



Citation: *CA v Canada Employment Insurance Commission*, 2022 SST 1403

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: C. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 3, 2022
(GE-22-1763)

Tribunal member: Janet Lew

Decision date: December 1, 2022

File number: AD-22-797

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, C. A. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was disentitled from receiving Employment Insurance benefits because he had been suspended from his job for misconduct. He had refused to comply with his employer's vaccination policy.

[3] The Claimant argues that the General Division made several factual errors, including about whether he had been suspended from his job, and whether he was aware that he could be suspended or dismissed from his job for not complying with his employer's policy.

[4] Before the Claimant can move ahead with his 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, this ends the matter.

Issues

[6] The issues are as follows:

- (a) Is there an arguable case that the General Division made a factual error about whether the Claimant had been suspended from his job?

¹ Under section 58(2) of the *Department of Employment and Social Development 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.

- (b) Is there an arguable case that the General Division made a factual error about whether the Claimant was aware of the consequences of not complying with his employer's policy?
- (c) ©Is there an arguable case that the General Division made a factual error about whether the Claimant was aware that his employer was going to dismiss him on January 11, 2022?

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 factual errors?

– Whether the Claimant had been suspended from his job

[10] The Claimant argues that the General Division made a factual error that his employer had suspended from his job. He denies that his employer suspended him. He says that he was on a leave of absence from his job, even if he did not ask for the leave.

³ See section 58(1) of the *Department of Employment and Social Development Act*.

[11] In the initial Record of Employment, the employer stated that it either dismissed or suspended the Claimant from his employment.⁴

[12] The Claimant denies that his employer dismissed or suspended him. He says that his employer completed the Record of Employment incorrectly. He says the employer placed him on a leave of absence. He says the Record of Employment should have said he was on a leave of absence. Indeed, the Claimant notes that his employer amended the Record of Employment on October 25, 2022. The amended Record now shows that the Claimant was on a leave of absence.⁵

[13] The Appeal Division generally does not consider new evidence. The amended Record of Employment simply supports what the Claimant has been saying all along, that his employer incorrectly filled out the initial Record of Employment.

[14] The General Division was aware of the Claimant's assertions that his employer had incorrectly filled out the initial Record of Employment. However, the General Division found that the explanation on the Record of Employment was not determinative. The General Division rejected any notion that it was bound by the employer's explanation for the Claimant's separation from his employment.

[15] Instead, the General Division looked to the Claimant's actions. It found that the Claimant's actions defined the circumstances leading to the separation from his employment. It found that the Claimant's refusal to comply with his employer's vaccination policy led to him not working. The General Division found that this met the definition of a suspension under the *Employment Insurance Act*.

[16] The General Division also found that, if it had been a leave of absence under the *Employment Insurance Act*, the employer and claimant would have had to agree to the leave of absence. This would involve an agreed end date to the leave of absence. As the General Division found, these considerations were missing. So, it found that there was no leave of absence.

⁴ See Record of Employment dated December 1, 2021, at GD 3-21.

⁵ See Record of Employment dated October 25, 2022, at AD 1-31.

[17] I am not satisfied that there is an arguable case that the General Division made an error of fact on this point. The General Division was mindful of the evidence before it, as well as the Claimant's assertions that the information on the Record of Employment was wrong.

[18] The General Division simply found that it did not matter what the Record of Employment stated. The *Employment Insurance Act* defines both a leave of absence and a suspension, and the General Division found that the Claimant's circumstances did not fall into a leave of absence under the *Employment Insurance Act*.

– **Whether the Claimant was aware of the consequences of not complying with his employer's policy**

[19] The Claimant argues that the General Division made a factual error when it found that he was unaware that his employer could dismiss or suspend him from his employment. He says that if the General Division had not made this error, there would have been no misconduct. After all, as the General Division wrote, misconduct arises if a claimant knows or should have known that their conduct could get in the way of carrying out their duties toward their employer and there was a real possibility of being let go because of that.

[20] The General Division found that the Claimant knew that his refusal to comply with his employer's policy could lead to being placed on an unpaid leave of absence (suspension) and an eventual dismissal.⁶ The General Division did not fully set out the evidence that supported its findings that the Claimant knew the consequences of non-compliance.

[21] Even so, the evidence shows that the Claimant should have at least known the consequences for not complying with his employer's vaccination policy. The employer sent several messages, including on August 13, 2021, September 8, 2021,

⁶ See General Division decision, at para 35.

September 9, 2021, and on October 14, 2021⁷ setting out what the consequences would be for an employee not complying with its policy.

[22] The first of these notices did not mention any consequences, but the notice dated September 8, 2021, said, “Unless you are fully vaccinated, you will not be allowed to continue working after November 1, 2021. This means that your employment will be suspended without pay or, as the case may be, terminated”.⁸ The notice dated September 21, 2021, said the same thing.⁹

[23] The notice dated October 14, 2021, stated that unless an employee was fully vaccinated, or unless they had an exception, they would be placed on leave without pay or, as the case may be, terminated.¹⁰

[24] Given the evidence, I am not satisfied that the Claimant has an arguable case that the General Division made an error that he knew or should have known that his refusal to comply with his employer’s policy could lead to being placed on an unpaid leave of absence, suspension, or even dismissal.

– **Whether the Claimant’s employer was going to dismiss him on January 11, 2022**

[25] The Claimant argues that the General Division made a factual error when it found that he was going to be dismissed on January 11, 2022. The Claimant denies that anyone ever advised him that he could be dismissed on that date.

[26] The General Division wrote, “This leave of absence was initially for a definite period to January 11, 2022, at which time the Claimant would be dismissed if he didn’t agree to follow the vaccination policy. The employer deferred the Claimant’s dismissal”.¹¹

⁷ See employer’s notices, at GD 3-27 to GD 3-30.

⁸ See employer’s notice dated September 8, 2021, at GD 3-28.

⁹ See employer’s notice dated September 21, 2021, at GD3 – 29.

¹⁰ See employer’s notice dated October 14, 2021, at GD 3-30.

¹¹ See General Division decision, at para 5.

[27] It also wrote, “On November 30, 2021, the employer wrote to the Claimant stating he would be dismissed effective January 11, 2022, if he didn’t provide proof of vaccination by January 10, 2022”.¹²

[28] Nothing turns on whether the employer was going to dismiss the Claimant because the employer did not dismiss the Claimant on January 11, 2022. Even so, the evidence supports the General Division’s findings. The General Division specifically referred to the employer’s letter dated November 30, 2021, in which the employer clearly stated that the Claimant would be released from his employment effective January 11, 2022, unless he satisfied the conditions of employment.

[29] I am not satisfied that the Claimant has an arguable case on this point.

Conclusion

[30] Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

¹² See General Division decision, at para 25, citing page GD 3-51.