Citation: *RS v Canada Employment Insurance Commission*, 2023 SST 789

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated March 8, 2023 (GE-22-2588)

Tribunal member:	Janet Lew
Decision date:	June 15, 2023
File number:	AD-23-371

Decision

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

Overview

[2] The Applicant, R. S. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Respondent, the Canada Employment Insurance Commission (Commission) had proven that the Claimant's employer suspended the Claimant because of misconduct. In other words, she did something that led to the suspension. Because of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural, legal, and factual errors.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] In other words, there has to be an arguable case. If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[5] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issue

[6] Is there an arguable case that the General Division made any procedural, legal, or factual errors?

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

I am not giving the Claimant permission to appeal

[7] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division potentially made a jurisdictional, procedural, legal, or certain type of factual error.[3]

[8] For factual errors, the General Division had to have based its decision on it and it had to have made it in a perverse or capricious manner, or without regard for the evidence before it.

Is there an arguable case that the General Division made any procedural, legal, or factual errors?

[9] The Claimant argues that the General Division made procedural, legal, and factual errors.

– The Claimant argues that the General Division failed to observe a principle of natural justice

[10] The Claimant argues that the General Division failed to observe a principle of natural justice because it failed to follow one of the recommendations of the United Nations Committee on Economic, Social and Cultural Rights (Committee).

[11] The Claimant says the Committee has identified Canada's Employment Insurance system as a "principle [*sic*] subject of concern,"[4] particularly as it relates to what it regards as the stringent conditions for qualifying for benefits. She notes that on March 23, 2016, in its sixth periodic report, the Committee recommended that:

> 32. … The State party revise the eligibility thresholds for and amounts of employment insurance, with a view to ensuring that all workers, including part-time and temporary foreign workers, can access adequate employment insurance benefits without discrimination.

[3] See section 58(1) of the DESD Act.
[4] Claimant's Application to the Appeal Division-Employment Insurance, filed April 21, 2023, at AD 1-8.

[12] Breaches of natural justice typically deal with whether the process was fair in the administrative tribunal context. For instance, a breach could involve a failure to give adequate notice of a hearing or adequate disclosure of documents or depriving a claimant the right to be heard or present their case. Those allegations do not arise here.

[13] The Claimant also does not suggest that the General Division member was biased or had prejudged the appeal.

[14] For a reasonable chance of success to be made out, the Claimant's arguments have to be about any type of procedural error. The Claimant's arguments that the General Division failed to follow one of the recommendations of the Committee are irrelevant to any procedural matters.

[15] Besides, the Committee's recommendations are simply that: recommendations. They do not represent the law. They might be appropriate for another body to consider, but the General Division has no authority to consider or abide by the Committee's recommendations.

[16] As the Claimant's arguments do not address whether the process was fair at the General Division, I am not satisfied that the appeal has a reasonable chance of success on this point.

– The Claimant argues that the General Division made legal and factual errors

[17] The Claimant argues that the General Division overlooked some of the evidence before it and that it misinterpreted what suspension means. In particular, she says that the General Division must have failed to consider document GD10 because it did not refer to the document in its reasons. She says the General Division might have overlooked the document because it did not have a copy of it before the hearing.

[18] When she filed document GD10 with the Social Security Tribunal, the Claimant stated that document was to be discussed at the hearing later that day.

[19] Document GD10 consists of excerpts of definitions from the Dictionary of Canadian Law. The Claimant highlighted “leave of absence” and “suspension” from the excerpts. The Dictionary defines these as follows:

> “leave of absence” – a period of time during which an employee is permitted to be absent from work, usually without pay
>
> “suspension” – 1. [A]n annulment of the rights and obligations accruing during the suspension, and that the parties for the time being are in the same position as if the contract did not exist….
>
> 2. [I]n an employment context the term suspension is usually used in the sense of discipline being imposed upon an employee. …
>
> 3. A temporary interruption of employment, other than a lay-off at the direction of the employer.

[20] The Claimant expected that the General Division member would not only consider but apply these definitions when it examined whether her actions amounted to misconduct.

[21] The Claimant argues that, had the General Division followed these definitions from the Dictionary of Canadian Law, it would have concluded that her employer simply placed her on a leave of absence when she did not comply with her employer’s vaccination policy. She says that it would have concluded that she was not suspended from her employment.

[22] In support of this, the Claimant points to the Record of Employment that her employer prepared. The employer stated that it was issuing the Record because of a leave of absence.[5] The Claimant also notes that any communications from her employer referred to a leave of absence.[6]

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[5] Record of Employment, at GD 3-13.
[6] Claimant's Application to the Appeal Division-Employment Insurance, filed April 21, 2023, at AD 1-9.

