



Citation: *LB v Canada Employment Insurance Commission*, 2023 SST 1824

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: L. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 11, 2023
(GE-23-2536)

Tribunal member: Solange Losier

Decision date: December 22, 2023

File number: AD-23-1087

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] L. B. is the Claimant in this case. He applied for Employment Insurance (EI) regular benefits after he stopped working.

[3] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to get EI regular benefits from May 21, 2023 because he lost his job due to his own misconduct.¹

[4] The General Division concluded the same.² It said that the Claimant lost his job because of misconduct when he violated the employer's safety policy by wearing a non-fire resistant hooded sweater to work.³

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.⁴ He argues that the General Division member didn't follow a fair process because was biased and did not treat him like a human being.⁵ He also says that the General Division made an important error of fact because he supplied a letter from his landlord warning that he would be evicted for unpaid rent.⁶ He says that his explanation and letter was not given due consideration by the General Division.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.⁷

¹ See initial decision at page GD3-29 and reconsideration decision at page GD3-71. This is called a "disqualification" to EI benefits, see section 30(1) of the *Employment Insurance Act* (EI Act).

² See General Division decision at pages AD1A-1 to AD1A-13.

³ See paragraphs 44 -45 of the General Division decision.

⁴ See application to the Appeal Division at pages AD1-1 to AD1-13.

⁵ See page AD1-5.

⁶ See page AD1B-1.

⁷ See section 58(2) of the *Department of Employment and Social Development* (DESD Act). I have to refuse leave to appeal if I am satisfied that the appeal has no reasonable chance of success.

I am not accepting the new evidence

[7] The Claimant included two letters in his application to the Appeal Division. Both letters are dated November 6, 2023 and state that his restrictions from his dismissal have been lifted and he is now eligible to bid on any available work in the Province of Alberta.⁸

[8] These letters are new evidence because the General Division did not have them when it made its decision.

[9] The Appeal Division generally does not accept new evidence. This is because the Appeal Division cannot conduct a rehearing or consider new evidence.⁹ It is a review of a General Division decision based on the same evidence.¹⁰

[10] However, there are some exceptions to the new evidence. For example, I can accept new evidence if it provides one of the following:

- general background information only
- if it highlights findings made without supporting evidence
- shows that the Tribunal acted unfairly

[11] Since none of the exceptions apply in this case, I cannot accept the Claimant's letters and have not considered them.

⁸ See page AD1-8 and AD1-10.

⁹ See *Tracey v Canada (Attorney General)*, 2015 FC 1300 and *Parchment v Canada (Attorney General)*, 2017 FC 354.

¹⁰ See *Gittens v Canada (Attorney General)*, 2019 FCA 256.

Issues

[12] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) If found late: should I extend the time for filing the application?
- c) Is it arguable that the General Division based its decision on an important error of fact?
- d) Is there an arguable case that the General Division didn't follow procedural fairness?

Analysis

The application to the Appeal Division was filed late

[13] The Claimant wrote that the General Division decision was communicated to him on October 13, 2023.¹¹

[14] The deadline to file an application to the Appeal Division is 30 days after the day on which the General Division decision was communicated to him in writing.¹²

[15] This means that the 30 day deadline to file his application to the Appeal Division was November 13, 2023.

[16] The Tribunal received his Application to the Appeal Division on November 30, 2023.¹³

[17] Accordingly, I find that the Claimant filed his application to the Appeal Division late.

¹¹ See page AD1B-1.

¹² See section 57(1)(a) of the DESD Act.

¹³ See Application to the Appeal Division at AD1-1 to AD1-13.

I am extending the time for filing the application

[18] When deciding whether to grant an extension of time, I have to consider whether the Claimant has a reasonable explanation for why the application is late.¹⁴

[19] I wrote to the Claimant to tell him that the Appeal Division could consider accepting a late appeal, but that he would have to give a reasonable explanation for the delay in filing his appeal late.¹⁵ I asked him to write back and provide his reasons for filing the application late.

