



Citation: *LG v Canada Employment Insurance Commission*, 2023 SST 1327

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: L. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated July 7, 2023
(GE-23-432)

Tribunal member: Melanie Petrunia

Decision date: October 4, 2023

File number: AD-23-691

Decision

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

Overview

[2] The Applicant, L. G. (Claimant), lost his job as a concrete finisher after an accident with a company vehicle. He found another job but was laid off at the end of the contract and applied for employment insurance (EI) benefits.

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

[4] The Claimant unsuccessfully appealed this decision to the Tribunal's General Division. The General Division found that the Claimant was dismissed from his job because he refused to take a drug and alcohol test when requested by his employer. It decided that the Commission had proven that this was misconduct according to the *Employment Insurance Act* (EI Act).

[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 important errors of fact in its decision.

[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 failing to consider the requirements of the employer's drug and alcohol policy?
- b) Is there an arguable case that the General Division based its decision on an important factual error by failing to consider a previous accident that the Claimant was involved in?
- c) Is there an arguable case that the General Division based its decision on an important factual error by failing to consider that refusing the test was not the only reason the Claimant was denied benefits?
- d) 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;

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).

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 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 voluntarily left his job after he refused a substance test with valid reason. He said that he secured a new job the following day.⁶

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

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

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.

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

⁶ General Division decision at para 15.

⁷ General Division decision at para 24.

[15] The General Division found that the reason for the Claimant's dismissal was that he did not follow the employer's policy concerning drug and alcohol testing. The Claimant was asked by the employer to take a test following the accident with the company vehicle. The Claimant refused because he was concerned that his activities over the long weekend would result in a positive test. The Claimant also felt that the employer did not have reasonable grounds for requesting the test.

[16] The employer told the Claimant that a refusal to take the test would be treated like a positive result and he would be dismissed. The Claimant still refused to take the test and left the workplace.⁸

[17] The employer had provided the Commission with a copy of an accident report that it prepared which was part of the evidence considered by the General Division.⁹ The employer's policy concerning drug and alcohol testing was also provided, which had been signed by the Claimant.¹⁰

[18] The General Division set out the key principles concerning misconduct based on case law from the Federal Court and the Federal Court of Appeal.¹¹ It applied these principles to the Claimant's circumstances and found that the Commission had proven there was misconduct for the following reasons:

- The employer had a "fitness for work/impairment free workplace" policy which addressed drug and alcohol testing;¹²
- The Claimant had signed an acknowledgement that he had received the employer's handbook, which included the policy, and agreed to be bound by the employer's policies and procedures;¹³

⁸ General Division decision at para 25.

⁹ General Division decision at para 41.

¹⁰ General Division decision at para 37 and GD3-60.

¹¹ General Division decision at paras 27 to 30.

¹² General Division decision at para 37.

¹³ General Division decision at para 31.

- The policy states that an employee who refuses to test and does not self-report shall be terminated with cause;¹⁴
- The Claimant was told that he would be terminated if he refused the test;
- The Claimant knew or should have known that he would be let go if he refused the test;¹⁵
- The Claimant's decision to refuse the test was deliberate and wilful.¹⁶

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

[19] In his application for leave to appeal, the Claimant argues that the General Division made important factual errors. He does not take issue with the General Division's determination that he was dismissed and did not voluntarily leave his job.¹⁷

[20] The Claimant argues that the General Division failed to consider that the policy requires that the employer have reasonable grounds for suspicion of impaired driving and that two high-ranking company representatives must agree to request the test.¹⁸ The Claimant points to a number of issues with the conduct of the employer post-accident.

[21] The Claimant also argues that the General Division failed to consider a previous accident that he had been involved in, after which the employer did not request a drug and alcohol test. The Claimant says that this accident was far more serious, and no test was requested.¹⁹

[22] The Claimant also argues that his refusal to take the test was not the only reason for his dismissal. The Claimant points to a number of factors that he later learned the employer was relying on such as smelling alcohol on his breath. He says that he never

¹⁴ GD3-58

¹⁵ General Division decision at para 38.

¹⁶ General Division decision at para 40.

¹⁷ AD1-3

¹⁸ AD1-7

¹⁹ AD1-7

denied refusing to take the test but takes issue with the Commission's reliance on a number of fabrications by the employer.²⁰

[23] I find that these arguments do not have a reasonable chance of success. All of these arguments point to a failing of the General Division to consider certain conduct by the employer. The General Division noted the Claimant's position that the employer did not have grounds to request the test.²¹

[24] It is well established in the case law that it is the conduct of the employee that is in question in a misconduct analysis, not the conduct of the employer. In the Federal Court of Appeal case of *Canada (Attorney General) v. McNamara*, the claimant was dismissed for failing a drug test.²² That claimant also argued that the test was not justified.

[25] The Court confirmed that it is the behaviour of the employee that is at issue in a misconduct analysis, not the employer. Employees who are wrongfully dismissed have other remedies available to them.²³

[26] 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. The Claimant is restating the same arguments that were raised before the General Division.

[27] The General Division found that the Claimant knew he would be dismissed if he refused the test. The Claimant does not dispute this. The Claimant was advised that refusing the test would result in his dismissal and he wilfully refused. In his application for benefits, the Claimant stated that two senior executives demanded that he submit to a drug and alcohol test.²⁴

²⁰ AD1-8

²¹ General Division decision at para 30.

²² *Canada (Attorney General) v. McNamara*, 2007 FCA 107.

²³ See *MacNamara* at paras 22 and 23.

²⁴ GD3-12

[28] The General Division did not refer to the Claimant's previous accident, but I do not find that this amounts to a factual error. The General Division had to decide whether the Claimant's conduct that led to his dismissal was misconduct. The fact that he had been involved in a previous accident in which a test was not requested is not relevant to his dismissal for refusing the employer's request for a test after this accident. The Claimant argues that this suggests that the employer did not have reasonable grounds for requesting the test. As discussed above, the employer's conduct is not at issue.

[29] Similarly, there is no arguable case that the General Division failed to consider whether the Claimant was dismissed for other reasons. The record before the General Division clearly establishes that the Claimant was involved in an accident and his employer requested that he submit to a drug and alcohol test. The Claimant refused and was dismissed.

[30] The Claimant does not deny these facts. He says that the employer lied about other factors such as the Claimant's breath smelling of alcohol after the accident. I find that the General Division took into consideration all of the relevant facts and did not overlook any relevant facts. There is no arguable case that the General Division based its decision on an important factual mistake.

[31] 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 or an error of jurisdiction.

[32] 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

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

Melanie Petrunia
Member, Appeal Division