



Citation: *DB v Canada Employment Insurance Commission*, 2023 SST 1403

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: D. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated March 31, 2023
(GE-22-1554)

Tribunal member: Melanie Petrunia

Decision date: October 25, 2023

File number: AD-23-409

Decision

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

Overview

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

[3] The Respondent, the Canada Employment Insurance Commission (Commission) 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 because of unprofessional comments and conduct. It decided 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 important errors of fact in its decision and erred in law by not considering a case that he relied on.

[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 failed to consider the conduct of other employees?

- b) Is there an arguable case that the General Division failed to consider the conduct of the employer and that his dismissal was retaliatory?
- c) Is there an arguable case that the General Division erred by failing to refer to a Tribunal decision that he cited?
- 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;
- 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

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.

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.

[13] The Claimant argued that his employer had targeted him in retaliation for complaints that he filed to the human rights commission and employment standards. The Commission agreed with the reason given by the employer, that the Claimant was dismissed for violating the code of conduct and engaging in unprofessional behaviour.⁶

[14] The General Division recognized that the Commission has the burden of showing that the Claimant was dismissed due to misconduct.⁷ It found that evidence supported that the Claimant was dismissed after several incidents of unprofessional comments to customers and other employees.⁸

[15] The General Division considered the Claimant's evidence concerning the conduct of other employees and retaliation by the employer.⁹ It found that there was no connection between his dismissal and the complaints that he had made.¹⁰

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 paras 11 and 12.

⁷ General Division decision at para 13.

⁸ General Division decision at para 31.

⁹ General Division decision at paras 20 to 24.

¹⁰ General Division decision at para 32.

[16] The General Division then had to determine whether the reason for the Claimant's dismissal amounted to misconduct according to the *Employment Insurance Act* (EI Act).

[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.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 policies that set out guidelines for employee conduct;¹²
- The Claimant knew about the employer's policies;¹³
- The Claimant repeatedly violated the employer's Code of Conduct and Code of Ethics;¹⁴
- The Claimant was warned about his conduct and given three progressive suspensions for similar behaviour;¹⁵ and
- The Claimant was aware of the consequences of not complying with the policies and was told such behaviour could result in termination.¹⁶

– **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 the General Division erred when it found that the comments made by co-workers in group chats were not relevant to the issue of whether the Claimant had engaged in misconduct. He says that the team

¹¹ General Division decision at paras 34 to 42.

¹² General Division decision at para 46.

¹³ General Division decision at para 46.

¹⁴ General Division decision at para 47.

¹⁵ General Division decision at para 48

¹⁶ General Division decision at para 48.

manager who initiated discipline against him also made a potentially objectionable remark in a group chat.¹⁷

[19] The Claimant says that the Skype group conversations were part of the work environment as it relates to the Code of Conduct. He argues that the General Division found that the remarks made by co-workers in the group chat were less serious than his comments in private chats or phone conversations with clients.¹⁸

[20] The Claimant says that the Code of Conduct does not make the distinction that the General Division made. The chats were not available to customers but were monitored by team managers. He argues that his employer was motivated by retaliation as evidenced by the fact that other employees weren't disciplined.¹⁹

[21] The Claimant argues that his earlier suspensions were also in retaliation. He acknowledged that some of his remarks were impolite but were explained by the stressful working conditions and his employer's misconduct.²⁰ He says that the employer's did not follow its own Code of Conduct or act lawfully by not adequately responding to a request for accommodation.²¹

[22] The Claimant cites numerous examples of behaviour by the employer which he argues violated the Code of Conduct. He says that these examples show far more serious breaches than his actions that led to his termination.²²

[23] There is no arguable case that the General Division based its decision on any factual errors concerning the conduct of other employees. The General Division considered the Claimant's arguments and his evidence of the comments made by others. It found that the Claimant was not dismissed for comments made in a group chat setting, but for unprofessional conduct toward clients and business partners.²³

¹⁷ See AD1-5. The Claimant refers specifically to para graph 25 of the General Division decision.

¹⁸ AD1-5

¹⁹ AD1-6

²⁰ AD1-7

²¹ AD1-8

²² AD1-8

²³ General Division decision at para 25.

[24] The General Division found that there was no evidence that the co-workers behaved unprofessionally toward clients, as the employer said that the Claimant did. It considered the Claimant's arguments and evidence and explained why it did not agree with him.²⁴

[25] There is no arguable case that the General Division erred when it found that the employer was not motivated by retaliation when it disciplined the Claimant. Again, the General Division considered the Claimant's arguments and evidence. It found that he was disciplined a number of times before making complaints about the employer.²⁵

[26] The General Division acknowledged the Claimant's position that the employer was retaliating but found that there was no evidence to support this. It decided that the Claimant's suspicions about the employer's motivations was outweighed by the documentary evidence of the Claimant's history of discipline and non-compliance.²⁶

[27] The General Division explained that the binding case law requires the Tribunal to consider the conduct of the Claimant in a misconduct analysis, not the employer's conduct.²⁷ There is no arguable case that the General Division erred by not considering whether the employer engaged in misconduct.

[28] 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 important factual errors.

– **No arguable case that the General Division made an error of law**

[29] In his application for leave, the Claimant argues that the General Division did not reference another General Division decision that he relied on.²⁸ He says that the case

²⁴ General Division decision at paras 26 to 28.

²⁵ General Division decision at para 29.

²⁶ General Division decision at para 30.

²⁷ General Division decision at para 42.

²⁸ See AD1-9. The Claimant refers to *G L v Canada Employment Insurance Commission* 2017 SSTGDEI 188.

law that the GD did rely on was less relevant given factual differences.²⁹ The Claimant says that his evidence that his conduct could not reasonably be considered misconduct was not rebutted and the GD should not have preferred the employer's account of events.

[30] There is no arguable case that the General Division erred by not following the case referenced by the Claimant. The General Division is not required to follow other General Division decisions. The case law that it referenced may have factual differences, but the principles from it concerning misconduct were properly applied to the Claimant's circumstances. These cases are binding on the General Division.

[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 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

²⁹ AD1-10