Citation: *EI v Canada Employment Insurance Commission*, 2023 SST 991

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	E. I.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated April 28, 2023 (GE-22-3496)

Tribunal member:	Stephen Bergen
Decision date:	**July 27, 2023**
File number:	AD-23-554

Decision

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

Overview

[2] E. I. is the Applicant. He made a claim for Employment Insurance (EI) benefits so I will call him the Claimant. The Respondent, the Canada Employment Insurance Commission (Commission), denied the Claimant's claim for benefits because it found that the employer dismissed him for misconduct.[1] When the Claimant asked the Commission to reconsider, it would not change its decision.

[3] The Claimant appealed to the General Division of the Social Security Tribunal, which dismissed his appeal. He is now seeking leave to appeal from the Appeal Division.

[4] I am refusing leave to appeal. The Claimant has not identified an arguable case that the General Division made an important error of fact.

Issue

[5] Did the General Division make an important error of fact by

a) Misquoting the Claimant about his "right to disregard" the employer's decisions.
b) Considering only a selective excerpt from the Claimant's May 2, 2022, letter.
c) Characterizing as an "afterthought" part of the Claimant's testimony.
d) Misunderstanding the nature of his supervisor's authority.
e) Relying on biased information from the Commission file.

[1] Section 30(1) of the *Employment Insurance Act* states that a claimant is disqualified from receiving any benefits if they lost their employment because of their misconduct.

Analysis

General Principles

[6] For the Claimant's application for leave to appeal to succeed, his reasons for appealing would have to fit within the "grounds of appeal." The grounds of appeal identify the kinds of errors that I can consider.

[7] 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.[2]

[8] 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. Other court decisions have equated a reasonable chance of success to an "arguable case."[3]

Important Error of Fact

[9] The Claimant does not accept that his actions in taking four weeks off was misconduct.[4] He asserts that the General Division ignored or misunderstood evidence in assessing his conduct. He has pointed to a number of specific instances.

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[2] 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).
[3] See *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and *Ingram v Canada (Attorney General)*, 2017 FC 259.
[4] The Employment Insurance

– **Misquoting the Claimant**

[10] The Claimant refers to paragraph 15 of the General Division decision where the member stated, “He says he had a right to disregard his employer’s decision.” The Claimant says that he never said this in the hearing.

[11] There is no arguable case that the General Division mistook the Claimant’s evidence.

[12] The General Division did not claim to be quoting the Claimant’s testimony from the hearing. Where it referred to the Claimant’s statement, it provided a citation to the Commission’s notes of its conversation with the Claimant (GD3-25). Those notes stated as follows: “The employer advised the client the most vacation he can take at one time is 2 weeks. The client believed it was his right to disregard this because it was his vacation time.”

– **Considering only part of the May 2, 2022, letter.**

[13] The Claimant argues that the General Division referred to only part of his May 2, 2022, letter, and that it did not consider the entire letter.

[14] The Claimant is correct that the General Division cited only the first portion of the letter, which was his notice to the employer of his intention to take 20 working days vacation, and to return on July 5, 2022. The General Division did not refer to the second paragraph in which the Claimant mentions some previous discussions he had with the employer.

[15] However, there is no arguable case that the General Division made an important error of fact in failing to refer to the entire letter. From my reading of the decision, the General Division referred to the letter only because it identified when the Claimant gave notice of his intention to take vacation, and the period of vacation that he expected.

[16] The discussion mentioned in the second part of the letter apparently concerned the employer’s ability to hire a temporary employee to cover for the Claimant while he

was on vacation. It appears that the Claimant understood that he and the employer had made arrangements that would allow him to take the requested four weeks off.

[17] I would agree that the General Division ought to have referred to this evidence, if there had been no other evidence of the employer's response to the Claimant's request to take four weeks off.

[18] However, there was other evidence. The employer specifically denied the Claimant's request both before and after the May 2, 2022, letter. The employer's Vice President wrote the Claimant on April 17, 2022, to say that she had discussed his request with the Claimant's manager. She supported the manager's decision to grant two consecutive weeks of vacation only. This was in response to the Claimant's April 12, 2022, request that the Vice President overrule the manager's decision, and to the Claimant's April 17, 2022, reminder email. In his reminder email, the Claimant said he needed the approval quickly so that he could book his airline ticket.

