Citation: *WJ v Canada Employment Insurance Commission*, 2023 SST 1123

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated June 19, 2023 (GE-23-378)

Tribunal member:	Janet Lew
Decision date:	August 17, 2023
File number:	AD-23-637

Decision

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

Overview

[2] The Applicant, W. J. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The Claimant applied for Employment Insurance benefits on June 17, 2022. She wanted to have her application backdated to January 2, 2022.

[4] The General Division determined that the Claimant had to show good cause for the entire period of the delay, from January 2, 2022 to June 17, 2022. The General Division found that the Claimant had not shown good cause for the delay. So it meant that her application could not be treated as if she had made it by January 2, 2022.

[5] The Claimant argues that the General Division made important mistakes about the facts.

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

[7] 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

[8] Is there an arguable case that the General Division made important mistakes about any of the facts?

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment and 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

[9] 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 arguably made a jurisdictional, procedural, legal, or certain type of factual error.[3]

[10] 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 made important mistakes about any of the facts?

[11] The Claimant argues the General Division made important mistakes about the facts.

– The Claimant denies she was on a leave of absence from her employment

[12] The Claimant argues that the General Division made a mistake when it wrote that she was on a leave of absence. The Claimant says that she testified she had been suspended from her employment while there was an investigation at work.

[13] For an arguable case to arise on a factual error, the General Division had to have based its decision on that factual error. The General Division had to examine whether the Claimant had good cause for the delay in applying for benefits.

[14] The issue about whether the Claimant was on a leave of absence or a suspension from work was not relevant to this consideration. The General Division did not base its decision on whether the Claimant was either on a leave of absence or had been suspended from work.

[15] What was important for the General Division's consideration was that there was an investigation at work. The Claimant argued that she had good cause for the delay

[3] See section 58(1) of the DESD Act.

because she thought she would be able to return to work after the investigation ended. The General Division considered this reason, along with others, when it decided whether the Claimant had good cause for the delay.

[16] I am not satisfied that the Claimant has an arguable case that the General Division made a factual mistake when it wrote that she was on a leave of absence.

[17] In any event, I notice that some of the documents refer to a leave of absence. For instance, when the Claimant spoke with the Respondent, Canada Employment Insurance Commission, on January 19, 2023, the Claimant reportedly said that she received an email saying she was being placed on leave.[4]

[18] The termination letter also indicated that the employer had placed the Claimant on a leave of absence.[5] So, there was evidence to support the General Division's description of the Claimant's separation from her employment as a leave of absence.

– **The Claimant denies that she received full pay until January 2, 2022**

[19] The Claimant argues that the General Division made a mistake about her pay. The General Division wrote that the Claimant stated that she got her full pay until January 2, 2022. The Claimant denies that she testified that she received her full pay to this date. Instead, she says that she testified that she got paid after January 2, 2022. She received severance.

[20] The Claimant says, "I told [the General Division member] about the severance pay employer has to pay during the termination that could be the last payment to prove the termination, but I didn't get and their last pay stub was also submitted."[6]

[21] The General Division also wrote that the Claimant got three small payments arising out of obligations under the collective agreement. The General Division also

[4] Supplementary Record of Claim dated January 19, 2023, at GD 3-22.
[5] Termination letter dated April 26, 2022, at GD 3-25.
[6] Claimant's Application to the Appeal Division - Employment Insurance, at AD 1-3.

wrote that, aside from these three small payments received in early 2022, the Claimant did not have any other sources of income after January 2, 2022. [7]

[22] The General Division overlooked some of the evidence when it found that the Claimant did not have any other sources of income after January 2, 2022, other than the three small payments received in early 2022.

[23] The Claimant submitted payment notification for the pay period June 12, 2022 to June 25, 2022.[8] It showed that the Claimant received amounts for vacation pay and for what the employer described as "transfer claim to overpayment." The payment notification showed that the Claimant had not been fully paid by January 2, 2022.

[24] Whether the Claimant had been "fully paid" up to January 2, 2022 was important. The Claimant wanted her application backdated to this date and the General Division required the Claimant to show that she had good cause from January 2, 2022.

[25] The General Division examined whether anything important happened on January 2, 2022, to require the Claimant to show that she had good cause from that date. It found that this was when her employer last paid her.

[26] The General Division used the expression "full pay," but it is clear from the rest of its decision that it defined this expression to mean "regular (employment) income."[9] The Claimant does not deny that she no longer received "regular employment income" after January 2, 2022. Hence, the General Division did not make an error when it found that the Claimant had received "full pay" by January 2, 2022.

