Citation: *HR v Canada Employment Insurance Commission*, 2023 SST 845

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	H. R.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 22, 2023 (GE-23-142)

Tribunal member:	Stephen Bergen
Decision date:	**June 24, 2023**
File number:	AD-23-319

Decision

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

Overview

[2] H. R. is the Applicant for leave to appeal. I will refer to him as the Claimant because he made a claim for Employment Insurance (EI) sickness benefits. When the Respondent, the Canada Employment Insurance Commission (Commission), found that the Claimant was able to work, it terminated his sickness benefits.

[3] The Claimant asked the Commission to reconsider, but the Commission would not change its decision. The Claimant appealed the Commission's reconsideration decision to the General Division of the Social Security Tribunal.

[4] The General Division agreed with the Commission, concluding that the Claimant had not proven that he was unable to work due to his illness after June 30, 2022.

[5] The Claimant is now asking for leave to appeal the General Division's decision.

[6] I am refusing the application for leave to appeal. The Claimant does not have an arguable case that the General Division decision made an error of jurisdiction or that it made an important error of fact. He does not have a reasonable chance of success in his appeal.

Issues

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

[8] Did the General Division make an important error of fact by ignoring or misunderstanding reports that the Claimant had stopped working?

I am not giving the Claimant permission to appeal

[9] For the Claimant's application for leave to appeal to succeed, his 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.

[10] 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.[1]

[11] The Courts have equated a reasonable chance of success to an "arguable case."[2]

Error of Jurisdiction

[12] When the Claimant selected a ground of appeal on his Application to the Appeal Division form, he chose the error considered with an error of jurisdiction.

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

[14] Errors of jurisdiction are where the General Division makes a decision that it is not permitted to make, or fails to make a decision that it is required to make.

[15] The General Division is only permitted to review those issues that were considered in the Commission's reconsideration decision.[3] The Commission had found that the Claimant was not entitled to sickness benefits beyond June 30, 2022. It maintained this decision in its reconsideration decision.

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[1] This is a plain language version of the grounds of appeal. The full text is in section 58(1) of the *Department of Employment and Social Development Act* (DESDA).
[2] See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; *Ingram v Canada (Attorney General)*, 2017 FC 259.
[3] See section 113 of the *Employment Insurance Act.*

[16] The General Division reviewed the Commission's decision on this one issue. It did not make a decision on any other issues.

Important Error of fact

[17] On June 6, 2023, the Claimant wrote the Appeal Division to add to his grounds of appeal. He said that the General division made an important error of fact. He asserted that the General Division did not consider reports that said he stopped working because he was sick.[4]

[18] There is no arguable case that the General Division made an important error of fact by failing to refer to reports that he **stopped** working because he was sick.

[19] The General Division understood that the Claimant stopped working on May 20, 2022.[5] It also understood that the Claimant received sickness benefits beginning on June 5, 2022. However, it was not concerned with why the Claimant **stopped** working.

[20] The Claimant's appeal was about his entitlement to continuing sickness benefits beyond June 30, 2022. The General Division needed to determine if the Claimant was still unable to work beyond June 30, 2022. It did not need to decide whether he should have been entitled to any sickness benefits in the first place.

[21] The *Employment Insurance Act* (EI Act) says that a claimant is not entitled to (regular) benefits unless the claimant is capable of and available for work. However, claimant's may be entitled to sickness benefits if they are unable to work because of illness or injury (where they would have been available if not for the illness or injury).[6]

[22] It is possible that the Claimant meant to argue that the General Division ignored or misunderstood evidence that he was still unable to work because of illness **after June 30, 2022**. Assuming that this is what he intended, I have considered it.

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[4] See AD1B-1.
[5] See the General Division decision at para 2.
[6] See section 18(1) of the EI Act.