[19] The Vice President emailed the Claimant again on May 25, 2022. She emphasized that she was not approving the Claimant's four-week vacation and to warn him that he had to return within 2 weeks or risk losing his job. On June 1, 2022, the Claimant confirmed that he received the May 25, 2022, email from the Vice President.

[20] The General Division is not required to refer to each and every piece of evidence, but may ordinarily be presumed to have considered the evidence before it.[5]

[21] In this case, the General Division's decision depended on its finding that he disobeyed a direct, written order and that he knew there was a real possibility he would lose his job as a result. The second part of the May 2, 2022, decision may be evidence to support the Claimant's assertion that he and the employer had discussed how he could take four weeks vacation. However, it would have been of little relevance to the decision. Whatever the Claimant's impression of those earlier discussions, evidence of

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82, (Except evidence that fatally undermines the decision – see *Canada (Attorney General) v. Mendoza,* 2021 FCA 36).

earlier discussions does not challenge the evidence that the Claimant understood that the employer made a final decision to deny his request to take four weeks vacation.

– **Mischaracterizing the Claimant's response**

[22] The Claimant said that the General Division member "made my response to [the member's] statement that I bought the ticket after the employer refusal, sound like an afterthought." The Claimant's concern is that the member drew an adverse inference from how he hesitated in answering the question and that this affected the member's assessment of his credibility. He said that the General Division member "sensed hesitancy," which, according to the Claimant, made him "assume he was probably not being truthful."

[23] There is no arguable case that the General Division made an error by mischaracterizing the Claimant's response.

[24] The General Division wrote that he "pointed out the dates on the ticket and the employer's emails," and that the Claimant, "thought about it and agreed he bought the ticket after the employer's refusal [of his request for four weeks vacation]."

[25] Regardless of whether the Claimant "hesitated" because he was thinking -as the General Division wrote - or hesitated because he was trying to understand the member through an interpreter, there is nothing in the decision to suggest that the General Division questioned his truthfulness because of his hesitation.

[26] The evidence of the employer's refusal letter dated April 17, 2022, directly contradicted the Claimant's initial assertion that the employer had not denied his request before he bought his ticket on May 18, 2022. In my view, it was open to the General Division to draw an adverse inference from this conflict, about either the credibility or the reliability of the Claimant's evidence. However, nothing in the decision suggests that it did so.

[27] The General Division did not find that the Claimant misled the Commission or that he meant to mislead the member. Nor did it make a finding against the Claimant's credibility generally.

– **Misunderstanding the supervisor's authority**

[28] The Claimant said that the General Division misunderstood the authority of his supervisor.

[29] The General Division member said he questioned why the Claimant took the word of his immediate supervisor over the decision of his vice president. He said that the Claimant responded that the supervisor was the company owner's mother, and that she had power.

[30] There is no arguable case that the General Division made an error of fact by misunderstanding the supervisor's authority.

[31] In his Application to the Appeal Division, the Claimant said essentially the same thing as was stated in the General Division decision. He said that his immediate supervisor was the mother of the owners of the company and wielded considerable informal power.

[32] The Claimant also elaborated on how the supervisor has over-ruled company policies in the past. To the extent that his additional explanation goes beyond what was in evidence before the General Division, I will not be considering it. I cannot consider additional information that was not before the General Division.[6]

[33] In any event, the General Division captured the gist of the Claimant's evidence, which is that his supervisor has more power in the company because of her relationship to the owners. As noted earlier, the General Division does not need to refer to all the evidence.

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[6] *Mette v Canada (Attorney General)* 2016 FCA 276, Parchment v. *Canada (Attorney General)* 2017 FC 354.

– Relying on Commission file

[34] Finally, the Claimant expressed concern that the Commission had predetermined the results of its investigation.

[35] Whether this is true or not, the General Division is not the same as the Commission. The unfairness or inadequacy of the Commission's investigation cannot support an arguable case that the General Division made an error. It is not relevant to whether the General Division made any kind of error.

[36] The General Division hearing was the Claimant's opportunity to bring his own evidence and present his side of the case. The General Division's job is to weigh the Claimant's testimony and other evidence, as well as the other evidence on the Commission file including the employer's evidence, and to make findings of fact.

[37] The Claimant has not suggested that the General Division member relied exclusively on the Commission file evidence. He has not suggested that the member was biased or predetermined the outcome.

[38] The Claimant's appeal has no reasonable chance of success.

Conclusion

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

Stephen Bergen
Member, Appeal Division