Citation: *LN v Canada Employment Insurance Commission*, 2023 SST 182

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	L. N.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 6, 2022 (GE-22-2205)

Tribunal member:	Stephen Bergen
Decision date:	February 18, 2023
File number:	AD-23-56

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] L. N. is the Applicant for leave to appeal. She is also the one who claimed Employment Insurance (EI) benefits so I will refer to her as the Claimant. The Claimant lost her job because she would not comply with her employer's vaccination policy. She applied for EI benefits on September 11, 2021.

[3] The Employment Insurance Commission (Commission) decided that the Claimant was disqualified from receiving benefits. It found that she lost her employment because of her misconduct. It also decided that she was disentitled to receiving regular EI benefits as of November 7, 2021, because she was not available for work.

[4] The Claimant asked the Commission to reconsider. The Commission responded with two separate reconsideration decisions. It refused to reconsider its disqualification in one decision. It refused to change its disentitlement decision in the other.

[5] The Claimant appealed both reconsiderations decisions. Both were heard at the same time by the General Division, but the General Division produced a separate decision for each of the Claimant's appeals.

[6] This application concerns only the General Division decision to dismiss the Claimant's appeal of the disentitlement (GE-22-2205). The General Division found that she had not proven her availability because she had set conditions that unduly limited her chances of returning to work.

[7] The Claimant disagrees with the General Division's decision. She is now asking for leave to appeal to the Appeal Division.

[8] I am refusing leave to appeal. There is no arguable case that the General Division made an error of jurisdiction. In addition, I have not found any instance in which the General Division relied on a finding that misunderstood or ignored evidence.

Preliminary matters

[9] The Claimant talked about several things in her Application to the Appeal Division. She explained why she believed it was reasonable for her to refuse to be vaccinated. She spoke of her vulnerability to an adverse reaction and of her views of the safety and efficacy of the vaccines more generally. She also spoke of her objections to vaccine mandate policies. She noted that alternative accommodations were sometimes available in the health care field that did not required vaccination.

[10] The Claimant's statement also included evidence of her availability for work. She referred to her previous and current job search efforts, and to her other efforts to find work.

[11] Some of this information was presented to the General Division and some of it is new. To the extent that it is new evidence, I will not be considering it. The Appeal Division is not authorized to consider evidence that was not available to the General Division.[1]

Issue

[12] Did the General Division make an error of jurisdiction?

[13] Did the General Division ignore or misunderstand the Claimant's evidence that

a) the employer had not taken the Claimant's particular health risks into consideration?

b) the Claimant looked for work outside the field of healthcare?

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I am not giving the Claimant permission to appeal

[14] For the Claimant's application for leave to appeal to succeed, her reasons for appealing must fit within the "grounds of appeal." To grant this application for leave and permit the appeal process to move forward, I must find that there is a reasonable chance of success on one or more grounds of appeal.

[15] The grounds of appeal identify the kinds of errors that I can consider. I may consider only the following errors:

a) The General Division hearing process was not fair in some way.
b) The General Division did not decide an issue that it should have decided. Or, it decided something it did not have the power to decide (error of jurisdiction).
c) The General Division based its decision on an important error of fact.
d) The General Division made an error of law when making its decision.[2]

[16] The Courts have equated a reasonable chance of success to an "arguable case."[3]

– Error of Jurisdiction

[17] On the Application to the Appeal Division form, the Claimant selected "error of jurisdiction" from the grounds of appeal. The application also provides a space for claimants to explain how the General Division made the error that they select. In that space, the Claimant reviewed her evidence and arguments to the General Division.

[18] This did not help me understand why she thought the General Division had made an error of jurisdiction. I wrote to the Claimant on February 3, 2023, to ask her to clarify which error or errors that she believed the General Division had made. I also asked why she thought the General Division had made an error.

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[2] This is a plain language version of the three grounds. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[3] See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.

[19] The Claimant responded on February 7, 2023, to say that she disagreed that she had set personal conditions that unduly limited her chances of finding employment. Once again, she described her views of the vaccine mandate and how the employer had disregarded her concerns about its safety. On February 15, 2023, she sent me a second response. In this response, she restated her objection to the General Division's finding that she had unduly limited her chances of going back to work. She said that the General Division had not considered that her work history in healthcare did not limit her from finding work. She emphasized that she had widened her job search and looked for work in non-healthcare related fields. She spoke again about how the vaccination policy was unreasonable.

[20] The Application to the Appeal Division states that the General Division makes an error of jurisdiction when it fails to decide something it must decide, or when it decides something that it doesn't have the power to decide.

[21] There is no arguable case that the General Division made an error of jurisdiction.

