



Citation: *NE v Canada Employment Insurance Commission*, 2022 SST 732

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: N. E.

Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision under appeal: General Division decision dated June 3, 2022
(GE-22-1269)

Tribunal member: Janet Lew

Type of hearing: Videoconference

Hearing date: July 26, 2022

Hearing participants: Appellant
Respondent's representative

Decision date: August 5, 2022

File number: AD-22-365

Decision

[1] The appeal is allowed. The matter will go back to a different member of the General Division for reconsideration.

Overview

[2] This is an appeal of the General Division decision. The General Division summarily dismissed the appeal of the Appellant, N. E. (Claimant). It did not hold a hearing to examine whether the Claimant's employer had dismissed or suspended him from work because of misconduct. The General Division summarily dismissed the Claimant's appeal because it found that the appeal did not have a reasonable chance of success.¹

[3] The General Division determined that the Claimant did not comply with his employer's COVID-19 vaccination policy, that he was aware of the consequences of non-compliance, and that his non-compliance led to his suspension. It concluded that there was misconduct, which meant that he was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division member was biased and that she made several procedural and factual errors. He says that the General Division should not have summarily dismissed his appeal. He says that he should have had a hearing at the General Division so that he could properly present his case. He argues that the appeal should be allowed.

[5] The Commission argues that the General Division member acted fairly and did not make any procedural or factual errors. The Commission argues that the appeal should be dismissed.

¹ Under section 53(1) of the *Department of Employment and Social Development Act*, the General Division must summarily dismiss an appeal if it is satisfied that the appeal does not have a reasonable chance of success.

Issues

[6] The issues in this appeal are as follows:

- a) Did the General Division make an error by summarily dismissing the Claimant's appeal?
- b) Was there a reasonable apprehension of bias?
- c) Did the General Division fail to provide the Claimant with copies of documents?
- d) Did the General Division base its decision on any errors of fact without regard for the evidence before it?

Analysis

[7] The Appeal Division may intervene in General Division decisions if there are jurisdictional, procedural, legal, or certain types of factual errors.

Did the General Division make an error by summarily dismissing the Claimant's appeal?

[8] The Claimant argues that the General Division should have held a hearing in his case, instead of summarily dismissing his appeal. That way, he could have given evidence that the General Division did not already have, and he could have clarified some of the evidence on record with which he disagreed. He could have also expanded on or explained his submissions.

– No automatic right to a hearing at the General Division

[9] There is no absolute right to a hearing. Indeed, the General Division can hold hearings by way of written questions and answers.² This would not require the appearance of the parties.

² See section 21(a) of the *Social Security Tribunal Regulations*.

[10] Further, under section 53 of the *Department of Employment and Social Development Act*, the General Division must summarily dismiss an appeal if it is satisfied that the appeal does not have a reasonable chance of success. When the General Division summarily dismisses an appeal, it does not hold a hearing.

[11] There are safeguards in place to ensure that parties have the chance to argue why the General Division should not summarily dismiss an appeal. The General Division has to give notice in writing to an appellant and give them a reasonable period of time to make submissions.

– **The General Division gave notice that it was considering summarily dismissing the appeal**

[12] The General Division emailed a letter to the Claimant on May 20, 2022.³ The General Division member informed the Claimant that she was considering summarily dismissing the appeal. She explained why she intended to proceed in this manner. The member wrote:

It is clear from the evidence on record that you chose not to comply with your employer's policy and that your conduct caused you to be put on an unpaid leave of absence. So, I see no reasonable chance for your appeal to succeed.

If the evidence on file is incomplete regarding whether you were suspended from your job because of misconduct within the meaning of the *Employment Insurance Act*, please notify the [Social Security] Tribunal in your written submission before the deadline below.

[13] The Social Security Tribunal (Tribunal) set a deadline of June 1, 2022 for the Claimant to respond. The Tribunal required detailed written submissions from the Claimant, explaining why his appeal had a reasonable chance of success.

³ See Social's Security Tribunal's letter dated May 20, 2022, at GD6.

– **The Claimant responded to the General Division’s notice that it was considering summarily dismissing the appeal**

[14] The Claimant responded on May 25, 2022 to the General Division’s notice.⁴ He wrote, in part:

- [he] could not possibly have committed misconduct as [he] violated no legal company policies which did not directly violate [his] human rights ...
- [The General Division had] not even spoken to [him] regarding this issue as was agreed ...

