the General Division erred in giving more weight to the employer's version of events considering that the employer did not show up at the hearing to respond to his defense.

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

[6] I refuse leave to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

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

Analysis

[8] 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.

[9] 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.

[10] 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?

[11] In support of his application for leave to appeal, the Claimant submits that the fault that lead to his dismissal was out of his control and did not cause the employer any prejudice. He argues that the dismissal is illegal and that the employer put him in that situation. The Claimant submits that the General Division erred in giving more weight to the employer's version of events considering that the employer did not show up at the hearing to respond to his defense.

[12] The General Division had to decide whether the Claimant lost his job because of his misconduct.

[13] 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 his actions would have on work performance.

[14] 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.

[15] Based on the evidence, the General Division determined that the Claimant fell asleep on duty. The Claimant admitted that he fell asleep on duty. It found that the employer's policy provides that an employee can immediately be fired for falling asleep on duty.[1] The General Division determined that the Claimant was aware of the company policy regarding sleeping on the job. The General Division found that the Claimant's actions were so reckless as to be wilful as he was well

[1] See GD03-31.

aware falling asleep was a real possibility in his state, which could lead to termination.

[16] The General Division concluded from the preponderant evidence that the Claimant's behavior constituted misconduct. It would have been significantly better for the Claimant to refuse the shift if he was not in a state to do it adequately.

[17] The Claimant argues that the General Division erred in giving more weight to the employer's version of events considering that the employer did not show up at the hearing to respond to his defense.

[18] I note that the General Division decision is based on uncontested evidence: the Claimant admitted that he fell asleep on duty and knew that the employer's policy prohibited such a behavior that could lead to dismissal.

[19] Furthermore, the General Division is not bound by the strict rules of evidence applicable in criminal or civil courts and they may receive and accept hearsay evidence. The General Division could not therefore reject the employer's evidence simply because the Claimant did not have the opportunity to cross-examine the employer.[2]

[20] I note that the Claimant was aware of the evidence on file prior to his appearance before the General Division and that he had plenty of time to prepare his arguments. The General Division allowed him to present his arguments regarding the case before it and the Claimant had an opportunity to challenge the employer's position.

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[2] *J. L. v Canada Employment Insurance Commission*, 2018 SST 683; *Y. D. v Canada Employment Insurance Commission*, 2017 CanLII 98603; *Y. L. v Canada Employment Insurance Commission*, 2016 CanLII 59140; *K. C. v Canada Employment Insurance Commission*, 2016 CanLII 96456.

[21] 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 favorable outcome.

[22] 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.

[23] 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

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

Pierre Lafontaine
Member, Appeal Division