



Citation: *CH v Canada Employment Insurance Commission*, 2022 SST 1264

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: C. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 6, 2022
(GE-22-1514)

Tribunal member: Melanie Petrunia

Decision date: November 13, 2022

File number: AD-22-706

Decision

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

Overview

[2] The Applicant, C. H. (Claimant), was suspended and then dismissed from her job as a registered nurse because she did not comply with the employer's COVID-19 vaccination policy. She applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's dismissal was misconduct. It disqualified 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 lost her job because of misconduct and she is disqualified from receiving EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues the General Division based its decision on important errors 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.

Issues

[7] 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 failed to comply with the employer's vaccination policy?

- 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 employer's policy violated the employment agreement?
- c) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

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] 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).²

[10] An appeal is not a rehearing of the original claim. Instead, I must decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) based its decision on an important factual error;³ or
- d) made an error in law.⁴

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 DESD Act, s 58(2).

³ 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.

⁴ This paraphrases the grounds of appeal.

[11] 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 her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.⁵

Background

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19 effective September 7, 2021. The policy required employees to receive a first dose of the vaccine by October 4, 2021 and to be fully vaccinated, or have a valid exemption, by November 4, 2021. Employees who did not comply would be placed on an unpaid leave of absence. Further non-compliance would result in termination for cause.⁶

[13] The Claimant did not provide proof of vaccination status by the required deadlines. The employer placed her on an unpaid leave of absence effective October 15, 2021.⁷ The employer later dismissed the Claimant, effective January 20, 2022, for failing to comply with the policy.⁸

[14] The Commission decided that the reason for the Claimant's dismissal was misconduct. It decided that she was disqualified from receiving EI benefits. The Claimant appealed this decision to the Tribunal's General Division. She argued that she has an auto-immune disease and was not comfortable getting the vaccine. She also argued that she had been wrongfully dismissed.

[15] The General Division dismissed the Claimant's appeal. It found that the Claimant lost her job because she failed to comply with the employer's vaccination policy.⁹ It also

⁵ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ GD3-33

⁷ GD3-28

⁸ GD3-31

⁹ General Division decision at para 12.

found that the Claimant was aware that failing to comply with the employer's policy could lead to her dismissal.¹⁰

[16] The General Division considered the Claimant's arguments that she was wrongfully dismissed and that the employer violated her employment contract. It found that that it was not within its jurisdiction to decide whether the employer's policy was fair or reasonable.¹¹ The General Division found that the only issue it had to decide was whether the Claimant lost her job because of misconduct.¹²

There is no arguable case that the General Division based its decision on an important mistake about the facts

[17] The Claimant argues that the General Division made important errors of fact. She says that there was no vaccination policy when she first entered into an employment contract with the employer. Because it was not an original term of her employment contract, she could not be found in non-compliance with the vaccination policy.¹³

[18] The Claimant also argues that the employer violated her employment agreement and did not offer alternatives to vaccination, such as regular testing. She states that she should not be found guilty of misconduct when it is her employer who is being negligent because she could not provide informed consent to be vaccinated.¹⁴

[19] There is no arguable case that the General Division based its decision on an important error of fact. The General Division considered the Claimant's arguments that the employer violated her employment contract and that she was wrongfully dismissed. It found that it is not within the jurisdiction of the Tribunal to decide whether the employer's policy was fair or reasonable. The General Division noted that there are other venues for the Claimant to pursue these arguments.¹⁵

¹⁰ General Division decision at para 19.

¹¹ General Division decision at para 20.

¹² General Division decision at para 19.

¹³ AD1-7

¹⁴ AD1-7

¹⁵ General Division decision at para 20.

[20] The General Division cited a decision of the Federal Court.¹⁶ This decision states that the conduct of the employer is not relevant to the issue of misconduct.¹⁷ There is no arguable case that the General Division based its decision on an important error of fact by not deciding whether the employer's policy was fair or reasonable.

[21] Both the Federal Court and Federal Court of Appeal have said that it is not the employer's conduct which is in issue when considering misconduct, and these issues can be dealt with in other forums.¹⁸

[22] I find that there is no arguable case that the General Division based its decision on an important mistake about the facts of the case.

[23] Aside from the Claimant's arguments, I have also considered other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any errors of law.

[24] The Claimant has not identified any errors of the General Division upon which the appeal might succeed. As a result, I am refusing leave to appeal.

Conclusion

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

Melanie Petrunia
Member, Appeal Division

¹⁶ General Division decision at footnote 7 references *Paradis v Canada (Attorney General)*, 2016 FC 1281 (*Paradis*).

¹⁷ See *Paradis* at para 31.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.