



Citation: *RB v Canada Employment Insurance Commission*, 2022 SST 938

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: R. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 22, 2022
(GE-22-1256)

Tribunal member: Neil Nawaz

Decision date: September 23, 2022

File number: AD-22-590

Decision

[1] Permission to appeal is refused. The appeal will not be going forward.

Overview

[2] The Claimant used to work as a forklift driver for a manufacturing company. On July 28, 2021, his employer dismissed him after he failed multiple drug tests.

[3] The Claimant applied for Employment Insurance (EI) benefits. He acknowledged failing drug tests but said the real reason his employer let him go was because of absenteeism. He also alleged that, because he had a prescription for medical marijuana, his employer wrongfully dismissed him.

[4] The Canada Employment Insurance Commission (Commission) looked at the Claimant's reasons for leaving. It decided that the Claimant had lost his job because of misconduct, so it didn't have to pay him EI benefits.

[5] The Claimant appealed the Commission's decision to the Social Security Tribunal's General Division. The General Division held a hearing and agreed with the Commission that the Claimant lost his job because of misconduct. The General Division found that the Claimant violated the conditions of his continued employment agreement by wilfully refusing to schedule an appointment with his substance abuse counsellor.

[6] The Claimant is now seeking permission to appeal the General Division's decision. He alleges that the General Division based its decision on a significant factual error. He says that the General Division ignored information that he passed his last drug test at X.

[7] I have decided to refuse the Claimant permission to appeal because his appeal has no reasonable chance of success.

Issue

[8] There are four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to use them;
- interpreted the law incorrectly; or
- based its decision on an important error of fact.¹

An appeal can proceed only if the Appeal Division first grants leave, or permission, to appeal.² At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.³ This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.⁴

[9] I had to decide whether any of the Claimant's reasons for appealing fall within one or more of the above-mentioned grounds of appeal and, if so, whether they raise an arguable case.

Analysis

There is no arguable case that the General Division ignored the Claimant's negative drug test

[10] The Claimant says that the General Division disregarded evidence that he passed a drug test before his dismissal.

[11] I fail to see an arguable case for this submission.

[12] The file contains several telephone memos documenting a Commission investigator's interviews with the Claimant. One of them contains this passage:

¹ *Department of Employment and Social Development Act* (DESDA), section 58(1).

² DESDA, sections 56(1) and 58(3).

³ DESDA, section 58(2).

⁴ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

The client stated that for "the first return to work test I had, I went 40 hour window [without smoking] and failed, then I **passed the return to work test**, then the first day I returned to work they performed another random test. **I passed that one** [emphasis added].⁵

[13] Another memo, this one conducted after the investigator interviewed the employer's human resources manager, said the following:

In response to T. K.'s statement that the client never did pass a return to work test, the client states that in fact, they went 12 days without consuming marijuana, and they were very symptomatic as a result, and **passed the test** and got a result below 2 nanograms in order to return to work [emphasis added].⁶

[14] As indicated by the above passages, the record contained evidence that the Claimant tested negative before being allowed to return to work. In its role as fact finder, the General Division is presumed to have considered all the evidence before it.⁷ What's more, the General Division clearly **did** consider the Claimant's negative drug test because it explicitly referred to it in its decision:

The Claimant said that **he took another drug test and passed it**. He was allowed to return to work. He was given another test on his first day back to work, and **he passed that test as well**. However, the following week, he was given another test and failed it. He said that he had not used marijuana for over 70 hours and that he tested barely above the threshold [emphasis added].⁸

[15] I don't see how the Claimant can argue that the General Division ignored the Claimant's passing tests.

⁵ See Supplementary Record of Claim dated November 19, 2019, GD3-36.

⁶ See Supplementary Record of Claim dated November 29, 2019, GD3-36.

⁷ See *Simpson v Canada (Attorney General)*, 2012 FCA 82.

⁸ See General Division decision, paragraph 22.

The General Division is entitled to weigh evidence

[16] So the General Division was aware that the Claimant had passed at least one drug test. However, the General Division concluded that this information was outweighed by other factors, for example:

- The Claimant signed a continued employment agreement that required him, among other conditions, (i) to pass eight drug tests over two years and (ii) make a follow-up appointment with his substance abuse counsellor;
- Although the Claimant tested below the two-nanogram threshold twice, he nonetheless tested above it on a third occasion;
- The Claimant refused to follow up with his substance abuse counsellor because he blamed him for giving him bad advice about how long it would take him to pass a drug test after abstaining from marijuana;
- Notwithstanding the Claimant's explanations, his failure to meet the above conditions placed him in violation of the continued employment agreement;
- The Claimant insisted that he had a prescription for medical marijuana, but he never provided proof of it; and
- If he did have such a prescription, he never told his employer about it, as required by his employer's drug and alcohol policy.

[17] Based on these factors, the General Division found that the Claimant's employer had reason to dismiss him for misconduct. I see nothing to suggest that, in doing so, the General Division misinterpreted the law or misread the evidence. The General Division is entitled to some leeway in how it chooses to weigh evidence, and it has the right to draw reasonable inferences from the information before it.

[18] The Claimant may not agree with how the General Division looked at the evidence, but that is not among the grounds of appeal permitted by the law.

Conclusion

[19] For the above reasons, I find that the appeal has no reasonable chance of success. Permission to appeal is refused.

Neil Nawaz
Member, Appeal Division