[20] The Claimant wrote back and explained that when he received the General Division decision he was heartbroken and devastated.¹⁶ He explained that his blood pressure increased which led to health and mental health issues. He was also unable to pay his rent at the time and that added to his stress and anxiety.

[21] I find that the Claimant has provided a reasonable explanation for the delay in filing his application to the Appeal Division. I am allowing him more time to appeal.¹⁷

I am not giving the Claimant permission to appeal

[22] An appeal can proceed only if the Appeal Division gives permission to appeal.¹⁸

[23] I must be satisfied that the appeal has a reasonable chance of success.¹⁹ This means that there must be some arguable ground upon which the appeal might succeed.²⁰

¹⁴ See section 27(1) of the *Social Security Tribunal Rules of Procedures* (SST Rules).

¹⁵ See pages AD2-1 to AD2-3.

¹⁶ See page AD3-1.

¹⁷ See section 27(2) of the SST Rules.

¹⁸ See section 56(1) of the DESD Act.

¹⁹ See section 58(2) of the DESD Act.

²⁰ See *Osaj v Canada (Attorney General)*, 2016 FC 115.

[24] I can only consider certain types of errors. I have to focus on whether the General Division could have made one or more of the relevant errors (this is called the “grounds of appeal”).²¹

[25] The possible grounds of appeal to the Appeal Division are that the General Division did one of the following:²²

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

[26] For the appeal to proceed to the next step, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

– **It is not arguable that the General Division based its decision on an important error of fact**

[27] 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”.²³

[28] This involves considering some of the following questions:²⁴

- 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?

²¹ See section 58(1) of the DESD Act.

²² See section 58(1) of the DESD Act.

²³ See section 58(1)(c) of the DESD Act.

²⁴ This is a summary of the Federal Court of Appeal’s decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.

[29] The General Division decided that the Claimant was dismissed from his job because he violated the employer's safety policy when he wore non-fire resistant hooded sweater on the job after having already incurring multiple prior safety infractions.²⁵ It said that his conduct was reckless and amounted to wilful misconduct.²⁶ It found that the Claimant ought to have known he could be dismissed for breaching the employer's safety policy.²⁷

[30] The Claimant argues that the General Division made an important error of fact because he supplied a letter from his landlord warning that he would be evicted for not paying rent for over six months.²⁸

[31] The Claimant also says that he has been working for the past 22 years and this is the first time he is asking for support and hopes that his request is approved.²⁹

[32] The hearing recording reveals that the Claimant raised this argument at the hearing.³⁰ He told the General Division that he had a letter from his building manager confirming that he hadn't paid rent the past six months and was going to be evicted. The letter was part of the file and he asked the General Division member to consider it.³¹

[33] In its decision, the General Division acknowledged that the Claimant was experiencing financial and emotional distress.³² It was aware that his rent hadn't been paid for a few months and that he received a letter from his landlord.

[34] The General Division didn't overlook or ignore the evidence about his financial circumstances, unpaid rent and eviction letter. While it sympathized with the Claimant, it correctly stated that it could not ignore the law.³³

²⁵ See paragraph 22 of the General Division decision.

²⁶ See paragraphs 27, 32, 44 and 45 of the General Division decision.

²⁷ See paragraph 43 of the General Division decision.

²⁸ See pages AD1B-1 and AD1-12.

²⁹ See page AD1-B.

³⁰ See hearing recording at 35:50 to 36:44.

³¹ See letter at page GD8-3.

³² See paragraphs 15 and 30 of the General Division decision.

³³ See paragraph 46 of the General Division decision.

