



Citation: *JJ v Canada Employment Insurance Commission*, 2024 SST 129

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: J. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 7, 2023
(GE-23-1128)

Tribunal member: Solange Losier

Decision date: February 13, 2024

File number: AD-23-879

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] J. J. is the Claimant in this case. When he stopped working, he applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) approved the Claimant's EI claim and paid him benefits.¹ However, the employer asked the Commission to reconsider their decision saying that he was terminated for cause.

[4] The Commission ended up changing their decision.² They decided that the Claimant was not entitled to get EI benefits from June 12, 2022 because he stopped working due to his own misconduct.³ This resulted in an overpayment of EI benefits.⁴

[5] The General Division concluded the same.⁵ It said that the Claimant lost his job because of misconduct, so he wasn't entitled to get EI benefits.

[6] The Claimant is now asking for permission to appeal the General Division decision to the Tribunal's Appeal Division.⁶ He argues that the General Division didn't follow a fair process and made an important error of fact.⁷

¹ See initial decision at page GD3-27 and payment chart at GD3-29.

² See Commission's reconsideration decision at pages GD3-58 to GD3-60.

³ See section 30(1) of the *Employment Insurance Act* (EI Act). This is called a disqualification to EI benefits.

⁴ See notice of debt at page GD3-61.

⁵ See General Division decision at pages AD1A-1 to AD1A-10.

⁶ See application to the Appeal Division at pages AD1-1 to AD1-13 and AD1B-1 to AD1B-7.

⁷ See sections 58(1)(a) and 58(1)(c) of the *Department of Employment and Social Development (DESD Act)*.

[7] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.⁸

Preliminary Matter

[8] When the Claimant submitted his application to the Appeal Division he included two attachments.⁹ One of the attachments is called "Claim ID" and the other says "Order to Pay Wages (34)".

[9] The Tribunal wasn't able to retrieve the two attachments referenced above. So, a Navigator from the Tribunal contacted the Claimant to asking him to resubmit them.¹⁰

[10] The Claimant tried to resubmit them by email, but ended up sending the Tribunal a duplicate copy of his application without any of the attachments.¹¹

[11] The Tribunal sent the Claimant a letter asking him to resubmit them by the deadline, on February 5, 2024.¹² The Tribunal received no response to this letter.

[12] As a result, a final letter was sent to the Claimant on February 12, 2024 to let the Claimant know that the Tribunal had not received the attachments, so it would proceed with next steps.¹³

Issues

[13] The issues in this appeal are:

- a) Was the application to the Appeal Division late?
- b) If so, should I extend the time for filing the application?

⁸ See section 58(2) of the DESD Act. I have to refuse leave to appeal if I am satisfied that the appeal has no reasonable chance of success.

⁹ See page AD1B-1.

¹⁰ These calls took place on January 22, 2024 and January 24, 2024.

¹¹ See pages AD1C-1 to AD1C-33.

¹² See pages AD2-1 to AD2-3.

¹³ See pages AD3-1 to AD3-3.

- c) Is there an arguable case that the General division didn't follow a fair process or made an important error of fact?

Analysis

The application was late

[14] The General Division decision is dated September 5, 2023.¹⁴

[15] The Tribunal received the Claimant's application to the Appeal Division on September 22, 2023, but it was missing some information ("the reasons for his appeal").¹⁵ So, the Tribunal sent the Claimant a letter asking him for additional information on October 10, 2023. It asked him to provide the information to the Tribunal before November 10, 2023.

[16] The Claimant didn't reply by the deadline on November 10, 2023. However, a few days later on November 12, 2023 he submitted another application to the Appeal Division and this time he included his reasons for appealing.¹⁶

[17] The deadline to file an application to the Appeal Division in the prescribed form and manner is 30 days after the day on which the General Division decision was communicated in writing.¹⁷

[18] The Claimant doesn't say when the General Division decision was communicated to him. However, I can see that he submitted his initial application to the Appeal Division on September 22, 2023. So, I think the General Division's decision was likely communicated to the Claimant in writing by September 22, 2023.

[19] I will start counting the 30 days from the following day, on September 23, 2023. This means that the deadline to file his application to the Appeal Division was on October 23, 2023.

¹⁴ See General Division decision at pages AD1A-1 to AD1A-10.

¹⁵ See application to the Appeal Division at pages AD1-1 to AD1-13.

¹⁶ See pages AD1B-1 to AD1B-7.

¹⁷ See section 57(1)(a) of the DESD Act.

[20] I find that the Claimant filed his application to the Appeal Division late. The deadline was October 23, 2023 and he submitted it on November 10, 2023.

I am extending the time for filing the application

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

[22] The Claimant provided an explanation.¹⁹ He explained that he submitted the application to the Appeal Division previously but that it was filled out incorrectly and he was aware of the November 10, 2023 deadline. He said that he tried to find someone to represent him and spoke to a few lawyers, but eventually told him they couldn't help him.²⁰

[23] I am granting the Claimant an extension of time to file his appeal because I find that he has provided a reasonable explanation for why his appeal was late.

Analysis

[24] An appeal can proceed only if the Appeal Division gives permission to appeal.²¹

[25] I must be satisfied that the appeal has a reasonable chance of success.²² This means that there must be some arguable ground upon which the appeal might succeed.²³

[26] 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").²⁴

¹⁸ It says this in section 27(2) of the *Social Security Tribunal Rules of Procedure*.

¹⁹ See page AD1B-5.

²⁰ See page AD1B-5.

²¹ See section 56(1) of the DESD Act.

²² See section 58(2) of the DESD Act.

