



Citation: *XL v Canada Employment Insurance Commission*, 2023 SST 963

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** X. L.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated April 21, 2023  
(GE-22-3454)

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**Tribunal member:** Melanie Petrunia

**Decision date:** July 22, 2023

**File number:** AD-23-424

## Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

## Overview

[2] The Applicant, X. L. (Claimant), was dismissed from her job as a financial planner at a bank. Her employer said that she was terminated for improperly accessing customer accounts and sharing confidential information. It said that this violated company policies.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason that the Claimant lost her job is considered misconduct. It disqualified her from receiving benefits.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Commission had proven that the Claimant lost her job due to misconduct.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division made errors of law and based its decision on important factual errors. However, she needs permission for her appeal to move forward.

[6] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

## Issues

[7] The issues are:

- a) Is there an arguable case that the General Division made an error of law by misapplying the law of misconduct?

- b) Is there an arguable case that the General Division made an error of law by finding that the Claimant's actions were causally linked to her termination?
- c) Is there an arguable case that the General Division based its decision on any factual errors?

## **I am not giving the Claimant permission to appeal**

[8] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?<sup>1</sup>

[9] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the *Department of Employment and Social Development Act* (DESD Act).<sup>2</sup>

[10] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;<sup>3</sup> or
- d) made an error in law.<sup>4</sup>

[11] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these

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<sup>1</sup> This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

<sup>2</sup> DESD Act, s 58(2).

<sup>3</sup> The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as "willfully going contrary to the evidence" and defined capricious as "marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent" *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

<sup>4</sup> This paraphrases the grounds of appeal.

grounds of appeal. A reasonable chance of success means that the Claimant could argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.<sup>5</sup>

– **The General Division decision**

[12] The General Division had to decide why the Claimant was terminated and whether this reason amounted to misconduct according to the Employment Insurance (EI) Act.

[13] The General Division found that the reason for the Claimant's termination was that she breached her employer's policies.<sup>6</sup> The Claimant had worked as a financial planner at a bank. She was asked by a former employee to access accounts of the employee's former clients and change a standing transaction in each account. The former employee also asked her to start the process to transfer the accounts to a new institution and email her a client business investment account statement.<sup>7</sup>

[14] The Claimant testified that she accessed the client accounts to see if she could expand her own portfolio of clients but did not change the standing transactions or start the transfer process. She also emailed the former employee the business investment account statement of one client.<sup>8</sup>

[15] The employer conducted an investigation, which the Claimant participated in. The investigation found that she violated several policies and the Claimant's employment was terminated.<sup>9</sup>

[16] The General Division took into consideration the termination letter from the employer.<sup>10</sup> It also considered and addressed the Claimant's arguments that her actions did not breach the policy, and that she had been singled out with the investigation and

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<sup>5</sup> *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

<sup>6</sup> General Division decision at para 13.

<sup>7</sup> General Division decision at para 30.

<sup>8</sup> General Division decision at para 30.

<sup>9</sup> See General Division decision at para 30 and the termination letter at GD2-17.

<sup>10</sup> General Division decision at para 14.

discipline.<sup>11</sup> It found that the reason given by the employer was the reason the Claimant lost her job: because the employer's investigation found that she had violated policies.<sup>12</sup>

[17] The General Division then set out the key principles concerning misconduct based on case law from the Federal Court and the Federal Court of Appeal.<sup>13</sup> It applied these principles to the Claimant's circumstances and found that the Commission had proven there was misconduct for the following reasons:

- The Claimant knew about the employer's Code of Conduct (Code) and the duties she owed the employer and clients;
- She knew what her former colleague asked her to do was wrong and she could be disciplined if she did what was asked of her;
- She intentionally accessed client accounts without a business purpose, in breach of the Code;
- She intentionally sent the former employee a client's business investment account statement, in breach of the Code; and
- She was terminated for breaching the employer's policies, including the Code.<sup>14</sup>

– **No arguable case that the General Division made errors of law**

[18] In her application for leave to appeal, the Claimant argues that the General Division made errors of law. She says that it erred in law when it found that her actions constituted misconduct. Specifically, the Claimant argues that the General Division misdirected itself on the law and application of the EI Act.<sup>15</sup>

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<sup>11</sup> General Division decision at paras 15 and 18.

