



Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 920

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 26, 2023
(GE-22-3812)

Tribunal member: Melanie Petrunia

Decision date: July 14, 2023

File number: AD-23-589

Decision

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

Overview

[2] The Applicant, D. S. (Claimant), was dismissed from his job. His employer implemented a mandatory vaccination policy. The Claimant did not have an exemption and did not tell the employer whether he was vaccinated. The employer dismissed him for not complying with the policy.

[3] The Claimant applied for employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant lost his job because of misconduct and he was disqualified from receiving benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Commission had proven that the reason that the Claimant lost his job is considered misconduct under the *Employment Insurance Act* (EI Act).

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. He argues that the General Division failed to follow procedural fairness. However, he needs permission for his 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 failed to provide a fair process by not requiring the Commission to answer the Claimant's questions?

- b) Is there an arguable case that the General Division failed to provide a fair process when it did not accept a post-hearing submission by the Claimant?
- c) Does the Claimant raise any other errors of the General Division that have a reasonable chance of success?

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?¹

[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).²

[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;³ or
- d) made an error in law.⁴

[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

¹ 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.

² DESD Act, s 58(2).

³ 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.

⁴ This paraphrases the grounds of appeal.

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

No arguable case that the General Division did not follow procedural fairness

[12] The Claimant argues that the General Division did not follow a fair process.⁶ The Claimant had submitted written arguments before the General Division hearing in response to the Commission's submissions. In his response, the Claimant posed two questions to the Commission:

1. Has the Commission approved any employment insurance claims throughout Canada where the dismissal was the result of a mandatory COVID-19 vaccination policy (for any or all causes, not just religious)?
2. If yes, can the de-identified case details be provided by the Commission to the Tribunal for review prior to my hearing (...)?⁷

[13] The Commission did not provide a written response to the Claimant's questions. He states that he was not informed that the Commission would not attend his hearing. With the Commission not in attendance, the Claimant was not able to ask these at the hearing, nor any follow-up questions.

[14] The Claimant argues that the General Division failed to provide a fair process by not requiring the Commission to provide answers to the questions he posed.⁸

[15] I find that there is no arguable case that the General Division failed to provide a fair process for this reason. The Commission is not required to attend the hearing and was not required to answer the questions posed by the Claimant. I have listened to the

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

⁶ AD1-3

⁷ See GD6-6

⁸ AD1-3

recording of the hearing before the General Division and this was explained by the member.⁹

[16] The General Division was required to look at the conduct of the Claimant and determine whether his actions amounted to misconduct pursuant to the EI Act. The Claimant may have found the answers to his questions helpful or relevant to his preparation for the hearing. However, there is no arguable case that failing to require a response from the Commission violated a principle of natural justice.

[17] The Claimant also argues that the General Division erred by not accepting a post-hearing submission. This submission was an application to the Federal Court for judicial review in another matter.¹⁰

[18] The General Division explained in its decision why it did not accept the document. After receiving the submission, the Tribunal wrote to the Commission and the Claimant explaining the factors it considers when deciding whether to accept a late document. It asked both parties for their input on whether the document should be accepted and provided one week for receipt.¹¹

[19] The Claimant did not make further submissions. The General Division explains its decision that it did not consider the document relevant as it was arguments being made in another case and not a binding decision.¹² It also noted that the document was dated April 17, 2023, and the Claimant could have provided it prior to the hearing if he wished to rely on it.¹³

[20] The Claimant argues in his application for leave to appeal, that he was only made aware of the document on May 12, 2023, and that he did provide submissions

⁹ Recording of the General Division hearing at 2:10 and 35:00.

¹⁰ GD9

¹¹ GD10

¹² General Division decision at para 11.

¹³ General Division decision at para 10.

with the document.¹⁴ I find that there is no arguable case that the General Division failed to provide a fair process by not accepting this document.

[21] The Claimant did not reply to the General Division's request for additional arguments. He had the opportunity to explain further at that time when he became aware of the document and why he believed that it was relevant. The General Division specifically requested that the parties address "the relevance of a request for judicial review that has not yet been heard and no decision rendered."¹⁵

[22] The General Division provided an opportunity for the Claimant to explain why he believed the additional document was relevant and should be considered. There is no arguable case that the process was procedurally unfair to the Claimant.

[23] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any errors of law, and I see no evidence of such errors. There is no arguable case that the General Division based its decision on an important mistake about the facts or made an error of jurisdiction.

[24] 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

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

Melanie Petrunia
Member, Appeal Division

¹⁴ AD1-3

¹⁵ GD10-1