



Citation: *CJ v Canada Employment Insurance Commission*, 2022 SST 1303

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. J.
Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision under appeal: General Division decision dated September 20, 2022
(GE-22-1799)

Tribunal member: Janet Lew
Type of hearing: On the Record
Decision date: November 10, 2022
File number: AD-22-702

Decision

[1] The appeal is allowed. The matter will go back to a different member of the General Division for reconsideration.

Overview

[2] This is an appeal of the General Division decision. The General Division summarily dismissed the appeal of the Appellant, C. J. (Claimant). The General Division found that the Claimant had been suspended and then dismissed from his employment for misconduct. As a result, he could not receive Employment Insurance benefits.

[3] The General Division did not hold a hearing to address the misconduct issue. The General Division found that it would have made no difference if the Claimant had presented new evidence and made other arguments. The General Division determined that the Claimant's appeal had no reasonable chance of success in that the appeal was bound to fail.

[4] The Claimant has not directly addressed the summary dismissal issue in his appeal. However, he argues that the General Division made procedural, legal, and factual errors. He denies that there was any misconduct and says the General Division used an outdated definition of misconduct.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), accepts that the General Division erred in law in summarily dismissing the Claimant's appeal. The Commission says that appeals of misconduct cases are not clearly bound to fail, so the General Division should not have summarily dismissed the Claimant's appeal.

Issue

[6] The issue in this appeal is: Did the General Division make an error by summarily dismissing the Claimant's appeal?

Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.

Did the General Division make an error by summarily dismissing the Claimant's appeal?

[8] The General Division determined that the Claimant did not comply with his employer's COVID-19 vaccination policy, that he was aware of the consequences of non-compliance, and that his non-compliance led to his dismissal. The General Division found that the Claimant's actions amounted to misconduct. The General Division also found that there was nothing the Claimant could have added to his appeal to change the outcome.

[9] The General Division referred to section 53(1) of the *Department of Employment and Social Development Act*. The section requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[10] The General Division found that it was clear from the record that the Claimant's appeal did not have any reasonable chance of success and that his appeal was bound to fail. For that reason, it summarily dismissed the Claimant's appeal.

[11] The Commission notes that the Federal Court of Appeal has held that an appeal should be summarily dismissed only when it is obvious that the appeal is bound to fail no matter what evidence or arguments might be presented at a hearing.¹

¹ See Commission's representations to the Social Security Tribunal-Appeal Division (SST-AD), filed October 31, 2022, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

[12] The Commission argues that the Claimant's case is unlike those in which an applicant does not meet the qualifying conditions, has insufficient insurable hours, or has reached the maximum number of weeks paid for sickness benefits. The Commission says that those types of appeals are clearly bound to fail.

[13] The Commission argues that appeals of misconduct cases are not clearly bound to fail because an appellant might submit evidence or make arguments at a hearing that could alter the outcome.

[14] The Commission argues that, in effect, the General Division decided the case on the record when it decided that the appeal has no reasonable chance of success. But, the Commission notes, the Employment Insurance Section of the General Division does not have any authority to decide cases on the record. The Commission says that the general rule is that appellants must be given an opportunity to be heard.

[15] The Commission argues that the General Division used the summary dismissal procedure to disguise what it is not permitted to do. The Commission argues that the General Division should not be using the summary dismissal procedure to circumvent the general rule for Employment Insurance cases that appellants be given the chance to be heard.

[16] The Commission submits that, in the context of the summary dismissal procedure, it is inappropriate for the General Division to consider a case on its merits in the parties' absence and then find that the appeal has no reasonable chance of success.

[17] Indeed, the Claimant has raised several arguments. He has not had an opportunity to fully address these arguments.

[18] I accept the parties' arguments that the General Division erred in summarily dismissing the appeal when there was a reasonable chance of success. The General Division should not have relied on the procedure as a means to give a decision on the record, in light of the Claimant's evidence and arguments and the nature of the issues involved.

Remedy

[19] The Claimant states that he felt “somewhat handicapped articulating [him]self via writing opposed to talking ...”² He argues that he was not given a fair chance to comment. It is clear that the Claimant has more evidence and that he wishes to expand on some of his arguments.

[20] The Commission asks the Appeal Division to send the matter back to the General Division for reconsideration. The Claimant has no objections to sending the matter back. That is the appropriate remedy in this case, as it will provide the Claimant with a fair opportunity to give evidence and make arguments on the merits of his appeal on the misconduct issue.

Conclusion

[21] The appeal is allowed. I am returning this matter to a different member of the General Division for reconsideration.

Janet Lew
Member, Appeal Division

² See Claimant’s submissions, filed on October 6, 2022, at AD1B.