²³ See *Osaj v Canada (Attorney General)*, 2016 FC 115.

²⁴ See section 58(1) of the DESD Act.

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

- 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

[28] In this case, the Claimant selected two grounds of appeal on his application to the Appeal Division. He said that the General Division didn't follow a fair process and made an important error of fact.

– **The Claimant argues that the General Division didn't follow a fair process and made an important error of fact**

[29] The Claimant says that the General Division didn't follow a fair process because he provided them with a decision letter from the labour board that states there was no cause for him to be terminated.²⁶ Because of that decision, the employer had to pay him vacation pay and two weeks notice. He says that Employment Insurance didn't even bother to look at this letter.

[30] The Claimant also says that the General Division made an important error of fact. He restates that the reason he took a day off from work was not for pleasure but because his disabled parents needed help with some lifting and setting stuff up. He did not know that he would lose his job.

²⁵ See section 58(1) of the DESD Act.

²⁶ See page AD1B-3.

I am not giving the Claimant permission to appeal

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

[31] There is no arguable case that the General Division didn't follow a fair process when it decided that it didn't have to follow the Ontario Labour Relations Board (OLRB) decision submitted by the Claimant.²⁷

[32] First, the OLRB decision submitted by the Claimant relates to the *Employment Standards Act*, not the *Employment Insurance Act*.²⁸

[33] The General Division addressed the Claimant's argument about it in its decision.²⁹ It correctly stated that it was not bound by the OLRB decision because it wasn't based on the *EI Act* but instead on a different type of law.³⁰

[34] The General Division decided that the OLRB decision wasn't relevant because it had to focus on the Claimant's actions and whether it amounted to misconduct according to the *EI Act* and case law.³¹ It correctly stated that it only has the power to decide questions under the *EI Act* and that it couldn't decide whether the Claimant had options under laws.³²

[35] Second, the General Division has to follow Federal Court and Federal Court of Appeal (Court) decisions. At the General Division hearing, the Claimant talked about how the employer owed him some money after his dismissal.³³ However, the Court has said that the Tribunal doesn't have to determine whether the dismissal was justified or whether the penalty was justified. It has to determine whether the claimant's conduct amounted to misconduct within the meaning of the *EI Act*.³⁴

²⁷ See section 58(1)(a) of the *DESD Act*.

²⁸ See the *Employment Standards Act*, 2000, SO 2000, c 41.

²⁹ See OLRB decision at pages GD11-1 to GD11-8. The OLRB decided that the Claimant was entitled to vacation pay and termination pay.

³⁰ See paragraph 46 of the General Division decision.

³¹ See paragraph 47 of the General Division decision.

³² See paragraph 14 of the General Division decision.

³³ Listen to the audio recording at 40:40 to 41:47.

³⁴ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[36] I listened to the hearing recording and reviewed the file. The hearing lasted for 47 minutes. The General Division explained the legal test and asked the Claimant questions about his case throughout the hearing. The Claimant testified at the hearing and had a full opportunity to present his case.

[37] It is clear that the Claimant feels the General Division's decision and outcome was unfair, but that itself is not a ground of appeal. The General Division has to follow the EI Act. I found no evidence that the General Division didn't provide a fair process.

[38] As a result, there is no arguable case that the General Division didn't follow a fair process.³⁵

– **It is not arguable the General Division made an important error of fact**

[39] There is no arguable case that the General Division made an important error of fact when it decided that the Claimant's conduct amounted to misconduct based on the EI Act.

[40] An error of fact happens when the General Division bases its decision on an "erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it."³⁶ In other words, I can intervene if the General Division bases its decision on an important mistake about the facts of the case.

[41] The General Division had to decide whether the Claimant lost his job due to his own misconduct.³⁷

[42] The EI Act doesn't define misconduct, but the Court has defined misconduct as conduct that is wilful.³⁸ This means conduct that is conscious, deliberate or intentional. It also includes conduct that is reckless that is almost wilful.³⁹

³⁵ See section 58(1)(a) of the DESD Act.

³⁶ See section 58(1)(c) of the DESD Act.

³⁷ See section 30(1) of the EI Act.

³⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[43] The General Division decided that the Claimant's actions were wilful when he was consciously absent from work without his employer's permission.⁴⁰ It said that he took the day off from work even after the employer told him that he could not have the day off.

[44] It rejected the Claimant's argument that he thought he could have the day off when his employer didn't respond to his text message over the weekend because he had already been told he couldn't have the day off.⁴¹

[45] The General Division found that the Claimant **knew or ought to have known** that being absent from work without permission could lead him to being let go.⁴²

[46] The Claimant's argument to the Appeal Division is the same argument that he made at the General Division. He insists that his conduct was not misconduct. However, the General Division is the finder of fact and it was free to examine the Claimant's conduct, as well determine that it amounted to misconduct according to the EI Act.

[47] An appeal to the Appeal Division is not a redo of the General Division hearing. The Appeal Division is not an opportunity to reargue your case while hoping for a different outcome.

[48] The General Division's key findings are supported by the evidence. I did not find any relevant evidence it might have ignored or misinterpreted. As well, the General Division correctly stated and applied the EI Act and applicable case law.

[49] As a result, there is no arguable case that the General Division made an important error of fact when it decided the issue of misconduct.⁴³

⁴⁰ See paragraphs 19, 30 and 31 of the General Division decision.

⁴¹ See paragraphs 27-29 of the General Division decision.

⁴² See paragraph 31 of the General Division decision.

⁴³ See section 58(1)(c) of the DESD Act.

Conclusion

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

Solange Losier
Member, Appeal Division