Citation: *JB v Canada Employment Insurance Commission*, 2023 SST 1201

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 26, 2023 (GE-22-3050)

Tribunal member:	Solange Losier
Decision date:	September 1, 2023
File number:	AD-23-125

Decision

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

Overview

[2] J. B. is the Claimant in this case. She worked as service delivery worker. When she stopped working, she applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits from December 19, 2021 because she lost her job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It said that the Claimant was suspended and then lost her job because she didn't comply with the employer's vaccination policy.[3]

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[4] She argues that the General Division made important errors of fact because the employer changed the Record of Employment (ROE) proving there was no misconduct.[5] She says that government failed to investigate and made an arbitrary decision affecting her financially and emotionally. Also, she wants the Tribunal to reconsider the decision because it has caused her great hardship.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.[6]

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[1] See initial decision at page GD3-32 and reconsideration decision at page GD3-40.
[2] See General Division decision at pages AD1A-1 to AD1A-10.
[3] See paragraph 19 of the General Division decision.
[4] See Application to the Appeal Division at pages AD1-1 to AD1-8.
[5] See page AD1-5.
[6] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act).

Issue

[7] Is there an arguable case that the General Division made an error of fact when it decided the issue of misconduct?

Analysis

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.[7]

[9] I must be satisfied that the appeal has a reasonable chance of success.[8] This means that there must be some arguable ground upon which the appeal might succeed.[9]

[10] The possible grounds of appeal to the Appeal Division are that the General Division:

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law;
- based its decision on an important error of fact.[10]

[11] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

[12] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[11]

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[7] See section 56(1) of the DESD Act.
[8] See section 58(2) of the DESD Act.
[9] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[10] See section 58(1) of the DESD Act.
[11] See section 58(1)(c) of the DESD Act.

[13] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:[12]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[14] Not all errors of fact will allow me to intervene. An error of fact needs to be important enough that the General Division relied on it to make a finding that impacted the outcome of the decision.

I am not giving the Claimant permission to appeal

[15] The Claimant argues that the General Division made the following errors of fact in its decision:

- First, she had an agreement with the employer and in response they changed the ROE to "dismissal without cause" and that proves there was no misconduct.

- Second, the government failed to investigate and made an arbitrary decision affecting her financially and emotionally. Also, the employer did not respond to the government's requests for discussion.

- Third, the Tribunal should reconsider its decision because it has caused her great hardship.

[12] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[16] The *Employment Insurance Act* (EI Act) says that a Claimant who is suspended because of misconduct is not entitled to receive EI benefits.[13] This also applies if a Claimant is dismissed due to misconduct.[14]

[17] Misconduct is not defined in the EI Act but the Federal Court and Federal Court of Appeal (Court) has provided some guidance. The Court defines "misconduct" to be conduct that is wilful, which means conscious, deliberate, or intentional conduct.[15] Misconduct also includes conduct that is so reckless that it is almost wilful.[16]

[18] The Court has also said there is misconduct if the claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[17]

– **There is no arguable case that the General Division made an error of fact**

[19] There is no arguable case that the General Division based its decision on an important error about the facts of the case, so I am not giving the Claimant permission to appeal. My reasons are below.

[20] The General Division had to first decide why the Claimant stopped working.

[21] The General Division asked the Claimant about the agreement with her employer. The Claimant testified that "it was between her and her employer" and it was "private".[18] The General Division noted that the Claimant would not elaborate on the agreement with her employer, so it could not consider it.[19]

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[13] This is called a disentitlement to benefits. Also see section 31 of the *Employment Insurance Act* (EI Act) says that a claimant who is suspended for misconduct is disentitled to EI benefits until the period of suspension expires, or if they lose or voluntarily leave their job, or if they accumulate enough hours of insurable employment with another employer to qualify for EI benefits.
[14] This is called a disqualification to benefits. Also see section 30(1) of the EI Act. It says that a claimant is disqualified from receiving any benefits if the claimant lost any employment because of their misconduct or voluntarily left any employment without just cause, unless they meet any of the exceptions in law.
[15] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[16] See *McKay-Eden v Her Majesty the Queen*, 1997 CanLII 17410 (FCA).
[17] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[18] See hearing recording at 17:09 to 18:45.
[19] See paragraphs 12, 17, 35 of the General Division decision.

