



Citation: *CK v Canada Employment Insurance Commission*, 2023 SST 153

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: C. K.

Respondent: Canada Employment Insurance Commission
Representative: A. Fricker

Decision under appeal: General Division decision dated August 31, 2022
(GE-22-1507)

Tribunal member: Janet Lew

Type of hearing: In Writing
Decision date: February 13, 2023
File number: AD-22-696

Decision

[1] The appeal is allowed. The matter will be go 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. K. (Claimant). The General Division found that the Claimant had been suspended from her employment for misconduct, which meant that she was disentitled from receiving Employment Insurance benefits. The Claimant had not complied with her employer's vaccination policy.

[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 presented new evidence or 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 argues that the General Division made jurisdictional and legal errors. Essentially, she says that her employer's vaccination policy was unlawful, and so, for that reason, argues that she did not have to comply with it. So, she claims that misconduct could not have arisen if she did not have to comply with the policy.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), argues that there are no grounds for appeal under section 58(1) of the *Department of Employment and Social Development Act*. The Commission asks the Appeal Division to dismiss the Claimant's appeal.

Issue

[6] The issue in this appeal is simply: 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 her employer's COVID-19 vaccination policy, that she was aware of the consequences of non-compliance, and that her non-compliance led to her dismissal. The General Division found that this amounted to misconduct. The General Division also found there was nothing the Claimant could have added to her 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 her appeal was bound to fail. For that reason, it summarily dismissed the Claimant's appeal.

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

[12] There are certain types of appeal that are clearly bound to fail. These could include, for instance, cases where a claimant has insufficient insurable hours, or where a claimant has reached the maximum number of weeks paid for sickness benefits.

[13] But, appeals of misconduct cases are not clearly bound to fail because there could be evidence or arguments submitted at a hearing that could alter the outcome. That is not to suggest that the Claimant here has in fact presented any evidence or

¹ See Commission's representations to the Social Security Tribunal—Appeal Division (SST-AD), filed September 20, 2022, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

arguments that could have changed the outcome in her favour. But, the General Division did not give her the chance to be heard.

[14] In the context of the summary dismissal procedure, it is not appropriate 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.

[15] The General Division should not have relied on the procedure as a means to give a decision on the record, in light of the nature of the issues involved.

Remedy

[16] It is clear that the Claimant has more evidence and that she wishes to expand on some of her arguments. The appropriate remedy in this case is to send the matter back to the General Division for reconsideration. It will provide the Claimant with a fair opportunity to give evidence and make her arguments.

[17] While the Claimant suggests that the Appeal Division should conduct a thorough review, it is not appropriate for me to hear the matter at the Appeal Division and decide whether there was misconduct, in part, because it would involve receiving evidence for the first time. Finally, to be clear, I have not made any determination—one way or the other—on the merits of the Claimant's case on the misconduct issue. That is for the General Division to decide.

Conclusion

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

Janet Lew
Member, Appeal Division