Citation: *KL v Canada Employment Insurance Commission*, 2022 SST 573

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. L.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 6, 2022 (GE-22-622)

Tribunal member:	Janet Lew
Decision date:	June 28, 2022
File number:	AD-22-261

Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

Overview

[2] The Claimant is appealing the General Division decision. The General Division found that the Claimant had not shown just cause for quitting her job when she did. The General Division concluded that the Claimant was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural and factual errors. She argues the General Division failed to call witnesses who were vital to her case. On top of that, she says that it mistakenly assumed that she voluntarily left her job. But she denies that she quit. She says the evidence clearly shows that she did not intend to leave her job and that she expected to return to it.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issues

[6] There are two issues:

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[1] Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

i. Is there an arguable case that the General Division made a procedural error by failing to call the Claimant's employer as a witness?

ii. Is there an arguable case that the General Division made factual errors without regard for the evidence before it?

Analysis

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.[3]

[8] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

[9] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

Is there an arguable case that the General Division made a procedural error by failing to call the Claimant's employer as a witness?

[10] The Claimant argues that the General Division made a procedural error by deciding not to call her employer and former work colleagues as witnesses, after having identified her employer as a potential party to the appeal. She says they were material witnesses. The Claimant says they would have been able to give evidence about the circumstances surrounding her alleged departure from her employment.

[11] She also claims that employer and work colleagues had documents, including text messages. She says they should have been required to produce this evidence.

[3] See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[12] The Claimant says evidence from her employer and work colleagues was important to address some of the conflicting information. The Claimant says that some of the witnesses' evidence would have supported her. Some of it may not have supported the Claimant, but she says the General Division would have been able to assess the witnesses' demeanour and credibility. She says that the member would have then been able to decide whose evidence was more credible.

[13] If the Claimant's employer and work colleagues had testified, she says that ultimately the General Division member would have decided that her evidence was more reliable and trustworthy. And, she says that the member would have then accepted her version of events.

[14] I am not satisfied that the Claimant has an arguable case on this point. A party bears the burden of proving their case. It is that party's responsibility to produce whatever evidence they think will support and prove their case. This means collecting whatever documents they need, and asking the witnesses that will help their case to attend the hearing. It is unlikely the Claimant's employer would have responded to a request from the Claimant. Even so, the obligation to call witnesses is with the party that wants them.

[15] The Claimant suggests that the Social Security Tribunal (Tribunal) was responsible for calling witnesses because it had the power to add parties to the proceedings.

[16] In this case, the Tribunal identified the employer as a possible added party. The Tribunal sent a letter to the employer.[4] The Tribunal wrote that it was possible to add the employer as a party to the appeal. But, the employer would have to prove that they had a direct interest in the appeal.

[4] See Social Security Tribunal's letter dated February 25, 2022, at GD5.

[17] The Tribunal also wrote that, if the employer did not want to be added as a party, no action was required. The employer could simply disregard the Tribunal's letter. The employer did not respond.

[18] The Tribunal does have the power to add any person as a party to a proceeding.[5] However, the Tribunal can only do so if the person has a direct interest in the decision. Being a party to the proceedings is different from serving as a witness. Witnesses do not have to be parties to the proceedings.

[19] While the Tribunal has the power to add a person as a party to the proceedings, this does not empower the Tribunal or the General Division to compel witnesses. The General Division does not have any power or any duty or obligation to identify and compel any witnesses on behalf of any party to the proceedings.

[20] The General Division's role as a decision-maker requires it to be wholly independent and impartial. So, it must necessarily mean that it operates at arm's length from the parties. It cannot decide whom to call as witnesses on behalf of a party. That is up to the parties.

[21] I am not satisfied that there is an arguable case that the General Division made a procedural error by not calling the Claimant's employer and work colleagues as witnesses.

Is there an arguable case that the General Division made factual errors?

[22] The Claimant argues that the General Division made several factual errors. She claims that if the General Division had not made these errors, it would have accepted that she had not voluntarily left her employment.