[15] It is clear from the Claimant’s letter that he disagreed that the General Division would consider summarily dismissing his appeal. It is also clear that he expected to have the chance to speak about the misconduct issue.

– **The Claimant challenged the legality of his employer’s vaccination policy**

[16] The Claimant denies any misconduct. He acknowledges that he did not comply with his employer’s policy. But, he denies that he violated any company policies that were legal. He says his employer’s vaccination policy was unlawful. He challenges the legality of his employer’s vaccination policy.

[17] The Claimant suggests that, if his employer’s vaccination policy was unlawful, then he did not have to comply with it. And, if he did not have to comply with the policy, then he could not possibly have committed misconduct.

[18] When the Claimant applied for employment Insurance benefits, he acknowledged that he had refused to submit to his employer’s vaccination policy. He felt the policy “compromised personal and deeply held religious beliefs.”⁵

[19] The Commission spoke with the employer in December 2021. The employer described its vaccination policy. The employer stated that there were some exemptions,

⁴ See Claimant's submissions, dated May 25, 2022, at GD7.

⁵ See Claimant’s application for Employment Insurance benefits, filed October 25, 2021, at GD3-11, and Supplementary Record of Claim, dated December 29, 2021, at GD3-28.

including for medical reasons or statutorily protected grounds. The employer reportedly stated that, “there was no exemption for religious beliefs.”⁶

[20] However, according to the employer, the Claimant never asked for a religious or any other exemption. The Claimant never told the employer why he was refusing vaccination or undergoing rapid testing.

[21] The employer’s vaccination policy stated that, “Where a vaccine has been made available and a Staff member remains unvaccinated, the Staff member will be required to disclose in writing to Human Resources the reason for not being vaccinated (e.g. medical ground or other statutory protected ground).”⁷ The policy did not define a “statutory protected ground.” It was unclear whether the employer would provide an exemption on religious or other grounds.

[22] When the Claimant first spoke with the Commission, he reportedly stated that he had not told his employer why he refused to comply with the vaccination policy. He believed that his employer was not making any religious exemptions available.⁸ (So, it is possible that the Claimant never asked for an exemption because he believed that his employer would not give him one anyway.)

[23] When the Claimant asked the Commission for a reconsideration, he wrote that his employer had dismissed him for refusing to be coerced into medical procedures that violated his deeply and sincerely held religious beliefs.⁹

[24] In short, the Claimant suggests that the General Division should have held a hearing so that he could challenge the legality of his employer’s vaccination policy, amongst other issues.

⁶ See Supplementary Record of Claim, dated December 23, 2021, at GD3-22.

⁷ See employer’s COVID-19 Vaccination Policy, dated September 1, 2021, at GD3-25, para 3.04.

⁸ See Supplementary Record of Claim, dated December 29, 2021, at GD3-28.

⁹ See Claimant's Request for Reconsideration, filed March 4, 2022, at GD3-51 to GD3-53.

– **The Commission’s position regarding the legality and reasonableness of an employer’s policy**

[25] The Commission argues that reasonableness of an employer’s policy is not a factor to consider when deciding whether misconduct has occurred.¹⁰ The Commission argues that introducing such a measure could lead to an onerous and subjective assessment of misconduct. The Commission argues that courts seem to have rejected this approach.

[26] The Commission notes that, in one case, the Federal Court of Appeal suggested that, as long as the employer’s directive was lawful, an employee would have to comply with that directive, otherwise that would amount to misconduct. The Court wrote:

In my opinion, the Board [of Referees, the predecessor to the General Division] was correct in concluding that the rather extraordinary conduct on the part of the respondent did amount to “misconduct” in the statutory sense. She wilfully refused to comply with her employer’s lawful direction respecting her work as an employee.¹¹

[27] The Commission argues that the General Division has limited authority. The Commission argues that, at most the General Division’s authority is limited to deciding whether a claimant is guilty of misconduct and whether the misconduct led to dismissal or suspension.

– **The General Division decision on the legality issue**

[28] The General Division acknowledged the Claimant’s arguments about the legality of his employer’s policy. The General Division wrote:

The [Claimant] argues that the employer’s policy was illegal. I see no decision by any legal or other authority say that this it [*sic*] the case. It is not the Tribunal’s role to determine the validity of the employer’s policies.

