



Citation: *AL v Canada Employment Insurance Commission*, 2023 SST 1153

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: A. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated April 6, 2023
(GE-22-3857)

Tribunal member: Melanie Petrunia

Decision date: August 23, 2023

File number: AD-23-401

Decision

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

Overview

[2] The Applicant, A. L. (Claimant), was dismissed from his job and applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) initially decided that the Claimant was entitled to benefits. His employer requested a reconsideration and the Commission changed its decision. It decided that the Claimant was dismissed due to misconduct and was disqualified from receiving benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division and his appeal was dismissed. The General Division found that the Claimant was dismissed from his job and did not quit. It found that he was dismissed because he violated two of his employer's policies and that this reason is considered misconduct under the law.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to move forward. He argues that the General Division made an important error of fact and exceeded its jurisdiction.

[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 based its decision on an important factual error by relying on information in a third party investigation report?

- b) Is there an arguable case that the General Division exceeded its jurisdiction by deciding whether the Claimant had valid reasons for quitting his job?
- c) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

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

– **The General Division decision**

[12] The General Division had to decide why the Claimant was no longer working. The Claimant argued that he filed a grievance and, as part of a settlement, he agreed that his termination would be changed to a voluntary resignation. His Record of Employment (ROE) was supposed to be changed to reflect this.⁶

[13] The General Division found that the Claimant was dismissed and did not voluntarily leave his job.⁷ It considered the Claimant's arguments about the settlement but found that he did not have a choice to continue working and was let go.⁸

[14] The General Division then had to determine why the Claimant was dismissed and whether this reason amounted to misconduct according to the *Employment Insurance Act* (EI Act).

[15] The General Division found that the reason for the Claimant's dismissal was that he violated two of his employer's policies. The Claimant was found by his employer to have harassed a co-worker and to have allowed his spouse to access his work email. The employer had fired the Claimant for violating both policies.⁹

[16] The employer conducted an investigation into the harassment allegations which found that the Claimant had harassed the co-worker.¹⁰ The employer also had a privacy

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

⁶ GD2-6

⁷ General Division decision at para 13.

⁸ General Division decision at para 19.

⁹ General Division decision at para 25.

¹⁰ General Division decision at para 41.

policy which required employees to take reasonable steps to protect their work email.¹¹ The Claimant's spouse knew his password and accessed his work email.¹²

[17] The General Division set out the key principles concerning misconduct based on case law from the Federal Court and the Federal Court of Appeal.¹³ It applied these principles to the Claimant's circumstances and found that the Commission had proven there was misconduct for the following reasons:

- The Claimant knew about the employer's harassment policy which said that employees should not harass their co-workers;¹⁴
- The Claimant knew about the employer's privacy policy that required him to protect the privacy of his work email;¹⁵
- The Claimant knew or should have known that he could be let go if he violated either of these policies;¹⁶
- The Claimant and his co-worker each alleged that they were harassed by the other. An independent investigator looked at both complaints;¹⁷
- The report found that the Claimant had harassed the co-worker and the evidence showed that the Claimant did things that were violations of the harassment policy;¹⁸
- The Claimant agreed that it was a violation of the privacy policy for the Claimant's spouse to know his password and access his work email;¹⁹ and

¹¹ General Division decision at para 37.

¹² See General Division decision at para 49.

¹³ General Division decision at paras 27 to 30.

¹⁴ General Division decision at para 37.

¹⁵ General Division decision at para 37.

¹⁶ General Division decision at para 38.

¹⁷ General Division decision at para 40.

¹⁸ General Division decision at paras 41 and 47.

¹⁹ General Division decision at para 49.

- The Claimant was dismissed for violating the employer's policies.²⁰

– **No arguable case that the General Division made errors of fact**

[18] In his application for leave to appeal, the Claimant argues that the General Division made important factual errors. He says that it erred by primarily considering the information in the investigation report.²¹

[19] The Claimant argued before the General Division that the investigation was biased and flawed. He says that he was wrongfully terminated and this decision was eventually overturned and he was given the opportunity to quit. The Claimant also argues that he was harassed and discriminated against by another employee and the HR director.²²

[20] There is no arguable case that the General Division made a factual error or erred by relying on the investigation report which was part of the Commission's file. The General Division acknowledged that the Claimant did not agree with the investigator's findings.²³ It explained why it preferred the findings in the report that the Claimant had harassed the co-worker over the Claimant's denials.²⁴

[21] The General Division also found that it did not need to agree with all of the investigator's findings to find that the Claimant's actions amounted to misconduct. It pointed to two events that the Claimant had agreed occurred and found that both were violations of the harassment policy.²⁵

[22] The General Division also found that the Claimant violated the employer's privacy policy.²⁶ It noted that the Claimant agreed that his spouse knew his work email

²⁰ General Division decision at para 40.

²¹ AD1-3

²² AD1-3

²³ General Division decision at para 42.

²⁴ General Division decision at para 46.

²⁵ General Division decision at para 47.

²⁶ General Division decision at para 50.

password and accessed his email.²⁷ The General Division found that this was also misconduct and these findings are unrelated to the investigation report.

[23] The General Division applied the proper legal test and explained why it preferred certain evidence. It acknowledged and considered the Claimant's evidence and arguments. There is no arguable case that the General Division based its decision on an important factual error.

– **No arguable case that the General Division exceeded its jurisdiction**

[24] The Claimant argues that the General Division did not have the authority to decide whether his reason for quitting were valid because it was based on his personal experience of being bullied by his employer. He says that there were subjective reasons for his decision to leave based on his human rights and concerns for safety in the workplace.²⁸

[25] The General Division had to determine why the Claimant was no longer working. When he applied for benefits, he indicated that he had been dismissed from his job.²⁹ The Claimant filed a grievance relating to his termination. He argues that a settlement of that grievance included the Claimant having the opportunity to resign effective the date of his termination.³⁰

[26] The General Division considered these arguments by the Claimant. It found that the Claimant was dismissed and did not quit, despite his evidence regarding the settlement.³¹ The General Division based this conclusion on its review of the evidence and made a finding of fact. There is no arguable case that the General Division erred in making this determination.

[27] The General Division noted that, had it found that the Claimant did quit, it would have decided that he did not have just cause for quitting because he had reasonable

²⁷ General Division decision at para 49.

²⁸ AD1-3

²⁹ GD3-10

³⁰ General Division decision at para 6.

³¹ General Division decision at paras 19 to 23.

alternatives to leaving when he did.³² However, the General Division's decision was that the Claimant was dismissed and did not quit.

[28] There is no arguable case that the General Division erred by commenting on the validity of the Claimant's reasons for quitting, had it determined that he did quit. If the General Division had made this determination, it would have been required to decide whether the Claimant had just cause for quitting, which requires a review of reasons for leaving. This would have been within its jurisdiction.

[29] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division, and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of law.

[30] 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

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

Melanie Petrunia
Member, Appeal Division

³² General Division decision at para 24.