[23] In particular, the Claimant argues that the General Division made errors when it found that the Claimant:

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[5] See section 10(1) of the *Social Security Tribunal Regulations*.

- swore and yelled at her employer and his spouse,
- had an ulterior motive for leaving her employment,
- quit her job, and
- said that she quit because she had COVID-19 or because her employer picked on her.

[24] The Claimant denies all of these findings. She says that she always intended to return to work. She denies that she had any ulterior motive for leaving her job. She also denies that she quit or said that she quit, either because she had COVID-19 or because her employer picked on her. She also denies that she ever yelled or screamed at her employer.

[25] For the reasons set out below, I am not satisfied that there is an arguable case that the General Division made these factual errors.

– **Allegation of swearing and yelling**

[26] The Claimant disputes that she ever swore or yelled at her employer.

[27] The General Division noted that the Respondent, the Canada Employment Insurance Commission (Commission) made notes of a telephone call with the Claimant's employer. The General Division noted that the Claimant's manager said that the Claimant swore at him and his wife. The manager recalled that the Claimant was "angry, swearing, and saying she was quitting."[6]

[28] The General Division seems to have accepted the employer's account. The General Division found that the Claimant continued to send confrontational text messages to the employer.[7]

[29] However, the General Division did not base its decision on whether the Claimant sent confrontational or inappropriate messages to her employer. The General Division

[6] See General Division decision, at para 28.
[7] See General Division decision, at para 34.

did not need to rely on these facts to decide whether the Claimant quit her job. Any alleged swearing took place after the Claimant wrote the text message saying that she was quitting. In other words, the alleged swearing was irrelevant to the issue of whether the Claimant quit her job.

[30] As I noted above, for there to be a factual error that merits granting leave, it has to be one upon which the General Division based its decision. So, if the General Division did not base its decision on whether the Claimant swore at her employer, then there is no arguable case.

[31] Even if this alleged incident was relevant and the General Division based its decision on it, in part, there was some evidence to support its finding.

[32] In telephone notes of a conversation with the employer on November 30, 2021, the Commission recorded that, "there were some heated conversation" between the Claimant and the employer.[8]

[33] And, in a subsequent telephone conversation with the employer on January 26, 2022, the Commission recorded the following:

> He said that all that he told her was not to go into the Legion as she had Covid. After that, she called him and his wife, started swearing at them and then sent the text stating she was quitting. He asked her to think about it (her decision to resign). She called after that but he doesn't recall her saying that wasn't resigning (that she was just angry and wanted to come back). All that he can recall is that she phoned and was swearing at them (calling them an "ahole" amongst other things and that she quit.[9]

[34] In other notes, the agent wrote that the Claimant phoned the manager a couple of times in between exchanging messages, "to yell and swear at him."[10]

[35] The General Division was entitled to accept the employer's statements to the Commission, even if they conflicted with the Claimant's evidence. The member

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[8] See Supplementary Record of Claim dated November 30, 2021, at GD3-22.
[9] See Supplementary Record of Claim dated January 26, 2022, at GD3-32.
[10] See Supplementary Record of Claim dated January 26, 2022, at GD3-33.

explained why she made her findings and explained why she preferred the employer's statements.

[36] I am not satisfied that there is an arguable case that the General Division based its decision on a factual error, when it described telephone conversations between the Claimant and her employer.

– **Whether the Claimant had an ulterior motive for quitting her job**

[37] The Claimant argues that the General Division made a factual error when it found that she had an ulterior motive for leaving her job.

[38] I do not see anything in the General Division decision that suggests the member found that the Claimant had an ulterior motive for leaving her employment. I am not satisfied that there is an arguable case on this point.

– **Whether the Claimant quit her job**

[39] The Claimant argues that the General Division made an important factual error when it found that she quit her job. She denies that she quit her job.

[40] I am not satisfied that there is an arguable case on this point. The Claimant even acknowledges in her Application to the Appeal Division that she texted her employer that she quit.

