



Citation: *GC v Canada Employment Insurance Commission*, 2022 SST 1090

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: G. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 26, 2022
(GE-22-1650)

Tribunal member: Melanie Petrunia

Decision date: October 25, 2022

File number: AD-22-673

Decision

[1] Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Applicant, G. C. (Claimant), was suspended from her job because she did not comply with the employer's mandatory COVID-19 vaccination policy. She applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to EI benefits because she was suspended due to misconduct. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Claimant was suspended by the employer for failing to comply with the vaccination policy. It found that this was misconduct under the law and the Claimant is disentitled from receiving benefits.

[5] The Claimant now wants to appeal the General Division's decision to the Appeal Division. She argues that the General Division made an error of jurisdiction. The Claimant first needs leave (permission) for her appeal to move forward.

[6] I am refusing permission to appeal because the Claimant's appeal has no reasonable chance of success. This means that the Claimant's appeal will not proceed.

Issue

[7] The issue in this appeal is:

- a) Is there an arguable case that the General Division made an error of jurisdiction because it cannot force the Claimant to take a vaccine?

Analysis

[8] The legal test that the Claimant needs to meet on an application for leave to appeal is a low one: Is there any arguable ground on which the appeal might succeed?¹

[9] The Appeal Division has a two-step process. Before the appeal can be decided on the merits, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. I can only grant permission to appeal if the Claimant's appeal has a reasonable chance of success.

[10] There are only certain types of errors that I can consider. These errors are:

- a) The General Division hearing process was unfair in some way;
- b) The General Division made an error of jurisdiction (meaning that it did not decide an issue that it should have decided or it decided something it did not have the power to decide);
- c) The General Division based its decision on an important error of fact; or
- d) The General Division made an error of law.²

[11] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of these errors. At this stage, the Claimant doesn't have to prove her case but must show that the General Division may have made one of the relevant errors.

Background

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19. This policy required employees to have two doses of the COVID-19 vaccine by October 15, 2021. Employees who did not comply would be placed on unpaid leave.³

¹ This legal test is described in cases like *Osaj v Canada (Attorney General)*, 2016 FC 115 at para 12 and *Ingram v Canada (Attorney General)*, 2017 FC 259 at para 16.

² This paraphrases the relevant errors, formally known as "grounds of appeal," which are listed under section 58(1) of the DESDA.

³ General Division decision at para 33.

[13] The Claimant told the General Division that she was aware of the policy and that she did not ask for an exemption. She argued before the General Division that the policy was illegal because immunizations are not mandatory in Canada.⁴

[14] The General Division found that the Claimant willfully chose not to comply with the employer's policy. She knew that she would be placed on unpaid leave if she did not comply. For this reason, the General Division found that the Claimant was suspended for misconduct.

There is no arguable case that the General Division exceeded its jurisdiction

[15] The Claimant argues that the General Division made an error of jurisdiction. She states that the General Division does not have the power to force her to take an experimental vaccine to keep her job. She says that mandatory vaccines are a violation of medical ethics.

[16] The Claimant argues that the government is acting beyond its jurisdiction in its application of misconduct in a way that violates the EI Act and the Charter. She says that she paid into the system that is now not available to her when she needs it. She argues that this can be considered theft and a violation of her civil rights.

[17] The General Division had to decide whether the Claimant was suspended because of her misconduct. For a finding of misconduct, it is sufficient that the conduct be conscious, deliberate, or intentional. In other words, in order to constitute misconduct, the act complained of must have been wilful or at least of such a careless or negligent nature that one could say the employee wilfully disregarded the effects their actions would have on their performance.

[18] The question of wilfulness concerns whether the Claimant refused to comply with the employer's policy, knowing that refusal could result in the loss of employment.

⁴ General Division decision at para 36.

[19] The General Division considered the Claimant's argument that the law does not allow for mandatory vaccinations in Canada. She argued before the General Division that the employer's policy was illegal.⁵

[20] The General Division considered this argument but found that the Claimant was aware of the employer's policy, did not request an exemption and did not comply. She knew that this could result in being placed on unpaid leave.⁶

[21] There is no arguable case that the General Division exceeded its jurisdiction. It did not force the Claimant to take a vaccine, as stated in the application for leave to appeal. The General Division was required to consider the reason for the Claimant's unpaid leave, and decide if this reason was misconduct under the law. The General Division applied the correct legal test.

[22] The Claimant's arguments to the General Division about the policy essentially amount to claims that the employer wrongfully suspended her based on a policy that was unlawful or discriminatory. She is restating these same arguments in her application for leave to appeal.

[23] The law is clear that whether the Claimant was wrongfully suspended or wrongfully terminated by her employer are not issues relevant to the misconduct test.⁷ It is not arguable that the General Division made an error of jurisdiction by deciding that the Claimant's failure to abide by the policy was misconduct.

[24] In addition to the grounds raised in the Claimant's application for leave to appeal, I have considered whether the General Division could have made any other relevant errors. There is no arguable case that the General Division failed to provide a fair process. It properly stated and applied the law. I am satisfied that the General Division

⁵ General Division decision at para 36.

⁶ General Division decision at para 41.

⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185 (CanLII) and *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107 (Can LII)

did not overlook or misconstrue any key evidence when it decided the Claimant was suspended and lost her job due to misconduct.⁸

Conclusion

[25] Permission to appeal is refused. There is no arguable case that the General Division made any reviewable errors. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

⁸ See *Karadeolian v Canada (Attorney General)*, 2016 FC 615, which recommends doing such a review.