



Citation: *NH v Canada Employment Insurance Commission*, 2022 SST 240

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant:	N. H.
Respondent:	Canada Employment Insurance Commission
<hr/>	
Decision under appeal:	General Division decision dated February 17, 2022 (GE-21-2491)
<hr/>	
Tribunal member:	Jude Samson
Decision date:	March 30, 2022
File number:	AD-22-154

Decision

[1] I am granting leave (permission) to appeal. The appeal will proceed.

Overview

[2] N. H. is the Claimant in this case. The Canada Employment Insurance Commission (Commission) refused her application for regular Employment Insurance (EI) benefits saying that she had lost her job because of her own misconduct.

[3] The Claimant appealed the Commission's decision to the Tribunal's General Division but it rejected her arguments on the misconduct issue.

[4] The Claimant now wants to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division based its decision on important mistakes about the facts of her case. I also read the Claimant's arguments to say that her actions should not be considered misconduct under the law. In other words, she argues that the General Division misinterpreted the legal test about misconduct.

[5] The Claimant's appeal has a reasonable chance of success. As a result, I am giving her permission to appeal and allowing the file to move forward.

Issues

[6] This decision focuses on one issue: Is there an arguable case that the General Division misinterpreted the legal test about misconduct?¹

[7] In this decision, I do not need to consider all the issues the Claimant is raising. At this point, I must grant leave as long as there is an arguable ground on which the Claimant's appeal might succeed.

¹ The *Employment Insurance Act* does not define "misconduct." However, the courts have interpreted the word in cases like *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 14.

Analysis

[8] Appeal Division files follow a two-step process. This appeal is at step one: permission to appeal.

[9] The legal test that the Claimant needs to meet at this step is a low one: Is there any arguable ground on which the appeal might succeed?² If the appeal has no reasonable chance of success, then I must refuse permission to appeal.³

[10] To decide this question, I focused on whether the General Division could have made a relevant error.⁴

The General Division arguably misinterpreted the legal test about misconduct

[11] In this case, the Claimant was away from work for medical reasons. After some time, the Claimant's employer refused to extend her medical leave any further. Instead, the employer insisted that the Claimant meet with them to discuss a return-to-work plan. When the Claimant refused to attend that kind of meeting, her employer dismissed her.

[12] The Claimant argued that she remained away from work on the advice of her doctor and that she never intended to abandon her job. She said that she would discuss return-to-work plans when her doctor said she was well enough to do so. She also said that her employer's repeated attempts to contact her amounted to harassment and worsened her medical condition.

[13] Nevertheless, the General Division found that the Claimant had misconducted herself by refusing to meet with her employer. In particular, the General Division noted that the Claimant was in control of her actions and that her employer had warned her that she would be fired if she continued to refuse to meet with them.

² This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at paragraph 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at paragraph 16.

³ This is the legal test described in section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

⁴ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act.

[14] The facts in this case are somewhat similar to those that the Federal Court considered in *Astolfi v Canada (Attorney General)*.⁵ In the *Astolfi* decision, the Court said that it's not enough for the General Division to simply summarize the facts. In some cases, the General Division must look at all the surrounding circumstances, including the employer's conduct, to determine if the employee's conduct was intentional, which is needed to establish misconduct.⁶

[15] In the end, the Federal Court decided that that it was unreasonable for the Appeal Division to have refused permission in Mr. Astolfi's case.

[16] The Claimant is arguing that there are special circumstances in her case too. And when all the surrounding circumstances are considered, including the employer's conduct, her actions should not be considered misconduct and should not disqualify her from receiving EI benefits.

[17] In the circumstances, I'm satisfied that the Claimant has raised an arguable ground on which her appeal might succeed. Specifically, the General Division might have misinterpreted the legal test about misconduct.⁷

Next step: the merits stage

[18] Although I am giving the Claimant permission to appeal, that does not guarantee that she will win at step two of the Appeal Division's process: the merits stage.

[19] The Claimant has a higher legal test to meet at the merits stage. She now has to establish that the General Division made one or more relevant errors.

[20] I have discussed one possible error on which the appeal might succeed. Going forward, however, the Claimant can make arguments about other possible errors too.

[21] The Claimant and the Commission now have time to provide additional written arguments. As part of those arguments, they are invited to discuss the best way of fixing

⁵ *Astolfi v Canada (Attorney General)*, 2020 FC 30.

⁶ In particular, see paragraphs 30 and 33 of *Astolfi v Canada (Attorney General)*, 2020 FC 30.

⁷ This could be an error under section 58(1)(b) of the DESD Act.

the General Division's error (if any), and the outcome they want. The main options for fixing errors include sending the appeal back to the General Division for reconsideration and giving the decision that the General Division should have given.

[22] Finally, the Tribunal has expedited the Claimant's appeal. In the circumstances, the parties are encouraged to submit their written arguments (or a statement saying they have no additional arguments) as quickly as possible. In their arguments, the parties can also provide their availability for a hearing sooner than the one the Tribunal is setting. The Tribunal will then try to provide an earlier hearing date, if possible.

Conclusion

[23] I am giving the Claimant permission to appeal. This means that the appeal will proceed.

Jude Samson
Member, Appeal Division