[23] To find that the General Division made an important error of fact, I would have to find that it based its decision on a finding of fact that ignored or misunderstood relevant evidence.[7]

[24] The Claimant said that the General Division did not consider "reports", but he did not otherwise identify the reports to which he was referring. He did not point to any evidence that the General Division missed or ignored that could have helped him prove that he was unable to work because of sickness or injury beyond June 30, 2022.

[25] Because the Claimant is unrepresented, I have reviewed the file to see if the General Division may have ignored or misunderstood reports or other evidence, relevant to its findings of fact.[8]

[26] The Commission file includes one medical report. This is a doctor's note (which appears to be) dated June 30, 2022.[9] That note says that he may work light duties. In addition, the Claimant apparently presented two other notes at his hearing. The General Division decision discusses the substance of these other notes and notes that they supported the Commission's position that the Claimant could have returned to light duties starting June 30, 2022.[10]

[27] On August 5, 2022, the Claimant also "reported" to the Commission that he was having pain in his knee and did not think he would be able to return to full-time work.[11] This is the only evidence that provides any support for the Claimant's position that he remained incapable of work because of illness or injury. The General Division did not refer to the August 5, 2022, statement.

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[7] This is a paraphrase. Section 58(1)(c) of the DESDA says that this kind of error occurs when the General Division bases 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."
[8] *Karadeolian v. Canada (Attorney General),* 2016 FC 615.
[9] See GD3-19.
[10] See the General Division decision at para 8.
[11] See GD3-18.

[28] However, there is no arguable case that the General Division ignored or misunderstood this evidence when it found that the Claimant had not shown that he was unable to work after June 30, 2022.

[29] All of the medical evidence that was available to the General Division suggested that the Claimant was capable of light duties beyond June 30, 2022. In the Claimant's August 5 statement to the Commission, the Claimant stated that he did not know what kind of light duty work he could do but he admitted that his doctor told him to return to light duty work.

[30] The Claimant made other statements that seem to qualify his August 5 comment that he did not think he could work full-time: On at least two occasions, he said that he was **unable to do** heavy work and that he was **unsuccessful in finding** light work.[12] In his September 12, 2022, reconsideration request, he confirmed that he was available for a light duty job and still searching.[13] He also testified that he could not find such work because he had trouble communicating in French.

[31] The significance of the August 5 comment must be viewed in the light of all the medical evidence as well as the worker's other statements before the General Division. The August 5 comment was not so significant that I would expect the General to refer to it. The Courts have said that General Division may generally be presumed to have considered all the evidence before it. The General Division is not required to refer to each and every piece of evidence.[14]

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

[33] I appreciate that the Claimant likely believes he would not have lost his job if he had not been sick, and would not have had to look for light duty work. This may be true, as the General Division acknowledged.[15]

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[12] See. GD2-7 and GD5-2.
[13] See GD3-24.
[14] *Simpson v. Canada (Attorney General),* 2012 FCA 82. (Except evidence that fatally undermines the decision – see *Canada (Attorney General) v. Mendoza,* 2021 FCA 36.
[15] See the General Division decision at para 14.

[34] Unfortunately, the EI Act only offers sickness benefits to claimants who are **unable** to work due to illness or injury. It could not find that he was entitled to sickness benefits just because he could not perform the heavier duties of his original job.

[35] I also note that the Federal Court of Appeal has considered this particular issue. In the *Ayai* decision, the Court reviewed a decision of the Umpire,[16] in which many of the facts were like unto this case.[17]

[36] The claimant in *Ayai* was also trying to claim sickness benefits for a period in which he could only work light duties. The claimant's employer had no light duties available. The Umpire found that the Commission was right to deny sickness benefits for that period.

[37] When the Federal Court of Appeal reviewed the Umpire decision, it decided that the Umpire decision had been reasonable: It acknowledged that the claimant had obtained medical certification that he could only work light duties but said that this did not establish that he was unable to work.

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

Conclusion

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

Stephen Bergen
Member, Appeal Division

[16] The Umpire was the administrative appeal tribunal that heard the claimant's appeal.
[17] *Ayai v Canada (Attorney General)* 2013 FCA 294.