Citation: *MH v Canada Employment Insurance Commission*, 2022 SST 1105

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated September 30, 2022 (GE-22-2352)

Tribunal member:	Janet Lew
Decision date:	October 27, 2022
File number:	AD-22-707

Decision

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

Overview

[2] The Applicant, M. H. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was suspended from his employment because of misconduct. In other words, it found that he did something that caused him to be suspended.

[3] The Claimant had not complied with his employer's mandatory COVID-19 vaccination policy. The policy required him to undergo vaccination or obtain an approved exemption before January 10, 2022. Otherwise, the employer would place him on an unpaid leave of absence. The Claimant did not comply with the policy and he did not obtain an approved exemption. His employer placed him on an unpaid leave of absence.

[4] Having determined that there was misconduct, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits for the duration of the suspension, starting January 9, 2022.

[5] The Claimant argues that the General Division made legal and factual errors. He argues that the General Division overlooked the fact that he sought a religious exemption. He also argues that the General Division misinterpreted what misconduct means because it failed to consider the fact that he did not go through the disciplinary process set out in his collective agreement. Therefore, he says that there was no misconduct on his part.

[6] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of

[1] Under section 58(2) 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."

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.

[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 his appeal.

Issues

[8] The issues are as follows:

a) Is there an arguable case that the General Division overlooked the fact that the Claimant sought a religious exemption?

b) Is there an arguable case that the General Division misinterpreted what misconduct means?

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] For a factual error, the General Division had to have based its decision on a factual error that it made in a perverse or capricious manner, or without regard for the evidence before it.

[11] 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.

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[2] See *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[3] See section 58(1) of the DESD Act.

Is there an arguable case that the General Division overlooked the fact that the Claimant sought a religious exemption?

[12] The Claimant argues that the General Division overlooked the fact that he had sought a religious exemption from his employer. He says that if the General Division had not overlooked this fact, it would have accepted that he should have received a religious exemption. That way, it would have concluded that his employer did not have a valid reason to suspend him from his employment.

[13] The General Division noted the Claimant's evidence that he chose not to be vaccinated for medical and religious reasons.[4] The General Division also noted the Claimant's evidence that he requested and believe that he was entitled to a religious exemption from his employer.[5]

[14] The General Division did not overlook the fact that the Claimant sought a religious exemption from his employer. The General Division simply found that the Claimant's employer did not provide him with an exemption. The General Division wrote:

- at paragraph 43, "[the Claimant's] exemption request was declined" and
- at paragraph 44, that the Claimant "fail[ed] to obtain an approved exemption"

[15] The General Division determined that it did not have any authority to decide if the employer's accommodation request process was proper. It also determined that it did not have the authority to decide whether the employer could have accommodated the Claimant in some other way.

[16] The Claimant suggests that the General Division only considered whether he sought a medical exemption. But, given that the General Division determined that it did not have the authority to decide whether the employer should have granted an

[4] See General Division at paras 10, 26, 34, and 36.
[5] See General Division at para 26, 36, 37, and 45.

exemption, it is immaterial whether the General Division did not differentiate between a medical or religious exemption, or did not always specify what type of exemption the Claimant sought.

[17] Clearly, the General Division considered whether the Claimant sought a religious exemption. For that reason I am not satisfied that there is an arguable case that the General Division overlooked the fact that he had sought a religious exemption from his employer.

Is there an arguable case that the General Division misinterpreted what misconduct means?

[18] The Claimant argues that the General Division misinterpreted what misconduct means. So, he argues that it mistakenly concluded that there was misconduct in his case.

[19] The Claimant notes that his collective agreement sets out a disciplinary process that his employer has to follow when misconduct occurs. He states that when an employee is suspended, the union meets with the employee and the manager. But, that did not happen in this case. He says there was no meeting because his employer did not consider his non-compliance with the vaccination policy to be a disciplinary matter.

[20] The Claimant denies that there could have been any misconduct because his non-compliance with his employer's vaccination policy did not lead to any disciplinary measures under his collective agreement. In other words, he says that even his employer did not think there was any misconduct on his part.

[21] However, a claimant's collective agreement or an employer's finding of misconduct does not define misconduct for the purposes of the *Employment Insurance Act*.

[22] The *Employment Insurance Act* does not define what misconduct is, but the courts have defined it. The courts have consistently held that "there will be misconduct where the claimant knew or ought to have known that his conduct was such as to impair

the performance of the duties owed to his employer and that, as a result, dismissal [or suspension] was a real possibility."[6]

[23] The General Division cited the courts' definition of misconduct and examined whether the Claimant's conduct fell into this definition.

[24] The General Division followed and applied the case law in determining whether there was misconduct. For that reason, I am not satisfied that there is an arguable case that the General Division misinterpreted what misconduct means when it did not examine whether the Claimant's conduct led to any disciplinary action under his collective agreement.

Conclusion

[25] As the appeal does not have a reasonable chance of success, I am not granting leave (permission) to appeal. The appeal will not be going ahead.

Janet Lew
Member, Appeal Division

[6] See *Mitshibinijima v Canada (Attorney General)*, 2007 FCA 36. See also, for instance, *Guerrier v Canada (Attorney General)*, 2020 FCA 178, citing *Canada (Attorney General) v Maher*, 2014 FCA 22; *Canada (Attorney General) v Lemire*, 2010 FCA 314; *Canada (Attorney General) v Brissette*, 1993 CanLII 3020 (FCA).