<sup>12</sup> General Division decision at para 20.

<sup>13</sup> General Division decision at paras 22 to 25.

<sup>14</sup> General Division decision at para 40.

<sup>15</sup> AD1-13

[19] The Claimant says that the General Division made a further error of law when it found that her actions were causally linked to her termination. She says that she testified that she did not know that her conduct could result in termination. She believed that she could be suspended or otherwise disciplined.<sup>16</sup>

[20] I find that there is no arguable case that the General Division erred in law in its decision. The General Division accurately set out the law concerning misconduct. It then applied these principles to the Claimant. It explained, with reference to the evidence, why it found that the Claimant was aware of the duties owed to the employer according to the Code, that her conduct was intentional, and that she knew or should have known it could result in dismissal.

[21] The Claimant's actions were accessing information of clients without a business purpose and sending an account statement to a former employee. These actions were investigated by the employer and resulted in her termination. There is no arguable case that the General Division made an error of law in finding that the Claimant's actions were causally linked to her termination.

[22] The General Division took into consideration that the Claimant believed she could be suspended or otherwise reprimanded for her actions but did not think she would be terminated. It found that the Claimant's testimony showed that she knew, or ought to have known, that termination was a possibility.<sup>17</sup>

[23] There is no arguable case that the General Division made an error of law in this respect. The Courts have consistently found that the fact that a sanction was harsher than an employee expected does not mean that the conduct was not misconduct.<sup>18</sup> The General Division applied the proper legal test when it found that the Claimant knew or ought to have known that she could be terminated.

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<sup>16</sup> AD1-13

<sup>17</sup> General Division decision at para 42.

<sup>18</sup> See *Canada (Attorney General) v. Jolin*, 2009 FCA 303 and *Nelson v. Canada (Attorney General)*, 2019 FCA 222 at para 29.

– **No arguable case that the General Division based its decision on factual errors**

[24] In her application for leave, the Claimant argues that the General Division based its decision on factual errors when it found that she disclosed confidential information and accessed client accounts without a business purpose.<sup>19</sup>

[25] The Claimant argues that the information she provided was not confidential. She also says that she had access to client accounts in her role as a financial planner and could view these accounts in order to grow her business.<sup>20</sup>

[26] I find that there is no arguable case that the General Division made any factual errors in its decision. The Claimant made these arguments before the General Division and they were considered in its decision. The General Division gave detailed reasons why it did not agree with the Claimant's arguments.<sup>21</sup>

[27] The General Division noted that the Claimant agreed, when asked, that she did not have a business purpose for accessing the client accounts.<sup>22</sup> It found that the Claimant was required to follow the letter and spirit of the Code and her conduct was in violation.<sup>23</sup>

[28] The General Division also found that the information provided to the former employee was confidential. It considered the Code which says that confidential information is "all information that it not public." The former employee did not have a right to the information just because the information belonged to a former client of hers. The information was still confidential.<sup>24</sup>

[29] The Claimant is restating the same arguments that it made before the General Division. I cannot reweigh the evidence. The General Division considered all of the Claimant's arguments and explained, with reference to the evidence, it's reasons why it

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<sup>19</sup> AD1-13

<sup>20</sup> AD1-13

<sup>21</sup> General Division decision at paras 43 to 48.

<sup>22</sup> General Division decision at para 48.

<sup>23</sup> General Division decision at para 44.

<sup>24</sup> General Division decision at para 45 and 47.

disagreed with the Claimant. There is no arguable case that it based its decision on factual errors.

[30] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction.

[31] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

## **Conclusion**

[32] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia  
Member, Appeal Division