



Citation: *LW v Canada Employment Insurance Commission*, 2022 SST 1415

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: L. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 6, 2022
(GE-22-2652)

Tribunal member: Janet Lew

Decision date: December 5, 2022

File number: AD-22-814

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, L. W. (Claimant), is appealing the General Division decision of October 6, 2022.

[3] The General Division dismissed the Claimant's application to rescind or amend its decision of March 21, 2022 (Earlier Decision). The General Division found that the Claimant's additional information did not support new facts to support amending or rescinding the Earlier Decision.

[4] The Claimant argues that the General Division made procedural, jurisdictional, and factual errors.

[5] 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.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, this ends the matter.

Issues

[7] The issues are as follows:

- (a) Is there an arguable case that the General Division made any procedural errors?

¹ Under section 58(2) 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.

- (b) Is there an arguable case that the General Division made any jurisdictional errors?
- (c) Is there an arguable case that the General Division made important factual errors?

Analysis

[8] 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

[9] 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.

[10] 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.

[11] The General Division's decision relates to the Claimant's application to rescind or amend its Earlier Decision. So, I have to focus on the Claimant's application to rescind or amend.

[12] I will not be considering the Claimant's application of her appeal of the General Division decision of March 21, 2022. In other words, I will not be looking at or deciding whether there is an arguable case that the General Division made an error when it decided that the Claimant lost her job because of misconduct. That is the subject of a separate appeal to the Appeal Division.

³ See section 58(1) of the DESD Act.

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

[13] The Claimant argues that the General Division made procedural errors when it dismissed her application to rescind or amend its earlier decision. However, the Claimant has not identified any errors that show she did not get a fair hearing. For instance, the Claimant does not allege that she did not get a fair chance to present her case, or that she did not receive some of the file materials to be able to respond to them.

[14] I do not see that there were any procedural irregularities or that the General Division failed to ensure that the process was fair. I am not satisfied that the Claimant has an arguable case on this point.

Is there an arguable case that the General Division made any jurisdictional or legal errors?

[15] The Claimant argues that the General Division made jurisdictional and legal errors by (1) failing to consider the fact that no one had ever suggested that she would be returning to work on March 1, 2021, and (2) failing to consider the relevance of the evidence she submitted with her application to rescind or amend.

[16] The Claimant argues that the General Division should have accepted the new facts because they were relevant to her appeal on the misconduct issue.

– The Claimant’s documents she filed with her rescind or amend application

[17] The Claimant filed the following with her application to rescind or amend:

- i. Employment Standards Branch letter dated June 20, 2022⁴
- ii. Employer’s letter and cheque stub dated June 10, 2022⁵

⁴ See RAGD 2-5 (and at RAGD 3-3).

⁵ See RAGD 2-6 (and at RAGD 3-7).

- iii. Doctor's letter dated March 31, 2022⁶ and
- iv. Claimant's letter dated August 19, 2022.⁷

[18] The Claimant says that these documents are relevant because they establish that she was still on medical leave and was not expected to return to work on March 1, 2021. So, she says they establish that there was no misconduct and no basis for her employer to dismiss her. For instance, the employer's letter and cheque stub do not mention anything about misconduct.

[19] The Claimant also says that the letter from the Employment Standards Branch shows that her employer was legally required to pay her severance. So, if her employer had to pay her severance, then she says there was no basis for it to dismiss her with cause.

[20] The Claimant's letter represents the Claimant's arguments and does not represent new facts, or show that the General Division concluded its Earlier Decision without knowledge of or was based on a mistake as to some material fact.

[21] The General Division examined each of the other documents. It looked at whether each of these documents met the requirements to allow it to consider rescinding or amending its Earlier Decision.

– **Requirements to rescind or amend a decision**

[22] The General Division recognized that it could rescind or amend its Earlier Decision if it was satisfied that the Claimant had presented new facts, or if its Earlier Decision was made without knowledge of, or was based on a mistake as to some material fact.⁸

[23] The General Division member found that, for facts to be new, they had to have happened after she made her decision. If the new facts happened before her decision,

⁶ See RAGD 3-2.

⁷ See RAGD 3-4 to 3-6.

⁸ See General Division decision, at para 7, citing section 66(1)(a) of the DESD Act.

they must not have been able to be discovered by the Claimant acting diligently. And, finally, the new facts had to be decisive of the issue to be decided.⁹

– **The General Division decision**

[24] The General Division considered whether the Claimant's documents were decisive, rather than whether they were relevant to the misconduct issue. The General Division was following established legal principles.¹⁰

[25] While the documents may have been relevant, they did not show why the employer dismissed the Claimant. As the General Division found, neither letter refers to the circumstances that led the employer to dismiss the Claimant.¹¹

[26] The Employment Standards Branch letter confirms that the Claimant had received payment from her employer, "in full satisfaction of your complaint. Accordingly, the Employment Standards Branch will take no further action regarding this complaint because the dispute that caused the complaint has been resolved".¹² The employer's letter and cheque stub simply refers to the payment as "salary".¹³

[27] Clearly, the Claimant had a complaint against her employer. But, contrary to the Claimant's suggestions, neither the Employment Standards Branch letter nor the cheque stub shows that her employer was aware that the Claimant remained unwell and was on sick leave when it dismissed her. The fact that neither letter uses the word "misconduct" does not show what happened to have led to the Claimant's dismissal.

[28] The doctor's letter explains why the Claimant did not get a note from her doctor on time. However, as the General Division explained, the information was not new. The Claimant had already explained why she had not received a note from her doctor. It was immaterial for the General Division why the Claimant had not received the note on time.

⁹ See General Division decision, at para 8, citing *Canada (Attorney General) v Chan*, A-185-94.

¹⁰ See also *Green v Canada (Attorney General)*, 2012 FCA 313.

¹¹ See General Division decision, at para 18.

¹² See RAGD 2-5 (and at RAGD 3-3).

¹³ See RAGD 2-6 (and at RAGD 3-7).

[29] Instead, the General Division determined that the Claimant could have at least alerted her employer that she was unable to get a note on time. The doctor's letter of March 31, 2022 did not change the General Division's decision on this point.

[30] The General Division applied the appropriate considerations when it dismissed the Claimant's application to amend its Earlier Decision. For that reason, I am not satisfied that the appeal has a reasonable chance of success on this argument.

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

[31] The Claimant argues that the General Division made factual errors. She argues that the General Division failed to consider that she had never given anything to her employer for it to assume she would be returning to work on March 1, 2021.

[32] As I indicated above, this application concerns whether the General Division made any errors relating to the Claimant's application to rescind or amend the Earlier Decision. This particular argument is more suitable for the Claimant's appeal of the General Division's decision of March 21, 2022.

Conclusion

[33] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal of the General Division decision of October 6, 2022 will not be going ahead.

[34] The hearing of the Claimant's appeal of the General Division decision of March 21, 2022, will be going ahead as scheduled on January 11, 2023.

Janet Lew
Member, Appeal Division