[41] The Claimant states that she was not serious and never intended to quit. Indeed, she contacted her manager after he responded to her text that she was quitting. She claims that he encouraged her to reconsider, but she says that she phoned him and told him that she was not quitting. The Claimant urges me to find that this whole incident shows that she did not truly intend to leave her job.

[42] The Claimant wrote：

> [She] texted I quit but [N. D., the manager] gave [her] 2 days as indicated in the text to think about it. [She] called him within a few seconds telling N. [she was not] quitting.[11]

[43] While the Claimant ultimately decided against leaving her job, she had already written to the employer to say that she quit. So, the General Division was entitled to accept that the Claimant quit, even if she later changed her mind.

[44] I am not satisfied that there is an arguable case on this point.

– **Whether the Claimant said that she quit her job because of COVID-19 or because her employer picked on her**

[45] The Claimant denies that she quit her job. She also denies that she ever said that she quit her job either because of COVID-19 or because her employer picked on her. She argues that the General Division made a factual error when it found that she made these statements. This is important because, if she did not quit, then she would not have to show that she had just cause.

– **Whether the Claimant stated she quit because of COVID-19**

[46] The Claimant denies that she ever stated that she quit because of COVID-19. So, she says the General Division made a factual error when it found that she quit due to COVID-19.[12]

[47] In fact, the evidence shows that the Claimant stated that she quit because she was sick with COVID-19. In her Notice of Appeal to the General Division, the Claimant wrote, “My reason for leaving was I was sick with Covid,”[13]

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[11] See Claimant’s Application to the Appeal Division, filed April 21, 2022, at AD1-2.
[12] See General Division decision, at paras 6 and 24.
[13] See Claimant’s Notice of Appeal to the General Division, at GD2-5.

– **Whether the Claimant stated she quit because her employer picked on her**

[48] The Claimant denies that she ever stated that she quit because she felt that her employer was picking on her. So, she says the General Division made a factual error when it found that she quit because she felt that her employer was picking on her.[14]

[49] The evidence suggests that the Claimant felt as if her employer was picking on her. The Claimant exchanged text messages with her employer, as follows:

> Claimant: How come.
>
> Employer: We had the legion cleaned and now I hear you were in there today. Please stay out till we open up again. Thanks.
>
> Claimant: To be safe.
>
> Employer: Yes to be safe. We want to make sure all is okay with you. We were thinking of you as well as the customers. Norm.
>
> Claimant: Why r u on top of my back.
>
> Employer: When you have covid your suppose to stay home…
>
> Claimant: I'm not coming back get someone else you r so rude.
>
> Say what u want and cut me off.
>
> I quit.
>
> Employer: Please think about it before you decide.
>
> Claimant: you r picking at me since I got sick. Is that how I was to u when your sister passed away? No.
>
> U r on S. and O. side.
>
> When I leave A. is coming with me.
>
> No one stayed at that Legion but went out on bad terms.[15]

[14] See General Division decision, at para 32.
[15] See copy of exchange of text messages between Claimant and her manager, attached to manager's email of January 26, 2022, at GD3-34 and GD3-35.

[50] At the General Division hearing, the Claimant testified that she contacted her manager N. She asked him why he was texting or phoning her when she was so sick. She also asked why he was getting so upset with her for having gone into the workplace. She thought her manager could have waited until she was better before contacting her. She noted that Nancy called her and was "ballistic."[16] She testified that she quit in the heat of the moment to see her employer's reaction.[17]

[51] This evidence supports the General Division's findings. Or, put another way, the General Division's findings are consistent with the evidence before it. Therefore, I find that the Claimant does not have an arguable case that the General Division made a factual error when it found that she felt like her employer was picking on her, so quit in the heat of the moment.

Conclusion

[52] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

[16] At approximately 25:25 of the audio recording of the General Division hearing.
[17] At approximately 54:36 of the audio recording of the General Division hearing.