



Citation: *MF v Canada Employment Insurance Commission*, 2022 SST 1099

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: M. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated August 29, 2022
(GE-22-1586)

Tribunal member: Melanie Petrunia

Decision date: October 26, 2022

File number: AD-22-677

Decision

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

Overview

[2] The Applicant, M. F. (Claimant), was placed on an unpaid leave of absence from his job when he did not comply with the employer's COVID-19 vaccination policy. He applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant had been suspended from his job, and that the reason for the suspension was the Claimant's misconduct. It disentitled the Claimant from receiving benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was suspended from his job for misconduct and he is disentitled from receiving EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to move forward. The Claimant argues the General Division based its decision on an important error of fact.

[6] I have to decide whether there is some reviewable error of the General Division on which the appeal might succeed. I am refusing leave to appeal because the Claimant's appeal has no reasonable chance of success.

Preliminary matters

[7] The Claimant submitted new evidence in support of his application for leave to appeal. The Claimant's new evidence includes public statements issued by the employer after the General Division hearing.¹

¹ AD1B

[8] I will not consider this new evidence. It is well established that the Appeal Division cannot consider new evidence. There are some exceptions to this general rule, but none apply in this case.²

Issues

[9] The issues are:

- a) Is there an arguable case that the General Division based its decision on an important error of fact when it found that the Claimant was suspended?
- b) Is there an arguable case that the General Division based its decision on an important error of fact by failing to consider that the Claimant's contract did not include the vaccination policy?
- c) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

Analysis

[10] 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?³

[11] To decide this question, I focused on whether the General Division could have made one or more of the relevant errors (or grounds of appeal) listed in the Department of Employment and Social Development Act (DESD Act).⁴ An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) provided a fair process;

² Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal described in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8.

³ 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.

⁴ DESD Act, s 58(2).

b) decided all the questions that it had to decide, without deciding questions that were beyond its powers to decide;

c) based its decision on an important factual error;⁵ or

d) misinterpreted or misapplied the law.⁶

[12] Before the Claimant can move on to the next stage of the appeal, I have to be satisfied that there is a reasonable chance of success based on one or more of these grounds of appeal. A reasonable chance of success means that the Claimant could argue his case and possibly win.

[13] I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁷

The Claimant does not raise any reviewable errors on which the appeal might succeed

[14] In his application for leave to appeal, the Claimant argues that the General Division made important errors of fact. He says that the General Division found that he was suspended from work, but his record of employment (ROE) recorded the reason for issuing as “leave of absence.” He argues that this is considered a lay-off, not a suspension.

[15] The Claimant also argues that his contract of employment does not include the vaccination policy at issue and he was within his rights to refuse the vaccine.

⁵ The language of section 58(1)(c) actually says that the General Division will have erred if it bases its decision on a finding of fact that it makes in a perverse or capricious manner or without regard for the material before it. The Federal Court has defined perverse as “willfully going contrary to the evidence” and defined capricious as “marked or guided by caprice; given to changes of interest or attitude according to whim or fancies; not guided by steady judgment or intent” *Rahi v Canada (Minister of Citizenship and Immigration)* 2012 FC 319.

⁶ This paraphrases the grounds of appeal.

⁷ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

– **There is no arguable case that General Division made a factual error when it decided the Claimant was suspended**

[16] In its decision, the General Division found that the Claimant was suspended from his job.⁸ In coming to this conclusion, the General Division took into consideration the Claimant's ROE indicating a leave of absence. It also considered the Claimant's arguments that this should be considered a lay-off, and not a suspension. The General Division rejected these arguments.⁹

[17] The General Division found that the Claimant was placed on an unpaid leave of absence for failing to comply with the employer's COVID-19 vaccination policy.¹⁰ The General Division also considered that the Claimant initially told the Commission he was suspended. He told the Commission that he did not know why the ROE showed a leave of absence and sent a copy of an email he had sent to his employer.¹¹

[18] The General Division took these facts into consideration and concluded that the employer placed the Claimant on a leave of absence due to actions taken by the Claimant.¹² The General Division explained why it considered these circumstances to be different from an employer imposing a leave of absence arbitrarily.¹³ It found that the employer suspended the Claimant.

