Citation: *JF v Canada Employment Insurance Commission*, 2022 SST 520

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	J. F.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 21, 2022 (GE-22-131)

Tribunal member:	Janet Lew
Decision date:	June 15, 2022
File number:	AD-22-247

Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

Overview

[2] The Applicant, J. F. (Claimant), is appealing the General Division decision. The General Division found that the Claimant lost her job because of misconduct. In other words, it found that she did something that caused her to lose her job. She did not comply with her employer's policy that required her to be vaccinated.

[3] Having determined that there was misconduct, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant does not dispute the basic facts. She did not comply with her employer's vaccination policy because she disagreed with it for various reasons.

[5] However, the Claimant argues that the General Division made two errors: (1) it failed to consider whether her employer's vaccination policy was reasonable and (2) it overlooked the collective agreement that gave her the right to refuse vaccination. She argues that she did not have to comply with her employer's vaccination policy under the terms of her collective agreement. She also says that she did not have to comply because, from her view, the vaccination policy was unreasonable. She argues that, as she did not have to comply with the policy, there was no misconduct.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] If the appeal does not have a reasonable chance of success, this ends the matter.

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[1] Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[7] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issues

[8] The issues are as follows:

a) Is there an arguable case that the General Division failed to decide whether the employer's vaccination policy was reasonable?

b) Is there an arguable case that the General Division overlooked the collective agreement between the Claimant's employer and her union?

Analysis

[9] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.[3]

[10] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

Is there an arguable case that the General Division failed to decide whether the employer's vaccination policy was reasonable?

[11] The Claimant argues that the General Division failed to decide whether her employer's vaccination policy was reasonable. She suggests that, had the General Division considered this issue, it would have found that the employer's vaccination policy was unreasonable. And, she says, once it came to this conclusion, it would have decided that she did not have to comply with it.

[3] See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

[12] The Claimant notes that the Respondent, the Canada Employment Insurance Commission, stated that the employer's policy was reasonable because it was intended to keep staff and vulnerable patients safe during the pandemic.[4]

[13] The Claimant argues however that her employer's vaccination policy was not reasonable since the vaccines are ineffective in preventing transmission. She also says that the vaccines could place her at a high risk for severe illness. She also argues that the employer's policy is altogether unnecessary for someone like her who works from home.

[14] Given all of these considerations, the Claimant argues that the General Division should have decided that the employer's vaccination policy was unreasonable. She argues that, because her employer's vaccination policy was unreasonable, ultimately, she did not and should not have had to comply with it.

[15] The General Division acknowledged the Claimant's arguments about the reasonableness of her employer's vaccination policy.[5] The General Division found that the reasonableness of the policy was irrelevant to the misconduct issue. The General Division wrote:

> I understand that the [Claimant] is adamant that the employer's policy is not reasonable. This is not something for the Tribunal to decide. My task is to decide why the [Claimant] was fired and if the conduct in question is misconduct under the [*Employment Insurance Act*]. Anything else is best debated in a civil court or before a labour arbitrator.

[16] I do not see any cases in which the courts have reviewed the reasonableness of an employer's policies when deciding whether a claimant's conduct amounts to misconduct. Introducing such a measure could lead to an onerous and subjective assessment of misconduct. The courts seem to have rejected this approach.

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[4] See Claimant's Application to the Appeal Division – Employment Insurance, filed April 11, 2022, at AD1-4, citing the representations of the Canada Employment Insurance Commission, at GD4-3 and GD7-1.
[5] See General Division decision, at paras 12, 22, and 26.

[17] Indeed, in one case, the Federal Court of Appeal suggested that, as long as an employer's directive is lawful, an employee would have to comply with that directive.[6] Otherwise, failure to comply would be considered misconduct.

[18] The Federal Court of Appeal has long established that it is beyond the role of tribunals and courts to determine whether dismissal or some other penalty by an employer is justified. If tribunals and courts were to determine whether penalties were justified, this would necessarily involve looking at a claimant's conduct, measured against the reasonableness of the law or the employer's policy or directive. The reasonableness of the law or the employer's policy or directive then must lie beyond the role of tribunals and courts to determine.

[19] I am not satisfied that the General Division failed to decide whether the Claimant's employer's vaccination policy was reasonable because it is not a factor when assessing misconduct.

Is there an arguable case that the General Division overlooked the collective agreement between the Claimant's employer and her union?

[20] The Claimant argues that the General Division failed to consider the collective agreement between her employer and union. She claims that, under the agreement, she did not have to get vaccinated. So, she says that if she did not have to comply with the employer's vaccination policy, misconduct could not have occurred.

[21] The General Division did not address this argument. However, I do not readily see that the Claimant raised this specific argument either in the documents that she filed or in her oral submissions. At most, the Claimant argued that her employer could have reassigned her to work from home.[7] This argument deals with the consequences of any conduct or behaviour.

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[6] *Bedell*, A-1716-83.
[7] See Claimant's email dated January 19, 2022, at GD5-1.

[22] The consequences of any behaviour is a different issue from whether there is any misconduct in the first place. So, although the Claimant argued that her employer could have imposed other penalties for her non-compliance, it does not flow that the General Division should have also addressed the issue about whether the Claimant had to comply with the employer's policy in the first place.

[23] That said, I note that the provisions in the collective agreement relate to influenza vaccinations.[8] The provisions do not say anything about COVID-19 vaccines or, more generally, about coronavirus vaccines. It is debatable whether these terms of the collective agreement even extend to COVID-19 vaccines. In other words, one cannot assume that any exemptions that the collective agreement might offer for influenza also applies to COVID-19.

[24] Because the Claimant did not raise this specific argument, the General Division could not have been expected to address it. And, on top of that, the collective agreement referred to only influenza vaccines.

[25] I am not satisfied that there is an arguable case that the General Division should have considered the terms of the collective agreement and whether it exempted the Claimant from getting vaccinated for COVID-19.

Conclusion

[26] Permission to appeal is refused because the appeal does not have a reasonable chance of success. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

[8] See Article 25 – Flu Vaccine of the Collective Agreement between the Employer and the Union, at GD5-52.