



Citation: *DG v Canada Employment Insurance Commission*, 2024 SST 837

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: D. G.

Respondent: Canada Employment Insurance Commission
Representative: Nikkia Janssen

Decision under appeal: General Division decision dated March 12, 2024
(GE-22-3838)

Tribunal member: Janet Lew

Type of hearing: In Writing

Decision date: July 17, 2024

File number: AD-24-283

Decision

[1] The appeal is allowed. The matter will go back to the General Division for a redetermination.

Overview

[2] The Appellant, D. G. (Claimant), is appealing the General Division decision of March 12, 2024. The General Division found that the Respondent, the Canada Employment Insurance Commission (Commission), had proven that the Claimant had been suspended from his job because of misconduct. It found that he had done something or had failed to do something that caused him to be suspended. The General Division found that he had not complied with his employer's vaccination policy.

[3] The General Division also found that, because of the Claimant's misconduct, he was disqualified from receiving Employment Insurance benefits.

[4] The Claimant denies that he was suspended from his employment, that he was aware that he could face any consequences for not complying with his employer's vaccination policy, or that he committed any misconduct. He argues that his employer placed him on a leave of absence from his employment and that it should be treated as such for the purposes of the *Employment Insurance Act*. The Claimant argues that the General Division made legal and factual errors.

[5] The Claimant also argues that the General Division failed to follow the principles of natural justice. He argues that he was denied a fair hearing in that the General Division effectively refused to let him have his legal representative attend the hearing.

[6] The Commission argues that the evidence clearly shows that the Claimant committed misconduct. However, the Commission concedes that the General Division made a legal error when it determined that the Claimant was disqualified—rather than disentitled—from receiving Employment Insurance benefits.

[7] Both parties agree that the General Division failed to follow the principles of natural justice when the Claimant did not get the opportunity to have his legal representative attend the hearing. They agree that the appeal should be returned to the General Division for a redetermination on all issues.

Issues

[8] The issues in this appeal are:

- a) Did the General Division breach the principles of natural justice by failing to accommodate the Claimant's request?
- b) Did the General Division make a legal error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for a suspension?
- c) Did the General Division base its decision on factual errors that it made in a perverse or capricious manner or without regard for the material before it?

Analysis

[9] The Appeal Division may intervene in General Division decisions if the General Division made any jurisdictional, procedural, legal, or certain types of factual errors.¹

[10] For these types of factual errors, the General Division had to have based its decision on that error and had to have made the error in a perverse or capricious manner, or without regard for the material before it.²

¹ See section 58 of the Department of Employment and Social Development (DESD) Act.

² See section 58(1)(c) of the DESD Act.

The General Division breached the principles of natural justice by failing to accommodate the Claimant's request

[11] The General Division failed to follow the principles of natural justice when it effectively denied the Claimant the opportunity to have his representative attend the hearing.

[12] Initially, the General Division scheduled a teleconference hearing for May 1, 2023. On May 10, 2023, the Claimant wrote to the Social Security Tribunal asking whether his representative could attend the hearing in person (in Ontario) while he attended by teleconference.³

[13] The General Division held a case conference to discuss various pre-hearing issues. At that time, the General Division member informed the Claimant that his request for a "hybrid" hearing at which he would attend in person and his representative by Zoom videoconference was unlikely to be accommodated. The General Division member informed the Claimant that Service Canada Centres, where it holds hearings, were not set up for these types of hearings.⁴

[14] The General Division member told the Claimant that he would make inquiries about whether it could hold a "hybrid" hearing.

[15] The hearing was rescheduled to September 15, 2023. The format of the hearing was changed to an in-person hearing in British Columbia. The hearing went ahead without the Claimant's counsel. The General Division did not arrange for a "hybrid" hearing at which counsel could have attended the in-person hearing by tele- or videoconference. And presumably, it was too prohibitively expensive for the Claimant to arrange to have his Ontario-based counsel attend in person for a hearing in British Columbia.

[16] The General Division should have been able to accommodate the Claimant's request to have his counsel attend the hearing in-person (in Ontario), while he attended

³ See Claimant's email of May 10, 2023, at GD 11-1.

⁴ At approximately 27:50 to 35:02 of the audio recording of the case conference.

by teleconference (from British Columbia), or for the Claimant to attend in person in British Columbia, while his counsel attended by phone or videoconference.

[17] I do not know where the Claimant's counsel is located, as not all Service Canada Centres are fully equipped or offer tele- and videoconferencing, though the Service Canada Centre for the region in which the Claimant is located has tele- and videoconferencing facilities. If the Claimant had chosen to attend the hearing in-person in British Columbia, his counsel should have been able to attend by phone or video.

[18] The Claimant argues that he should be granted a new hearing at the General Division, to enable his counsel to attend. The Commission says that, in the interest of natural justice, it does not oppose this matter being returned to the General Division.

[19] I agree that this is the appropriate remedy. The General Division should have allowed the Claimant to have his counsel present to represent him, even if it required accommodating an alternative format for hearing for either the Claimant or his counsel. I am returning this matter to the General Division for a redetermination on all issues.

[20] The Claimant should immediately give the Social Security Tribunal (Tribunal) the name and contact information for his counsel. He or his counsel should also file the appropriate authorization form with the Tribunal.

[21] If the Claimant asks the General Division to provide him with a "hybrid" hearing, the General Division should endeavour to provide him with one. The Claimant should note that the General Division can also readily hold videoconference hearings. All participants can attend by videoconference from virtually any location within Canada, provided they have an internet connection.

[22] As I am returning this matter on this issue, I do not have to address any of the other arguments that the Claimant raises. However I will address the disqualification issue, so the parties can be confident about when it arises.

The General Division made a legal error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for being suspended from work

[23] The General Division made a legal error when it found that the Claimant was disqualified from receiving Employment Insurance benefits for being suspended from his employment due to misconduct.

[24] A suspension for misconduct results in a disentitlement, rather than a disqualification from receiving Employment Insurance benefits.⁵ The result may appear the same, as a claimant would not receive any benefits in either case. But there is a distinction between the two. A disqualification can lead to harsher consequences.

[25] So, the General Division made a mistake in concluding that the Claimant was disqualified from receiving Employment Insurance benefits after having found that he was suspended from his employment due to misconduct. Having determined that the Claimant had been suspended from his employment due to misconduct, the General Division should have found that the Claimant was disentitled from receiving benefits.

Conclusion

[26] The Claimant did not get a fair hearing as the General Division did not accommodate his request to have his counsel attend by alternate means. The appeal is allowed. I am returning this matter to the General Division for a redetermination.

Janet Lew
Member, Appeal Division

⁵ See section 30 of the *Employment Insurance Act*.