[19] The General Division took into consideration all relevant facts and the Claimant's arguments. There is no arguable case that the General Division made an important error of fact when it decided that the Claimant was suspended.

– **There is no arguable case that the General Division failed to consider that the Claimant's contract did not include the vaccination policy**

[20] The General Division found that the Claimant was aware of the employer's COVID-19 policy and that he would be placed on unpaid leave if he did not comply.¹⁴

⁸ General Division decision at para 9.

⁹ General Division decision at paras 12 to 16.

¹⁰ General Division decision at para 19.

¹¹ General Division decision at para 13.

¹² General Division decision at para 19.

¹³ General Division decision at para 17.

¹⁴ General Division decision at para 36.

The policy was first communicated to employees on August 25, 2021 and two emails were sent to those who had not complied. In the second email, employees were told that they would be placed on unpaid leave if they did not provide their vaccination status by October 31, 2021.¹⁵

[21] The Claimant testified at the hearing before the General Division that his contract with the employer did not include a vaccination policy. He explained that he wanted more information after the policy was introduced and sent an email to the employer that was ignored.¹⁶

[22] The Claimant also explained at the hearing that he had sent the employer a notice of liability. He argued that the employer didn't respond which meant that he was exempt from the vaccination policy.¹⁷

[23] The General Division explained and considered both of these arguments. It gave clear reasons why it did not agree with the Claimant. The General Division found that the Claimant was aware of the policy and what he faced if he did not comply.¹⁸

[24] The Claimant did not ask the employer for accommodation based on medical, religious or other prohibited grounds of discrimination.¹⁹ The General Division concluded that the Claimant chose not to take the vaccine for personal reasons and that his actions were wilful.²⁰

[25] There is no arguable case that the General Division failed to take these facts or arguments into consideration.

[26] The Claimant also refers to another decision of the General Division.²¹ In that case, the General Division concluded that the claimant did not lose his job because of misconduct because the employer did not give him enough time to comply with the

¹⁵ General Division decision at para 33.

¹⁶ General Division decision at para 35.

¹⁷ General Division decision at para 39.

¹⁸ General Division decision at para 36.

¹⁹ General Division decision at para 37.

²⁰ General Division decision at para 43.

²¹ *TC v Canada Employment Insurance Commission*, 2022 SST 891.

employer's policy or to request an exemption. The claimant was also not informed that he would be dismissed from his job if he did not follow the policy.

[27] In that case, the claimant was only told of the employer's policy verbally and given two days to comply. The General Division member found that the Commission had not proven that the Claimant lost his job because of misconduct.

[28] The facts in the present case are different and do not support such a conclusion. The Claimant confirmed that he was aware of the policy and he received emails explaining the consequences of not complying.²² The General Division recognized that the Claimant's emails to his employer went unanswered. However, it determined that he was aware of the policy and made a conscious decision not to comply.²³

[29] I have found that there is no arguable case that the General Division based its decision an important error of fact. I am not satisfied that the appeal has a reasonable chance of success on this ground.

[30] I understand that the Claimant disagrees with the General Division's conclusion. However, an appeal to the Appeal Division of the Tribunal is not a new hearing, where a party can present their evidence and arguments again or provide new evidence and ask for a different outcome.

[31] I have also considered other grounds not raised by the Claimant. After reviewing the record, the decision of the General Division and the Claimant's arguments, I have not identified any errors of law. There is no arguable case that the General Division failed to provide a fair process or made an error of jurisdiction. I find that the appeal has no reasonable chance of success.

²² General Division decision at para 36.

²³ General Division decision at para 43.

Conclusion

[32] Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division