¹⁰ See Commission’s Representations to the Social Security Tribunal--Appeal, filed July 21, 2022, at AD2-6.

¹¹ *Bedell*, A-1716-83.

[29] In other words, the General Division found that it did not have any authority to decide whether the employer's vaccination policy was lawful.

– **Whether the Claimant raised an arguable case at the General Division**

[30] The Claimant argues that the General Division should not have summarily dismissed his appeal. He says this is because he had legal arguments at the General Division that gave him a reasonable chance of success. He denies that he did anything that justified dismissal or suspension from his employment. He maintains that he did everything lawful that his employer required of him.

[31] The Commission argues that the Claimant did not comply with his employer's policy. The Commission recognizes the Claimant's argument that he should not have had to comply with what he considered was an unlawful policy. But, the Commission argues that the General Division did not have the authority to decide the reasonableness of the employer's policy.

[32] But, there is a distinction between reasonableness and lawfulness of a policy. It may be that the reasonableness of an employer's direction or policy is irrelevant to the misconduct analysis. However, that does not appear to be the case where the lawfulness of a policy is in question.

[33] It is clear from the Court of Appeal's decision in *Bedell* that, where an employer's direction or policy is lawful, an employee must comply with that direction or policy, otherwise non-compliance would amount to misconduct.

[34] The Claimant does not disagree that an employee has to comply with lawful directions from his employer. But, he is saying that he should not have had to comply with something unlawful.

[35] If an employee must comply with a lawful policy, conversely, if an employer's policy is unlawful, arguably an employee should not have to comply with it. And, if the employee does not comply with a policy that is unlawful, arguably, they are not committing misconduct.

[36] Despite the General Division's determination that it did not have the authority to decide the legality of the employer's policy, I find that the Claimant raised an arguable case at the General Division that his employer's policy was unlawful, and that, if his employer's policy was unlawful, his non-compliance did not amount to misconduct. As the Claimant raised an arguable case,¹² the General Division should not have summarily dismissed the matter.

[37] The General Division determined that it did not have any authority to decide whether the employer's vaccination policy was lawful. But, surely the General Division would not hesitate to consider whether an employee had committed misconduct if the employer's policy was obviously unlawful.

[38] For instance, an employer's policy requiring employees to work 24 hours consecutively without any breaks would undoubtedly violate provincial employment standards. It is inconceivable that the General Division would determine that it had no authority to decide whether such a policy was lawful, when it clearly would not be, and then accept that an employee's non-compliance with such a policy would constitute misconduct.

[39] However, as I will be returning this matter to the General Division for a reconsideration, the member can invite submissions on the issue of the scope of its authority. The Claimant should have an opportunity to address this issue.

The Claimant's remaining arguments

[40] The Claimant has raised several arguments. But, it is unnecessary to address them, as I have determined that the General Division made an error by summarily dismissing the Claimant's appeal. This is enough for me to consider what remedy is appropriate to give.

¹² Under section 53(1) of the *Department of Employment and Social Development Act*, the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. Having an arguable case is the same thing as having a reasonable chance of success: *Fancy v Canada (Attorney General)*, 210 FCA 63.

Remedy

[41] There are two remedies available: the Appeal Division can send the matter back to the General Division for reconsideration, or it can give the decision that the General Division should have made.

[42] Ordinarily, I would substitute my own decision instead of sending the matter back to the General Division for reconsideration if the evidentiary record is complete, if there is a general agreement on the facts, and if the parties have had the chance to fairly argue the merits of their case.

[43] However, the Claimant disputes many of the factual findings that the General Division made. He also says that because the General Division summarily dismissed the matter, he did not have the chance to give a full evidentiary picture, or to reconcile some of what he considers are conflicting facts. He also says he did not have the chance to make full arguments.

[44] For these reasons, I am returning this matter to a different member of the General Division for a reconsideration to consider, among other things, whether the employer's policy was lawful, and if not, whether non-compliance with the policy amounted to misconduct. Although I am returning the matter to the General Division, this is not to say that the Claimant has established that his employer's policy was unlawful. He will have the opportunity to argue that at the General Division.

Conclusion

[45] The appeal is allowed. I am setting aside the General Division decision. I am returning the matter to a different member of the General Division for a reconsideration.

Janet Lew
Member, Appeal Division