[22] The Claimant did not say how the General Division failed to consider the issue of her availability for work and entitlement to benefits. She did not claim that the General Division considered some issue that it should not have considered.

[23] The General Division can only consider issues that arise from the reconsideration decision that is on appeal.[4] There was one issue in the May 18, 2022, reconsideration decision. The Commission had found that the Claimant was not entitled to benefits because she was not available for work. The only issue that the General Division had jurisdiction to consider was whether the Claimant had proven that she was available for work.[5]

[24] The General Division decision considered the issue of the Claimant's availability, as it was required to do. It determined that she was not available for work within the

[4] See section 113 and section 112 of the Employment Insurance Act (EI Act).
[5] See section 18(1) of the EI Act.

meaning of the EI Act. Because of this, the General Division found that she was disentitled to benefits.

[25] The Commission can also disentitle a claimant who has not made "reasonable and customary efforts" to find employment.[6] The General Division considered whether the Claimant was also disentitled for this reason. However, this issue is not found in the reconsideration decision that was on appeal. It is arguable that the General Division should not have considered this issue at all.

[26] Even so, I can only allow the appeal to proceed if the Claimant has a reasonable chance of success. When the General Division denied her appeal, it did so because it found that she was not available for work. To succeed at the Appeal Division, the Claimant would need to show that the General Division made an error in how it arrived at that finding.

[27] I am mindful that the General Division's finding that the Claimant made reasonable and customary job search efforts was in the Claimant's favour. The General Division may have exceeded its jurisdiction by considering the issue, but the Claimant is no more likely to succeed in her appeal as a result. The fact that the General Division considered the "reasonable and customary efforts" issue has no bearing on whether it made an error affecting its finding that she was not available for work.[7]

[28] The General Division did not otherwise decide any issue that it did not have power to decide.

[29] There is no arguable case that the General Division made an error of jurisdiction.

[30] As an aside, the Claimant should not confuse the issue in this application with the issue in her other appeal. This application is about her availability and disentitlement. The other appeal was concerned with whether the Claimant lost her

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[6] See section 50(8) of the EI Act *and* section 9.001 of the *Employment Insurance Regulations* (Regulations).
[7] The General Division found that the Claimant was disentitled to benefits because she was unavailable for work as required by s.18(1) of the EI Act.

employment for misconduct and whether she should be disqualified from receiving benefits as a result. Disqualification for misconduct is not the same as disentitlement for unavailability.[8]

– **Important Error of Fact**

[31] As noted above, a jurisdictional error may be found where the General Division fails to consider a legal **issue** that it was required to consider. The Claimant did not highlight any legal issue of concern.

[32] If the Claimant is concerned that the General Division decision failed to consider or properly understand relevant evidence, she would be asserting an "important error of **fact."** This would not be a jurisdictional error.

[33] In this case, it appears that the Claimant meant to argue (or meant to also argue) that the General Division made an important error of fact. In her February 7, 2023, letter, she disagreed with the finding that she set personal conditions that unduly limited her chances of going back to work. Following this statement, the Claimant discussed concerns with the facts of the case.

[34] In her February 15, 2023, letter, she said: "The General Division did not consider that just because [she] worked in the healthcare field it does not limit [her] from finding a job or it does not mean that [she is] not capable of and available for work."

[35] Therefore, I will consider whether there is an arguable case that the General Division made an important error of fact. This is consistent with direction from the Federal Court, which says that the Appeal Division should look beyond the stated grounds of appeal when it considers leave to appeal applications from self-represented parties, like the Claimant.[9]

[8] See section 30 of the EI Act.
[9] See, for example, the decision in *Karadeolian v. Canada (Attorney General)*, 2016 FC 615.

[36] The General Division decided that the Claimant had a desire to return to work as soon as possible. It also found that she had also made job search efforts that expressed that desire. These findings were in the Claimant's favour.

[37] However, the General Division found against the Claimant on the final factor that it had to consider.[10] It found that the Claimant was unavailable because she had set personal conditions that unduly limited her chances of finding employment.

[38] To grant leave to appeal, I must find an arguable case that the General Division mad an error in finding that the Claimant set personal conditions that unduly limited her chances of finding employment. I must find that the General Division overlooked or misunderstood evidence that was relevant to this finding.[11]

Reasonableness of the employer's actions

[39] In the Claimant's original Application to the Appeal Division, and her later letters, she implies that the General Division failed to consider the actions of her employer. She noted that she was especially vulnerable to an adverse reaction from the vaccine. In her view, the employer acted unreasonably in terminating her for refusing vaccination

[40] There is no arguable case that the General Division made an important error of fact in relation to her employer's actions. She has not said what evidence the General Division overlooked or misunderstood about how she was treated by the employer. In addition, she has not explained how this would have been relevant to her availability for work after her dismissal. That is the only issue in this appeal.