[23] First off, there is a general presumption in law that a decision-maker considers all of the evidence before it. As the Federal Court of Appeal has held, a decision-maker expresses only the most important factual findings and justifications for them.[7]

[24] Secondly, the General Division must interpret any terms consistent with the *Employment Insurance Act*. This may mean that it has to refer to any case law to determine whether the courts may have defined any terms (such as suspension or misconduct) for the purposes of the *Employment Insurance Act*. Thus, while any definitions from the Dictionary of Canadian Law or other sources may be helpful, they are not binding nor authoritative for the purposes of defining specific terms under the *Employment Insurance Act*.

[25] That said, I note that the Dictionary provided several meanings for the word "suspension." One of these is fairly broad. According to the Dictionary, a suspension could be a temporary interruption of employment at the direction of the employer, other than a lay-off. This definition could very well apply to even the Claimant's situation and is more appropriate than the definition given for a "leave of absence."

[26] According to the Dictionary, the definition for a "leave of absence" suggests that the employee initiates the absence. This is so because the employee requires permission to be absent. That is not the case here because the Claimant did not ask to be off work.

[27] So, even if the General Division did not the refer to document GD10, the Dictionary's definition of a "leave of absence" and "suspension" would not have helped the Claimant.

[28] The General Division acknowledged the Claimant's argument that her employer did not suspend her and that it had placed her on a leave of absence instead.[8] It also

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[7] *Canada v South Yukon Forest Corporation*, 2012 FCA 165.
[8] General Division decision, at paras 8 and 15.

acknowledged the Commission's argument that, under the *Employment Insurance Act*, a leave of absence without pay counts as a suspension.[9]

[29] The General Division determined that it had to look at the evidence through the lens of the *Employment Insurance Act*. It found that the evidence showed that the Claimant's employer told her not to return to work because she was unvaccinated. It also found that her employer did not pay her while she was on leave. So, although the Claimant and her employer regarded her separation as a "leave of absence," the General Division found that the *Employment Insurance Act* defined this scenario as a suspension.

[30] The Claimant also argues that the General Division made other errors:

i. when it wrote that the Record of Employment stated that her employer placed her on an "involuntary unpaid leave of absence."[10] She says that in fact her employer just wrote "leave of absence."

ii. when it wrote that the Commission noted that documents GD3-15, GD3-18 and GD3-19 stated that the Claimant had been placed on an unpaid leave of absence. The Claimant says neither of these documents state this. She says there is no mention of an "unpaid" leave.

[31] For any factual errors, the General Division had to have based its decision on that error.

[32] It did not matter whether the General Division misstated this evidence because the General Division did not base its decision on whether the Claimant's separation from her employment was "unpaid" or not. Indeed, the General Division stated that it was treating a suspension, leave of absence, and an unpaid leave of absence as the same thing.[11]

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[9] General Division decision, at para 14.
[10] General Division decision, at para 15.
[11] General Division decision at footnote 1.

[33] And there is no dispute over the evidence that the Claimant's separation was involuntary. She would have preferred to continue working, but because she had not complied with her employer's vaccination policy, her employer would not allow her to continue working.

[34] The Claimant also argues that, if the separation from her employment had in fact been a suspension, her employer would have re-issued the Record of Employment. She says her employer would have corrected the Record to say that there had been a suspension, rather than a leave of absence.

[35] As the General Division noted, what appears on a record of employment (or a vaccination policy) is not determinative of whether an employee was suspended or placed on a leave of absence. The General Division had to consider all of the surrounding evidence and see what provisions of the *Employment Insurance Act* applied.

[36] Finally, the Claimant argues that the General Division failed to fully consider her ability to perform her duties. She says that she experienced dizziness that interfered with her driving to/from work and with work itself.

[37] If the Claimant is suggesting that the General Division should have considered whether she was entitled to Employment Insurance medical benefits, that issue was not properly before the General Division. There was no evidence before the General Division that the Claimant had applied for medical benefits, or that the Commission had made a (re)determination on her entitlement to them.

[38] The Claimant suggests that she was on a leave of absence because of her health. But clearly the General Division did not accept this reason, as the evidence showed that the employer placed the Claimant on a leave of absence because she was non-compliant with its vaccination policy. The employer also reported to the Commission that the Claimant could return to work once she was vaccinated.[12]

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[12] Supplementary Record of Claim dated March 23, 2022, at GD 3-18.

[39] Otherwise, the issue of the Claimant's medical condition was irrelevant to the issue of whether the Claimant's actions amounted to misconduct. It was irrelevant even if she was trying to investigate that medical condition to see if it was safe for her to get vaccinated. The Claimant might have had a legitimate basis to avoid getting vaccinated, but misconduct under the *Employment Insurance Act* does not consider these reasons when determining whether misconduct might have arisen.

Conclusion

[40] I am not satisfied that the appeal has a reasonable chance of success.

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

Janet Lew
Member, Appeal Division