



Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 1680

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 16, 2023
(GE-23-1431)

Tribunal member: Pierre Lafontaine

Decision date: November 27, 2023

File number: AD-23-885

Decision

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

Overview

[2] The Applicant (Claimant) lost his job. The employer said that he violated the company policy by sleeping on duty in a forklift while it was running. He was also warned about smoking in non-designated areas. The Claimant disputed that this happened.

[3] The Respondent (Commission) decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits. After an unsuccessful reconsideration, the Claimant appealed to the General Division.

[4] The General Division found that the Claimant lost his job because he got into a forklift to warm up and then fell asleep while it was running. It found that the Claimant knew or should have known that he could lose his job if he went against the company policy. This was the reason he lost his job. The General Division concluded that the Claimant lost his job because of misconduct.

[5] The Claimant now seeks leave to appeal of the General Division's decision to the Appeal Division. The Claimant submits that he disagrees with the false statements of his employer. He puts forward that the employer has cameras that prove he did not fall asleep in the forklift.

[6] I must decide whether the Claimant 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, 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 General Division had to decide whether the Claimant lost his job because of misconduct.

[13] The Claimant submits that he disagrees with the false statements of his employer. He puts forward that the employer has cameras that prove he did not fall asleep in the forklift.

[14] The General Division's role is to determine whether the employee's conduct amounted to misconduct within the meaning of the *Employment Insurance Act* and not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal.

[15] The General Division must decide the issue before it based on the evidence presented by the parties. I note that the Claimant did not produce video evidence before the General Division.

[16] The General Division found that the Claimant lost his job because he got into a forklift to warm up and then fell asleep while it was running. It found that the Claimant knew or should have known that he could lose his job if he went against the company policy. This was the reason he lost his job. The General Division concluded that the Claimant lost his job because of misconduct.

[17] The General Division gave more weight to the employer's evidence. It found that the employer provided written statements that were consistent, were made at the time of the incident, and were made by several employees, including peers and managers. It relied on the reports of three individuals that said the Claimant admitted he was very tired and knew he shouldn't sleep in the forklift.

[18] The preponderant evidence before the General Division shows that the Claimant's actions were wilful or of such a careless or negligent nature that one could say that the Claimant wilfully decided to disregard the effects his actions would have on his job performance.

[19] I see no reviewable error made by the General Division. It made its decision based on the evidence before it, and the decision complies with both the legislative provisions and the case law regarding misconduct.

[20] Unfortunately, for the Claimant, an appeal to the Appeal Division is not an appeal in which there is a new hearing where a party can re-present their evidence and hope for a favourable decision.

[21] After reviewing the appeal file and the General Division's decision as well as considering the Claimant's arguments in support of his request for leave to appeal, I have no choice but to find that the appeal has no reasonable chance of success. The Claimant has not set out a reason, which falls into the above-enumerated grounds of appeal that could possibly lead to the reversal of the disputed decision.

Conclusion

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

Pierre Lafontaine
Member, Appeal Division