



Citation: *TR v Canada Employment Insurance Commission*, 2022 SST 826

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: T. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated June 21, 2022
(GE-22-1605)

Tribunal member: Janet Lew

Decision date: August 29, 2022

File number: AD-22-440

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, T. R. (Claimant), is appealing the General Division decision.

[3] The General Division found that the Claimant had been suspended from her work as an airline customer service agent because of misconduct. She had failed to comply with her employer's vaccination policy or get an approved exemption.

[4] The Claimant argues that the General Division made legal and factual errors.

[5] 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.

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

Issue

[7] Is there an arguable case that the General Division made legal and factual errors about whether the Claimant's conduct amounted to misconduct?

Analysis

[8] 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.

¹ Under section 58(1) of the *Department of Employment and Social Development 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.

[9] 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.

[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 made a legal or factual error about whether the Claimant's conduct amounted to misconduct?

[11] The Claimant argues that the General Division misinterpreted what misconduct means. She also argues that the General Division made a factual error about whether there was misconduct.

– The General Division's interpretation of misconduct

[12] The Claimant argues that there was no misconduct because her employer enacted a policy that she felt potentially jeopardized her health and religious and spiritual well-being. She stated that she refused to be injected with what she called a "so-called 'Covid vaccine' that had been inadequately tested and had received an emergency use authorization—essentially a waiver from the normal testing requirements."³

[13] Essentially, the Claimant says that she should not have had to follow her employer's vaccination policy because she disagreed with it.

[14] The Claimant argues that her employer's vaccination policy was a clear failure, highlighted by the fact that her employer recently reinstated her,⁴ even though she

³ Claimant's Application to the Appeal Division--Employment Insurance, at AD1-11.

⁴ Employer's email dated June 16, 2022, at GD7-1.

continues to refuse to get vaccinated. She argues that it is not misconduct to refuse a “dangerous chemical into [her] body to keep [her] job.”⁵

[15] The General Division defined misconduct, as follows:

To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. [Citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [Citation omitted] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law. [Citation omitted]

There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and that there was a real possibility of being let go because of that. [Citation omitted]

The Commission has to prove that the Claimant was suspended [sic] her job because of misconduct. The Commission has to prove this on a balance of probabilities this means that it has to show that it is more likely than not that the Claimant was suspended because of misconduct. [Citation omitted]

[16] The General Division addressed the Claimant's arguments that there was no misconduct. The General Division also acknowledged the Claimant's concerns about the safety of the vaccine.

[17] The General Division dismissed the Claimant's arguments about the safety of the vaccine, noting that a tribunal does not have to determine whether an employer's policy is reasonable or whether a claimant's dismissal is justified.

[18] The General Division referred to a decision by the Federal Court of Appeal, in concluding that ultimately the issue before it is to determine whether a claimant's conduct amounts to misconduct within the meaning of the *Employment Insurance Act*.

[19] In that case, the Court of Appeal defined what the tribunal's role is in misconduct cases. The case involved a claimant who had been dismissed from his employment. He

⁵ Claimant's Application to the Appeal Division--Employment Insurance, at AD1-11.

argued that the dismissal was excessive and unfair. After all, it had been his first offence and he had 14 years of service with the company.

[20] The Court said that the tribunal's role was to determine whether there was misconduct. It had no role in deciding the appropriateness of the penalty, or in deciding whether the employee's conduct was a valid ground for dismissal.

[21] The General Division concluded that the Claimant's refusal to get vaccinated amounted to misconduct because she "wilfully and consciously chose to not comply with the employer's policy. It is clear from the evidence that she knew the consequences of not complying would result in losing her job."⁶

[22] The General Division's interpretation of misconduct is consistent with the case authorities to which it referred.

– The General Division's factual findings

[23] The Claimant argues that the General Division also made a factual error.

[24] The General Division determined that the Claimant's reasons for refusal for complying with the employer's policy irrelevant. The Claimant's reasons had no bearing on the outcome.

[25] Besides, the General Division's findings were consistent with the evidence before it. The General Division noted the reasons behind the Claimant's refusal for complying with her employer's vaccination policy.

Conclusion

[26] I am not satisfied that the appeal has a reasonable chance of success. For that reason, permission to appeal is refused. This means that the appeal will not be going proceed.

⁶ General Division decision, at para 27.

Janet Lew
Member, Appeal Division