[27] I am not satisfied that the Claimant has an arguable case that the General Division made a mistake when it said that she testified she received full pay to January 2, 2022 because it is clear the General Division defined this as regular employment income.

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[7] General Division decision, at para 15.
[8] Payment Notification, at GD 2-11.
[9] General Division decision, at para 35.

– The Claimant says the General Division ignored ESDC's role

[28] The Claimant argues that the General Division ignored some of the evidence. She says it failed to mention the role that the Department of Employment and Social Development Canada (ESDC) played when it hired an investigator in February 2022. She says that she produced an email to confirm this happened.

[29] The Claimant wrote:

> I sent her an email proof regarding hiring an investigator by ESDC in Feb 2022, it's all a part of Service Canada, I didn't talk to her about the union that much other than the wrong ROE they gave for casuals and their collective agreement but she praised the union, ignored ESDC part.[10]

[30] I am not satisfied that the Claimant has an arguable case on this point. A decision-maker does not have refer to all of the evidence before it, unless it is of such importance that it could affect the outcome. A decision-maker is presumed to have considered all of the evidence before it.

[31] The General Division determined that, the Claimant did not have good cause. It determined that, after the Claimant was no longer receiving a regular income in January 2022, she could have contacted Service Canada to find out about her rights and obligations under the *Employment Insurance Act*.

[32] Here, the Claimant has not given any indication how ESDC's role, if any, could have impacted whether she had good cause for the delay.

[33] As it is, I do not see any evidence in the hearing file that suggests any involvement by ESDC in the Claimant's appeal in February 2022. The Claimant had yet to make her claim. Even if ESDC had hired an investigator, as the Claimant suggests, this would not have prevented the Claimant from contacting Service Canada to find out about her rights and obligations.

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[10] Claimant's Application to the Appeal Division - Employment Insurance, at AD 1-3.

[34] I am not satisfied that the Claimant has an arguable case that the General Division ignored ESDC's role in her case.

– The Claimant says the General Division mischaracterized the evidence about how long she remained an active employee

[35] The Claimant argues that the General Division mischaracterized her evidence about how long she remained an active employee. The Claimant denies that she testified that she believed her employment was ongoing. The Claimant says that once her employer removed her from SAP, she received a record of employment and then immediately applied for Employment Insurance.

[36] In other words, the Claimant denies that she did not act as a reasonable and prudent person would have acted. She says that she acted promptly once she received the record of employment.

[37] The General Division did not base its decision on whether the Claimant remained an active employee and when the Claimant might have received her record of employment.

[38] As the General Division pointed out, the Claimant did not need a record of employment to make an application for benefits. The General Division determined that if the Claimant had acted as a reasonable and prudent person would have done, she would have contacted Service Canada and learned that she could apply for benefits without a record of employment. She could have applied and then provided the record of employment later on.

[39] I am not satisfied that there is an arguable case that the General Division mischaracterized this evidence. The General Division did not base its decision on this evidence. It was immaterial whether and how long the Claimant believed that her employment was ongoing, or when she received her record of employment.

– The Claimant says the General Division misapprehended the evidence regarding her union

[40] The Claimant says that the General Division was mistaken about the evidence she gave about her union. The General Division found that the Claimant held off on applying for Employment Insurance benefits because her union informed her that she would eventually get paid for the time that she was not working.

[41] The Claimant says, "The union part is [the General Division member's] story." The Claimant says that she actually testified that:

> [the] union made [the employer] send [records of employment] for casuals during COVID-19 to get EI when they decided not to call the casuals and then in a week, they found they want the casuals badly and called them but they refused to come and [the employer] hired new casuals and cheated EI by giving the wrong [records of employment]. I told [the General Division member] as per the collective agreement we are insured through Canada Life and Canada Life is accountable to pay not EI. EI part will apply after termination.[11]

[42] Even if the General Division mis-stated some of the Claimant's evidence regarding her union, that alone is insufficient to establish an arguable case. The union's efforts might have shown that there was a delay in getting a record of employment. But as the General Division noted, being without a record of employment did not mean the Claimant had good cause for the delay.

[43] As I noted above, the Claimant did not need a record of employment to make an application for benefits.

[44] It is clear from the decision that the General Division would not have been swayed by any evidence regarding the union's involvement in getting records of employment to show good cause for the Claimant's delay. The General Division would not have based its decision on this evidence, as it found this type of evidence irrelevant to establishing good cause.

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[11] Claimant's Application to the Appeal Division - Employment Insurance, at AD 1-3.

[45] I am not satisfied that there is an arguable case on this point.

Conclusion

[46] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing permission to appeal. This means that the appeal will not proceed.

Janet Lew
Member, Appeal Division