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[10] The three factors are described in a Federal Court of Appeal decision, *Faucher v. Canada (Attorney General)*, A-57-96.

[11] This is a paraphrase and a simplification. Section 58(1)(c) of the DESDA that the General Division makes an error when it has, "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

The Claimant set limits on her job search

[41] In her Application to the Appeal Division, the Claimant asserted that she applied to multiple places. These included non-healthcare-related service industries. In her February 15, 2023, letter, she argued that the General Division failed to consider that she could work outside of healthcare and that she had widened her job search to other kinds of jobs. She disagrees that she unduly limited her job search because she was unvaccinated.

[42] There is no arguable case that the General Division misunderstood or ignored evidence about the nature of her job search.

[43] The General Division's summary of the Claimant's evidence appears to cover the essentials, and is essentially correct. The Claimant did testify that she had applied for at least 20 jobs altogether,[12] and that some were non-nursing jobs. When the General Division member asked her how many of the jobs were non-nursing, she said that there were "a few." The jobs she identified were for a medical assistant, non-nursing clinic jobs, and a receptionist job in a chiropractic office.[13] She did not identify any job she applied for that was unrelated to healthcare.

[44] I also note that the Claimant told the Commission on February 28, 2022, that she was applying for jobs from time to time but was unable to find anything because "most employers" were requiring her to be vaccinated.[14] The Claimant confirmed in her testimony that she believed her vaccination status affected whether employers were interested in her.[15] She told the Commission on May 28, 2022, that she would not accept work that required her to be vaccinated because did not want to put her health at risk.[16]

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[12] Listen to the audio recording of the General Division hearing at timestamp: 0:26:15.
[13] Listen to the audio recording of the General Division hearing at timestamp: 0:29:30.
[14] See GD3-16.
[15] Listen to the audio recording of the General Division hearing at timestamp: 0:27:45.
[16] See GD3-25.

[45] The General Division found that the Claimant knew that her decision to not get vaccinated would limit her chances of future employment. It said that there was a "high expectation for vaccination in the medical field,"[17] and it found that the Claimant, "focussed her search on medical-related jobs with the full knowledge that those jobs would likely require vaccination."[18] It did not accept that she, "attempted to widen her search to jobs outside of those related to the medical field that might not have as stringent vaccination requirements."[19]

[46] These findings appear to be consistent with the evidence that was available to the General Division member. The Claimant may disagree with how the General Division assessed the evidence or with its conclusions, but I can only consider whether the General Division made an error under the grounds of appeal. It is not my role to re-evaluate or reweigh the evidence.[20]

[47] I am uncertain if the Claimant is making the argument that her vaccination status is not a significant enough limitation for the General Division to have found it to be "unduly limiting." If so, that is not something that I may consider.

[48] The test for availability—including the part dealing with whether a claimant sets a condition that is "unduly limiting"—is settled law. In deciding that the Claimant set conditions what were "unduly limiting," the General Division applied the law to the facts of the case. It had to decide what is known as a "question of mixed fact and law."

[49] The Federal Court of Appeal has stated that the Appeal Division does not have the jurisdiction to consider such questions.[21] That means that I am not allowed to review whether the Claimant's vaccination status sufficiently limited her chances of employment that it could be considered an "undue limit."

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[17] See General Division decision, para 41.
[18] See General Division decision, para 38.
[19] See General Division decision, para 39.
[20] See *Bergeron v. Canada (Attorney General)*, 2016 FC 220. See also *Hideq v. Canada (Attorney General)*, 2017 FC 439.
[21] See *Quadir v. Canada (Attorney General)* 2018 FCA 21.

[50] I note that the Claimant's submissions emphasized several concerns with vaccines and vaccine mandates. She talked about her personal anxiety about adverse effects from the Covid vaccines, the safety and efficacy of the Covid vaccines generally, and how her employer applied its Covid policy. I appreciate that the Claimant was legitimately fearful of accepting the vaccination for Covid, and that this put her in a very difficult position as a health professional looking for work.

[51] Unfortunately, none of the Claimant's concerns suggest that the General Division may have made an error when it found that she had "unduly limited" her chances of finding employment by her unwillingness to be vaccinated.

[52] I have reviewed the appeal record for any finding that may have ignored or misunderstood relevant evidence, but I cannot discover an arguable case that the General Division made any other important error of fact.

[53] The Claimant has no reasonable chance of success in this appeal.

Conclusion

[54] I am refusing permission to appeal. This means that the appeal will not proceed.

Stephen Bergen
Member, Appeal Division