



Citation: *FA v Canada Employment Insurance Commission*, 2023 SST 540

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: F. A.

Respondent: Canada Employment Insurance Commission
Representative: Josée Lachance

Decision under appeal: General Division decision dated October 31, 2022
(GE-22-2127)

Tribunal member: Janet Lew

Type of hearing: In Writing

Decision date: April 28, 2023

File number: AD-23-178

Decision

[1] The appeal is allowed. The matter will go to a different member of the General Division for reconsideration.

Overview

[2] The Appellant, F. A. (Claimant), is appealing the General Division decision. The General Division summarily dismissed the Claimant's appeal, having found that it did not have a reasonable chance of success. The Claimant had been placed on a leave of absence from his employment because he had not complied with his 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 jurisdictional, procedural, legal and factual errors. He filed several documents with his appeal, including a copy of his employment contract and collective bargaining agreement. He also included a copy of *A.L. v Canada Employment Insurance Commission*,¹ a decision that another member of the General Division issued in an unrelated case. That member issued *A.L.* after the Claimant's decision had already been issued.

[5] The Respondent, the Canada Employment Insurance Commission (Commission), accepts that the General Division made a legal error when it summarily dismissed the Claimant's appeal. The Commission says that appeals of misconduct

¹ *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.

cases are not clearly bound to fail, so the General Division should not have summarily dismissed the Claimant's appeal.

Preliminary matters

[6] Under the *Social Security Tribunal Regulations*,² the Appeal Division has two options:

- i. It can make a decision on the appeal, or
- ii. It can schedule a hearing – but only if it determines that a hearing is needed.

[7] I determined that the matter did not require a hearing. Even so, I invited the Claimant to provide submissions and explain why a hearing was necessary, in light of the Commission's concession and request to return this matter to the General Division.

[8] The Claimant confirmed that he continues to seek an oral hearing at the Appeal Division. He opposes having the matter returned to the General Division. He lacks confidence in the process there. He is asking the Appeal Division to decide whether there was any misconduct in his case.

[9] Unlike at the General Division, the Appeal Division generally does not consider any new evidence.³ So, the Appeal Division would not be able to consider anything that was not already before the General Division, whether that evidence was to come from the Claimant or the Commission. And there may be arguments that were not raised or considered that should be assessed at the General Division first.

[10] Returning this matter to the General Division for a redetermination is the best outcome that could result even if there were to be a hearing at the Appeal Division. It would be fundamentally unfair to decide the underlying misconduct issue when neither

² See section 63 of the *Social Security Tribunal Rules of Procedure*. For appeals of summary dismissal decisions, sections 34 to 37 of the former *Social Security Tribunal Regulations* continue to apply.

³ The Appeal Division very exceptionally considers new evidence, such as when it is intended to establish procedural breaches. That is not the case here.

party has had the chance to properly present their cases. I am unprepared to decide the misconduct issue when it may potentially prejudice one or both parties.

[11] As returning this matter is the best result that could possibly occur, I remain unconvinced that a hearing at the Appeal Division is necessary. I recognize the Claimant's concerns about the General Division process. But I can issue directions to address those concerns.

[12] In short, I have decided against scheduling a hearing and will make a decision on the appeal without one.

Issues

[13] The issues in this appeal are:

- a) Did the General Division make an error by summarily dismissing the Claimant's appeal?
- b) If so, how should the error be fixed?

Analysis

[14] 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?

[15] The General Division determined that:

- the Claimant did not comply with his employer's COVID-19 vaccination policy and did not get an exemption from the policy,
- he was aware of the consequences of non-compliance, and
- his non-compliance led to his suspension in February 2022.

[16] The General Division found that the Claimant's non-compliance with his employer's vaccination policy amounted to misconduct. The General Division also found there was no evidence or any arguments the Claimant could have made that would have led to a different conclusion.

[17] 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.

[18] 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 his appeal was bound to fail. For that reason, it summarily dismissed the Claimant's appeal.

[19] The Claimant filed a copy of the General Division decision of *A.L. v Canada Employment Insurance Commission* in his appeal to the Appeal Division. It is clear that the Claimant intends to rely on *A.L.* and make arguments about how it relates to his case. The fact that the Claimant has filed *A.L.* shows that he did not get the chance to fully set out his case. If there had been a hearing at the General Division, he could have presented all of his evidence and arguments.

[20] 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 preordained (meaning bound to fail), no matter what evidence or arguments might be presented at a hearing.⁴

[21] The Commission argues that the Claimant's case is unlike other cases where an appeal is bound to fail. Cases where an appeal is bound to fail include ones 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.

⁴ See Commission's Representations to the Social Security Tribunal – Appeal Division, at AD 2-3, citing *Lessard-Gauvin v Canada (Attorney General)*, 2013 FCA 147.

[22] 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 change the outcome. So, the Commission says that it was not appropriate then for the General Division to have summarily dismissed the matter.

[23] I accept the parties' arguments that the General Division made an error by choosing to summarily dismiss 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

[24] The Claimant would like the Appeal Division to resolve all issues. But it is clear that the Claimant has more evidence and arguments. It would be unfair to deprive the Claimant of the chance to fully present his case. 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 both the Claimant and the Commission a fair opportunity to present their respective cases.

[25] The Claimant is concerned about the fairness of the General Division procedures. This decision should address those concerns, as it should be evident that the summary dismissal procedure is not appropriate for misconduct cases. I am also sending this matter to a different member of the General Division for reconsideration.

Conclusion

[26] 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