Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 889

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 16, 2023 (GE-22-3565)

Tribunal member:	Janet Lew
Decision date:	July 5, 2023
File number:	AD-23-605

Decision

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

Overview

[2] The Applicant, J. W. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal with modification. It found that the Respondent, the Canada Employment Insurance Commission (Commission) had proven that, from November 22, 2021 to February 5, 2022, the Claimant's employer suspended him from work and then on February 10, 2022, terminated him from his job because of misconduct.

[3] In other words, the General Division found that the Claimant had done something that caused him to be suspended and then terminated from his job. The General Division found that the Claimant did not comply with his employer's mandatory vaccination policy.

[4] As a result of the misconduct, the Claimant was disentitled from receiving Employment Insurance benefits during the suspension, and then disqualified because of the termination.[1] The General Division modified when the disentitlement ended. It also found there was a disqualification, where none had existed before.

[5] The Claimant argues that the General Division made a mistake about the dates of modification. He also argues that the General Division overlooked the fact that he made two separate Employment Insurance claims. His second claim relates to his employment with another employer.

[6] He says that the General Division made an error by "merging" his two claims as this effectively meant he was denied benefits for his second claim. But he says that he is entitled to benefits for at least his second claim.

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[1] As the General Division explained, disqualifications start on the Sunday of the week in which the termination took place.

[7] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.[3]

[8] 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 his appeal.

Issues

[9] The issues are as follows:

(a) Is there an arguable case that the General Division overlooked the fact that the Claimant made two separate Employment Insurance claims?

(b) Is there an arguable case that the General Division made an error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for his second claim?

(c) Is there an arguable case that the General Division made an error when it modified the dates for disentitlement or disqualification?

I am not giving the Claimant permission to appeal

[10] 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 possibly made a jurisdictional, procedural, legal, or certain type of factual error.[4]

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[2] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] 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."
[4] See section 58(1) of the DESD Act.

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

Is there an arguable case that the General Division overlooked the fact that the Claimant made two separate Employment Insurance claims?

[12] The Claimant argues that the General Division overlooked the fact that he made two separate Employment Insurance claims. Each claim relates to separate places of employment. The Claimant says that he was at least entitled to benefits under his second claim. He says the General Division made a mistake by effectively merging the two claims, thus denying him any benefits at all.

[13] The General Division could only make findings based on the evidence before it. I do not see any evidence of another employment or of a second claim. So, it cannot be said that the General Division overlooked evidence if it did not have that evidence before it.

Is there an arguable case that the General Division made an error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for his second claim?

[14] The Claimant argues that the General Division made an error when it found that he was disqualified from receiving Employment Insurance benefits for his second claim.

[15] The General Division found that the Claimant was disqualified from receiving benefits starting February 6, 2022 because of misconduct. This was the Sunday of the week in which the Claimant was terminated from his employment.

[16] If misconduct exists, the length of the disqualification is for each week of a claimant's benefit period following the waiting period. The length of the disqualification is

not affected by any subsequent loss of employment by that claimant during the benefit period.[5]

[17] The Claimant says this disqualification "merged" with his second claim. He asserts that the second claim should be treated separately. That way, he says he would get benefits under his second claim.

[18] It may be that the Claimant "re-qualified" for benefits with his new employment. Under section 30(1)(a) of the *Employment Insurance Act*, a claimant is disqualified from receiving any benefits because of their misconduct unless the claimant has, since losing the employment, been employed in insurable employment and accumulated sufficient hours of insurable employment to qualify for benefits.

[19] As the hearing file does not include any information relating to the Claimant's second employment, it is difficult to determine whether the Claimant accumulated sufficient hours of insurable employment in his subsequent employment to qualify for benefits.

[20] As the Claimant suggests that he is entitled to benefits in relation to his second claim, he should pursue any remedies he might have under that second claim. He will need to show that he has accumulated sufficient hours of insurable employment to qualify for benefits.

[21] I do not know at what stage the Claimant's second claim lies. If the Claimant has yet to ask the Commission to reconsider its decision, he should do so as soon as possible. If the Commission has already issued a reconsideration decision, the Claimant could bring an appeal with the General Division.

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[5] See section 30(2) of the *Employment Insurance Act*.

Is there an arguable case that the General Division made an error when it modified the dates for disentitlement or disqualification?

[22] Is there an arguable case that the General Division made an error when it modified the dates for disentitlement or disqualification?

[23] The General Division found that the Claimant had been suspended from his employment between November 22, 2021 to February 5, 2022, and then was terminated from his employment after that. The Claimant does not contest these particular findings, although says that his employer wrongfully dismissed him.

[24] The Social Security Tribunal does not have any authority to decide whether a claimant might have been wrongfully dismissed. The Claimant's options to pursue his employer for wrongful dismissal lies elsewhere.

[25] The General Division found that the disentitlement ended once the Claimant's suspension ended. This finding is consistent with the *Employment Insurance Act* and with the facts before it. It is clear from the *Employment Insurance Act* that a disentitlement for suspension for misconduct continues for as long as that suspension lasts.[6] So, once the Claimant's suspension ended, then the disentitlement for that suspension ended.

[26] As for the disqualification, the General Division found that this arose once the Claimant lost his employment because of his misconduct. This finding too is consistent with the *Employment Insurance Act* and with the facts before the General Division. The *Employment Insurance Act* states that a claimant is disqualified from receiving any benefits if the claimant loses their employment because of their misconduct.[7] So, once the Claimant lost his employment because of misconduct, then the disqualification arose.

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[6] See section 31(a) of the *Employment Insurance Act*. However, a disentitlement is suspended during any week for which a claimant is otherwise entitled to special benefits.
[7] See section 30(1) of the *Employment Insurance Act*.

[27] I am not satisfied that there is an arguable case that the General Division made an error when it modified the dates for disentitlement or disqualification.

Conclusion

[28] I am not satisfied that the appeal has a reasonable chance of success. As a result, permission to appeal is refused. This means that the appeal will not be going ahead.

[29] To be clear, I am not making any decision about the Claimant's claim for benefits in relation to his subsequent employment. I do not know the status of that claim, or whether the Claimant qualifies for benefits under that claim. The Claimant may pursue that claim independently of this appeal.

Janet Lew
Member, Appeal Division