



Citation: *TD v Canada Employment Insurance Commission*, 2022 SST 973

Social Security Tribunal of Canada Appeal Division

Decision

Appellant: T. D.

Respondent: Canada Employment Insurance Commission
Representative: Anick Dumoulin

Decision under appeal: General Division decision dated July 14, 2022
(GE-22-1319)

Tribunal member: Pierre Lafontaine

Type of hearing: On the Record

Decision date: October 4, 2022

File number: AD-22-489

Decision

[1] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

Overview

[2] The Appellant (Claimant) worked as a nurse. Following a provincial health order, the Claimant's employer required all staff to be vaccinated against COVID-19 by October 25, 2021. The Claimant was not vaccinated by the employer's deadline. So, the employer suspended her, and then dismissed her on November 19, 2021.

[3] When the Claimant applied for Employment Insurance (EI) benefits, the Respondent (Commission) denied her benefits because she lost her job because of her misconduct. Upon reconsideration, the Commission maintained its initial decision. The Claimants appealed the reconsideration decision to the General Division.

[4] The General Division found that the Claimant's appeal had no reasonable chance of success and summarily dismissed the appeal. It found that the Claimant deliberately did not comply with the employer's vaccination policy, knew that she would lose her job, and lost her job because of her refusal. The General Division concluded that she lost her job because of her misconduct.

[5] The Claimant submits that she expected a hearing to determine the circumstances relevant to the case and collect the necessary evidence. She submits that making a medical decision for herself is not misconduct under the law. She submits that she did not have the opportunity to request an exemption for religious reasons. The Claimant puts forward that the Commission must demonstrate that the policy is valid and lawful since it is the basis of her dismissal.

[6] I must determine whether the General Division erred in summarily dismissing the Claimant's appeal.

[7] I am allowing the Claimants appeal. The matter is referred back to the General Division for reconsideration.

Issue

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

Analysis

Appeal Division's mandate

[9] The Federal Court of Appeal has determined that when the Appeal Division hears appeals pursuant to section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the mandate of the Appeal Division is conferred to it by sections 55 to 69 of that Act.¹

[10] The Appeal Division acts as an administrative appeal tribunal for decisions rendered by the General Division and does not exercise a superintending power similar to that exercised by a higher court.²

[11] Therefore, unless the General Division failed to observe a principle of natural justice, erred in law, based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it, I must dismiss the appeal.

Did the General Division make an error when it decided to summarily dismissed the Claimant's appeal?

¹ *Canada (Attorney General) v Jean*, 2015 FCA 242; *Maunder v Canada (Attorney General)*, 2015 FCA 274.

² *Idem*.

[12] I must decide whether the General Division erred when it summarily dismissed the Claimant's appeal.

[13] The Appeal Division has determined that the correct test to be applied in cases of summary dismissal is the following:

- Does the appeal manifestly lack substance, and is it clearly bound to fail?³

[14] To be clear, the question is whether that failure is pre-ordained no matter what evidence or arguments might be presented at the hearing. The threshold to summarily dismiss an appeal is high.

[15] The following appeals have been considered to be clearly bound to fail:

- Claimant did not meet qualifying conditions;
- Claimant had insufficient insurable hours; no jurisdiction to make a ruling on the Claimant's insurable hours;
- Allocation of a Claimant's undisputed earnings; obligation to repay;
- Claimant had reached the maximum number of weeks paid for sickness benefits.

[16] These examples demonstrate unambiguously when an appeal is clearly bound to fail or pre-ordained to failure.

[17] I note that Parliament has adopted a legislative and regulatory framework that does not authorize the Employment Insurance Section of the General Division to make decisions on the record. The general rule is that appellants must have an opportunity to be heard. Summary dismissal should not be expanded to circumvent that intention.

³ *M. V. v Canada Employment Insurance Commission*, 2015 SSTAD 59; *C. D. v Canada Employment Insurance Commission*, 2015 SSTAD 594; *M. C. v Canada Employment Insurance Commission*, 2015 SSTAD 237.

[18] In the context of summary dismissal, it is therefore not appropriate to consider the case on the merits in the parties' absence and then find that the appeal has no reasonable chance to succeed.

[19] In her notice of appeal to the General Division, the Claimant submitted, among other things, that making an informed decision not to accept the treatment is not misconduct under the law. She put forward that she was willing to submit to regular and rapid testing. She submitted that the employer did not have a policy. She therefore could not have violated any vaccination policy. She put forward that she has filed a grievance regarding her termination and that she is waiting for arbitration.

[20] I am of the view that, even if the General Division had serious doubts about the Claimant's arguments, it could not properly find that the appeal **was clearly bound to fail** regardless of what evidence or arguments might be submitted at a hearing.

[21] I find that the General Division decided the case on its merits in the parties' absence and then found that the appeal had no reasonable chance to succeed. This is an error of law.

[22] I am therefore justified to intervene.

Remedy

[23] Because the General Division erred in deciding the case on its merits in the parties' absence, I am allowing the appeal.

[24] In these circumstances, it is appropriate to refer the matter back to the General Division for reconsideration.

Conclusion

[25] The appeal is allowed. The matter is referred back to the General Division for reconsideration.

Pierre Lafontaine
Member, Appeal Division