[22] The General Division also asked the Claimant why she did not go to work on December 20, 2021 and she said "I was told not to" by her employer.[20]

[23] The General Division rejected the Claimant's argument that she stopped working because she had a mutual agreement with her employer.[21] It said that on a balance of probabilities, the Claimant was suspended and terminated for not complying with the vaccination policy.[22] This finding is consistent with the evidence in the file, including the employer's mandatory vaccination policy and termination letter.[23]

[24] The General Division identified in its decision that the employer had issued three ROE's, specifically on January 8, 2022, March 9, 2022 and May 24, 2022.[24] Each ROE provided different reasons for the issuance, including: *leave of absence*; *other*: *vaccination policy* and, finally *dismissal without cause*.

[25] However, the General Division decided that "any agreement between the employer and Claimant made before or after the fact cannot change the reason why the Claimant is no longer employed".[25] It said that the employer introduced a vaccination policy that required employees to comply by December 20, 2021 or risk facing unpaid leave and/or termination.

[26] It is undisputed that the Claimant knew about the policy, read the policy, chose not to comply and knew it would result in her suspension and dismissal.[26] This resulted in the Claimant's suspension and dismissal.[27]

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[20] See hearing recording at 23:10.
[21] See paragraphs 11, 17 and 18 of the General Division decision.
[22] See paragraph 35 of the General Division decision.
[23] See policy at GD3-23 to GD3-24 and termination letter at GD3-25 to GD3-30.
[24] See paragraphs 13, 14 and 15 of the General Division decision and ROE's are at pages GD3-16; GD3-18 and GD3-20.
[25] See paragraph 19 of the General Division decision.
[26] See paragraphs 40 and 41 of the General Division decision and hearing recording at 20:33.
[27] See paragraph 19 of the General Division decision.

[27] The General Division decided that it is not up to the employer and Claimant to decide if there is misconduct, but that it had to analyze all of the evidence and apply the EI Act and case law.[28]

[28] The Court has already said that the mere existence of a concluded settlement is not determinative of the issue of whether an employee was dismissed for misconduct.[29]

[29] The General Division assessed the evidence and decided why the Claimant stopped working. It considered all of the ROE's issued and the conflicting evidence about why the Claimant stopped working.

[30] The General Division was not bound by how the Claimant and employer characterized the grounds of her employment ending. It was free to assess and make findings based on the evidence.

[31] There is no arguable case that the General Division made an error of fact because it considered the Claimant's evidence that she had an agreement with her employer and the ROE's.[30] It explained why it preferred the evidence it did and its findings were consistent with the evidence. There is no reasonable chance of success on this ground.

– **There is no arguable case that the "government" failed to investigate and employer did not reply**

[32] The Claimant disagrees with the Commission's decision to deny her EI benefits and the procedure they undertook to review her EI claim. The file shows that the Commission did try to contact the employer on a few occasions, but received no reply.[31]

[33] The Tribunal does not have investigatory powers. The Appeal Division's jurisdiction is limited to determining whether the General Division made a reviewable

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[28] See paragraph 37 of the General Division decision.
[29] See *Canada (Attorney General) v Boulton* (1990), A-45-96 (FCA) and *Canada (Attorney General)* v *Perusse*, (1981), A-309-81 (FCA).
[30] See section 58(1)(c) of the DESD Act.
[31] See pages GD3-35 and GD3-38.

error.[32] In a similar case involving a vaccination policy, the Court has said that the Tribunal has a narrow and specific role and the involves determining why an applicant was dismissed from their employment and whether was misconduct.[33] That is exactly what the General Division did in this case.

[34] The Claimant has not raised a reviewable error that would allow me to intervene. There is no reasonable chance of success.

– **There are no other grounds for giving the Claimant permission to appeal**

[35] I acknowledge that the Claimant wants her case reconsidered because of hardship.[34] However, an appeal to the Appeal Division is not a new hearing. I cannot reweigh the evidence in order to come to a different conclusion that is more favourable for the Claimant.[35]

[36] I also reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.[36] I did not find any relevant evidence that the General Division might have ignored or misinterpreted. As well, the General Division applied the relevant parts of the EI Act and applicable case law.[37]

Conclusion

[37] There is no arguable case that the General Division made an error of fact.

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

Solange Losier
Member, Appeal Division

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[32] See section 58(1) of the DESD Act.
[33] See *Cecchetto* v *Canada (Attorney General),* 2023 FC 102, at paragraph 47.
[34] See page AD1-5.
[35] See *Garvey v Canada (Attorney General),* 2018 FCA 118, at paragraph 11.
[36] The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.
[37] See paragraphs 7, 21-30 of the General Division decision.