



Citation: *MM v Canada Employment Insurance Commission*, 2023 SST 526

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: M. M.

Respondent: Canada Employment Insurance Commission
Representative: M. Allen

Decision under appeal: General Division decision dated November 3, 2022
(GE-22-2233)

Tribunal member: Janet Lew

Type of hearing: In Writing

Decision date: April 26, 2023

File number: AD-22-969

Decision

[1] The appeal is allowed. The matter will 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, M. M. (Claimant), having found that the appeal did not have a reasonable chance of success. The Claimant had been placed on an indefinite leave of absence from her employment. She had not complied with her employer's mandatory COVID-19 vaccination policy. The General Division found that the Claimant's non-compliance amounted to misconduct. This resulted in a disentitlement to 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 even if the Claimant had presented new evidence or made other arguments. The General Division concluded that the Claimant's appeal had no reasonable chance of success and that the appeal was bound to fail.

[4] The Claimant argues that the General Division made legal and factual errors. The Respondent, the Canada Employment Insurance Commission (Commission), accepts that the General Division made a legal error 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

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

Analysis

[6] 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?

[7] The General Division determined that:

- the Claimant did not comply with her employer's COVID-19 vaccination policy,
- she was aware of the consequences of non-compliance, and
- her non-compliance led to her indefinite suspension.¹

[8] 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.

¹ The Claimant argued that her indefinite suspension should be treated as a dismissal. The General Division noted that the evidence on file "overwhelmingly indicates that the employer placed the Claimant on an unpaid leave of absence, which is akin to a suspension." The General Division cited, for instance, the fact that both parties agreed that she could return to her job if she was vaccinated or if the employer lifted its vaccination requirement. See para 23.

[11] The Claimant made more arguments about why the General Division was wrong in finding that non-compliance was misconduct. The Claimant argues that the General Division misapprehended the facts.

[12] She says that she worked for a nursing agency, rather than a hospital. So, she says that this meant she had a different work environment and duties. She says the evidence shows that she was effectively dismissed, rather than suspended. She also argues that vaccination represented a new condition of her employment. So, she says that she could refuse to abide by it, particularly as it involved medical intervention.

[13] The Claimant went further into the arguments she made at the General Division. The extent of these arguments show that by summarily dismissing the Claimant's appeal, she did not get the chance to fully set out her case. If there had been a hearing, she could have argued her case better.

[14] The Commission notes that 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.²

[15] The Commission argues that this is unlike other cases where an appeal is bound to fail. They include cases where a claimant does not meet the qualifying conditions, has insufficient insurable hours, or where a claimant has reached the maximum number of weeks paid for sickness benefits.

[16] The Commission argues that 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.

[17] 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

² See Commission's representations to the Social Security Tribunal—Appeal Division (SST-AD), filed February 3, 2023, at AD2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

not have any authority to decide cases on the record. The Commission notes that the general rule is that appellants must have the chance to be heard.

[18] 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.

[19] The Commission submits that, 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.

[20] I accept the parties' arguments that the General Division erred in summarily dismissing the appeal. 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

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

Conclusion

[22] I am allowing the appeal. I am sending this matter to a different member of the General Division for reconsideration.

Janet Lew
Member, Appeal Division