Citation: *DP v Canada Employment Insurance Commission*, 2024 SST 312

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. P.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated October 27, 2023 (GE-23-1553)

Tribunal member:	Melanie Petrunia
Decision date:	March 26, 2024
File number:	AD-23-1089

Decision

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

Overview

[2] The Applicant, D. P. (Claimant) stopped working and applied for Employment Insurance (EI) benefits. He said that his employer had introduced a COVID-19 vaccination policy that he refused to comply with. He was placed on a leave without pay and later dismissed.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was suspended and then dismissed due to his own misconduct and refused to pay him benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was disqualified from receiving benefits because he had voluntarily left his job without just cause. The General Division decided that it was the Claimant who initiated the termination of his employment and there were reasonable alternatives available to him.

[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. The Claimant argues the General Division based its decision on an error of fact when it found that he voluntarily left his job.

[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 error of fact when it decided that the Claimant voluntarily left his job?

b) 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

d) made an error in law.[4]

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[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.
[4] This paraphrases the grounds of appeal.

[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]

– Background

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19. The Claimant had been on sick leave and was told that he had to provide proof of vaccination in order to return to work, pursuant to the policy. The Claimant refused to comply with the policy because it was not in place when he was hired or part of his collective agreement.[6] The Claimant told the employer that he did not need a leave of absence and asked to be terminated.[7]

[13] The employer told the Commission that the Claimant was placed on a leave of absence without pay and later terminated because he would not provide his vaccination status.[8]

– The General Division decision

[14] The General Division first considered why the Claimant was no longer working. Relying on caselaw from the Federal Court and the Federal Court of Appeal, the General Division stated that it was not bound by how the Commission decided the employment relationship terminated.[9]

[15] The General Division found that the Claimant was the one to initiate termination of his employment. It based this decision on the Claimant's request, verbally and in writing, to be dismissed because he did not accept new conditions of employment.[10]

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[5] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[6] GD3-55
[7] GD2-10
[8] GD3-40
[9] General Division decision at para 7.
[10] General Division decision at para 12.

The General Division found that the Claimant did not intend to return to the workplace, even though he did not formally resign.

[16] The General Division then considered whether the Claimant had any reasonable alternatives to leaving his job. It found that the Claimant could have raised his medical concerns with the employer and had ample time to look for a new job before he voluntarily left.[11] The General Division concluded that the Claimant did not have just cause for leaving his job because there were reasonable alternatives available to him.

No arguable case the General Division based its decision on factual errors

[17] In his application for leave to appeal, the Claimant argues that the General Division made important errors of fact in its decision. He says that his words were taken out of context. The Claimant argues that his statement to his employer was meant to convey that he refused to accept the policy, was not planning to voluntarily resign and, if his employer did not terminate, he would see it as a constructive dismissal.[12]

[18] The Claimant says that he took an approach recommended by employment lawyers to try to try to get terminated without cause rather than quitting and claiming constructive dismissal.[13]

[19] The Claimant says that the General Division misinterpreted an email he sent to his employer. He argues that he was expressing his frustration that his employer ignored his refusal of the new policy. He says that he saw this action as an actual termination and a constructive dismissal.[14]

[20] The Claimant says that he did not resign because it would be against his interests to do so. He would lose his entitlement to EI benefits and severance, and it would not be inline with the grievance procedures under his collective agreement.[15]

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[11] General Division decision at paras 31 and 34.
[12] AD1-21
[13] AD1-21
[14] AD1-21
[15] AD1-22

[21] The Claimant argues that the General Division made an important error of fact. For this ground of appeal, the General Division has to have based its decision on a finding of fact that ignored or misunderstood relevant evidence, or where its finding does not rationally follow from the evidence.[16]

[22] The General Division explained why it found that it was the Claimant who initiated the termination of employment. It relied on the following evidence:

- The Claimant asked the employer to terminate his employment during a Skype call.[17]
- In a follow-up email exchange, the Claimant said that he would not take the three months of leave without pay.[18]
- Although the employer's policy said that it would continue to receive benefits, the Claimant's benefits were terminated in May, when the leave period was going to start.[19]
- The Claimant initiated the termination of the employment and had no intention of returning to the workplace after his sick leave due to the policy.[20]

[23] I appreciate that the Claimant disagrees with how the General Division interpreted the evidence. The General Division took the Claimant's evidence and arguments into consideration in making its finding. It explained, with reference to the evidence, why it decided that the Claimant voluntarily left his employment. There is no arguable case that the General Division based this decision on factual errors or ignored relevant evidence.

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[16] See section 58(1)(c) of the EI Act which states "the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."
[17] General Division decision at para 9.
[18] General Division decision at para 10.
[19] General Division decision at para 11.
[20] General Division decision at para 12.

[24] It is not the role of the Appeal Division to re-weigh the evidence to come to a different conclusion. I have not found any evidence that the General Division ignored or misinterpreted.

[25] Aside from the Claimant's arguments, I have also considered 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. I have not identified any errors of law.

[26] 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

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

Melanie Petrunia
Member, Appeal Division