



Citation: *MT v Canada Employment Insurance Commission*, 2021 SST 505

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 4, 2021
(GE-21-987)

Tribunal member: Melanie Petrunia

Decision date: September 22, 2021

File number: AD-21-278

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed.

Overview

[2] The Applicant, M. T. (Claimant), was fired from his job. His employer said that he was terminated because he refused to remove a mask with a confederate flag on it. The Claimant applied for regular employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission) decided the Claimant lost his job because of his own misconduct and disqualified him from receiving benefits.

[3] The Claimant appealed to the Tribunal's General Division. The General Division decided that he lost his job because he refused to remove his mask after being warned the day before. It found that this is considered misconduct because his actions were conscious and deliberate. It found that the Claimant should have known that he would be fired for refusing his employer's order.

[4] The Claimant now seeks leave to appeal the General Division's decision to the Appeal Division. He claims he did not think he would be fired for refusing to remove his mask. He says that there was no other mask offered to him and it would have been unsafe to remove the mask he was wearing. He argues that he did not commit any misconduct and that he was fired for personal reasons.

[5] 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.

Issue

[6] Does the Claimant raise some reviewable error upon which the appeal might succeed?

Analysis

[7] The *Department of Employment and Social Development Act* (DESD Act) sets out the only grounds of appeal of a General Division decision.¹ 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;² or
- d) made an error in law.³

[8] 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.

[9] I will grant leave if I am satisfied that at least one of the Claimant's stated grounds of appeal gives the appeal a reasonable chance of success. It is a lower threshold than the one that must be met when the appeal is heard on the merits later on in the process if leave to appeal is granted.

[10] Before I can grant leave to appeal, I need to be satisfied that the Claimant's arguments fall within any of the grounds of appeal stated above and that at least one of

¹ DESD Act, s 58(2).

² 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.

³ This paraphrases the grounds of appeal.

these arguments has a reasonable chance of success. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁴

Does the Claimant raise some reviewable error upon which the appeal might succeed?

[11] In the application for leave to appeal, the Claimant states that he did not think he would be fired for refusing to remove his mask. He says that he has a family, a mortgage and bills to pay and would not have risked losing his job. He also says that there was no other mask provided to him at the time that he was terminated. The Claimant argues that it would have been unsafe to remove his mask and risk the health of himself and others.

[12] The Claimant states that he worked for the employer off and on since 2007. He believes that the acting superintendent was out to get him and that his termination was personal. The Claimant argues that the case should be investigated and that the Tribunal should speak with his crew and foreman.

[13] The Claimant didn't specify what errors he thinks the General Division made. I've decided that the reasons given by the Claimant amount to alleged errors of fact. The arguments that the Claimant makes in his application for leave to appeal were made before the General Division and taken into consideration in its decision.

[14] At the hearing, the Claimant told the General Division member that he did not believe that he would lose his job for refusing to remove his mask. The General Division member found that the Claimant should have known he could lose his job. He was warned not to wear the mask with the confederate flag the day before he was fired. He came to work the following day wearing the mask. When he was called into a meeting and asked to remove the mask, he refused. The General Division found that this was

⁴ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

insubordination and that the Claimant should have known that refusing a direct order was likely to result in being fired.⁵

[15] The Claimant also said at the hearing that he was not given another mask at the meeting where he was fired. The General Division member also considered this in its decision. It found that it was more likely that the Claimant refused to remove the mask because he did not think it was racist rather than because he was not offered a replacement.⁶

[16] The General Division considered the Appellant's position that he was fired for personal reasons, rather than for refusing to remove his mask. It rejected this argument and found that refusing to remove his mask was the reason the Claimant was fired.⁷

[17] The Claimant is restating the same arguments as at the General Division and asking for the Appeal Division to re-weigh the evidence and come to a different conclusion. I have found that there is no arguable case that the General Division based its decision on an important error of fact and I cannot re-weigh the evidence.⁸ I am not satisfied that the appeal has a reasonable chance of success.

[18] I have also considered other grounds not raised by the Claimant. After reviewing the record and listening to the hearing before the General Division, I have not identified any errors of law or jurisdiction. There is no arguable case that the General Division failed to provide a fair process.

Conclusion

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

Melanie Petrunia
Member, Appeal Division

⁵ General Division decision at para 33.

⁶ General Division decision at para 27.

⁷ General Division decision at para 16.

⁸ *Rouleau v. Canada (Attorney General)*, 2017 FC 534, at para 42.