[35] The EI Act says that if a Claimant loses their employment due to their own misconduct, they are not entitled to get EI benefits.³⁴ The case law says that misconduct must be wilful, which means the conduct is conscious, deliberate or intentional.³⁵ It also includes conduct that is reckless that is almost wilful.³⁶

[36] The General Division has to follow the EI Act and binding case law. It referred to the law and relevant case law in its decision.³⁷ It has no authority to make an exception and grant EI benefits on the basis of financial hardship or because he felt his employer treated him unfairly.³⁸

[37] The General Division's key findings about the misconduct are consistent with the evidence that it heard and in the file. It didn't overlook or ignore any critical or contradictory evidence.

[38] It is not arguable that the General Division made an important error of fact when it decided that the Claimant's conduct amounted to misconduct. It considered his financial circumstances and letter from his landlord, and correctly decided that it had to follow the law.

– **It is not arguable that the General Division didn't follow a fair process and was biased**

[39] If the General Division didn't follow a fair process, then I can intervene in this case.³⁹

[40] The principles of "natural justice" are concerned with procedural fairness. The right to a fair hearing before the Tribunal includes certain procedural protections. For example, the right to an unbiased decision maker and the right of a party to know the

³⁴ See section 30(1) of the EI Act.

³⁵ See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

³⁶ See *McKay-Eden v. Her Majesty the Queen*, A-402-96.

³⁷ See paragraphs 24-26 of the General Division decision.

³⁸ See paragraph 46 of the General Division decision.

³⁹ See section 58(1)(a) of the DESD Act.

case against him or her and to be given an opportunity to respond are just some examples.

[41] The Claimant argues that the General Division was bias and did not treat him like a human being.⁴⁰ He says that the General Division took the employer's side more seriously than his own explanation, which he says was not given any consideration.⁴¹

[42] An allegation of bias is a serious allegation. The law says such an allegation cannot rest on mere suspicion, pure conjecture, insinuations, or mere impressions.⁴²

[43] The legal test for establishing bias is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would conclude that it was more likely than not that the General Division member, whether consciously or unconsciously, would not decide the case in a fair manner.⁴³

[44] I listened the audio recording of the General Division hearing. The hearing lasted for 38 minutes and only the Claimant attended. The General Division explained to the Claimant how the hearing would proceed and outlined the legal test for misconduct cases.⁴⁴ It also confirmed that he was ready to proceed and had reviewed the documents in his file.⁴⁵

[45] The recording reveals that the Claimant had a full opportunity to present his case and was given a chance to provide any additional information before the hearing ended.⁴⁶

⁴⁰ See page AD1-5.

⁴¹ See page AD1B-1.

⁴² See *Arthur v Canada (Attorney General)*, 2001 FCA 223.

⁴³ See *Committee for Justice and Liberty v National Energy Board*, 1976 CanLII 2 (SCC).

⁴⁴ See hearing recording at 7:50-9:08.

⁴⁵ See hearing recording at 3:20-5:16.

⁴⁶ See hearing recording at 35:50-36:44. This was when he told the General Division about the letter from his landlord.

[46] The recording confirms that the General Division listened to the Claimant while he presented his case. It asked him relevant questions when necessary and was always respectful throughout the hearing.

[47] An informed person, viewing the matter reasonably and practically and having thought the matter through would not conclude that it was more likely than not that the General Division was biased.

[48] The Claimant's allegation appears to amount to no more than a disagreement with the result. A disagreement with the result reached is insufficient to amount to bias and not a reviewable error.

[49] There is no arguable case that the General Division didn't follow a fair process or was biased, so there is no reasonable chance of success on this ground.⁴⁷

Conclusion

[50] In addition to the Claimant's arguments, I reviewed the file to make sure the General Division didn't make a mistake. I considered the documents in the file, examined the decision under appeal, listened to the recording and satisfied myself that the General Division did not misinterpret or fail to properly consider any relevant evidence.⁴⁸

[51] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Solange Losier
Member, Appeal Division

⁴⁷ See section 58(1)(a) of the DESD Act.

⁴⁸ See *Karadeolian v Canada (Attorney General)*, 2016 FC 165 at paragraph 10.