Citation: *MV v Canada Employment Insurance Commission*, 2022 SST 1254

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated September 9, 2022 (GE-22-1823)

Tribunal member:	Charlotte McQuade
Decision date:	November 14, 2022
File number:	AD-22-719

Decision

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

Overview

[2] M. V. is the Claimant. She worked as a respiratory therapist in a hospital. The Provincial Health Officer (PHO) in her province issued an Order requiring health care workers to be vaccinated or they would not be permitted to work. The only permitted exemption was on medical grounds. As a result of the Order, the Claimant's employer imposed a Covid-19 mandatory vaccination policy with the only exception being for those seeking approval from the PHO for a medical deferral or exemption.

[3] The Claimant had been off work due to illness. She asked her doctor for a medical leave and exemption from vaccination but her doctor refused. As such, the Claimant was unable to request a medical exemption from the PHO office. The Claimant remained unvaccinated so her employer placed her on an unpaid leave on October 26, 2021, and then terminated her on November 15, 2021.

[4] The Claimant then applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) disqualified the Claimant from benefits for reason she lost her job due to her own misconduct.

[5] The Claimant appealed to the Tribunal's General Division who dismissed her appeal. The General Division decided the Commission had proven that the Claimant lost her job due to misconduct. The Claimant is now asking to appeal the General Division's decision to the Appeal Division. However, she needs permission for her appeal to move forward.

[6] The Claimant submits the General Division made an error of law and an error of jurisdiction when it decided she was terminated due to misconduct.

[7] I am satisfied that the Claimant's appeal has no reasonable chance of success so I am refusing permission to appeal.

Issues

[8] Is it arguable that the General Division made a reviewable error when it decided the Claimant was terminated due to her own misconduct?

Analysis

[9] The Appeal Division has a two-step process. First, the Claimant needs permission to appeal. If permission is denied, the appeal stops there. If permission is given, the appeal moves on to step two. The second step is where the merits of the appeal are decided.

[10] I must refuse permission to appeal if I am satisfied that the appeal has no reasonable chance of success.[1] The law says that I can only consider certain types of errors.[2] These are:

- The General Division hearing process was not fair in some way.
- 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).
- The General Division based its decision on an important error of fact.
- The General Division made an error of law.

[11] A reasonable chance of success means there is an arguable case that the General Division may have made at least one of those errors.[3]

[12] Obtaining leave to appeal is a low bar and does not imply success on the merits of the appeal.

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[1] Section 58(2) of the *Department of Employment and Social Development Act* (DESD Act) says this is the test I have to apply.
[2] Section 58(1) of the DESD Act describes these errors.
[3] See *Osaj v Canada (Attorney General)*, 2016 FC 115, which describes what a "reasonable chance of success" means.

It is not arguable that the General Division made a reviewable error

[13] It is not arguable that General Division made a reviewable error when it concluded the Claimant's conduct in failing to comply with the employer's Covid-19 policy was misconduct under the *Employment Insurance Act* (EI Act).

[14] The Commission decided that the Claimant was disqualified from EI benefits because she lost her employment due to her own misconduct.

[15] The Claimant appealed the Commission's decision to the Tribunal's General Division.

[16] On October 14, 2021, the PHO for the Claimant's province issued an Order that applied to health care workers. The Order stated that an unvaccinated staff member must not work after October 25, 2021, unless the staff member was in compliance with the conditions of the exemption or the staff member could provide proof of having made an exemption request in which case they could work until request was responded to.[4]

[17] The Claimant worked as a respiratory therapist in a hospital. The Claimant agreed before the General Division that this Order applied to her.[5]

[18] The Claimant's employer sent its employees an email on October 15, 2021, saying that the PHO's Order required all of its employees to have at least one vaccination by October 26, 2021, to continue working. The email said that if employees did not have her first vaccination by October 26, 2021, they would not be permitted to work and would be placed on unpaid leave. The email also said that employees who had not received a first dose by November 15, 2021, should anticipate their employment may be terminated.[6]

[19] The email provided that the only exception to the mandatory vaccination order was for those seeking approval from the PHO for a medical deferral or exemption. The email explained the criteria for consideration of a medical exemption and that

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[4] See paragraphs 22 to 24 of the General Division decision.
[5] See paragraph 22 of the General Division decision.
[6] GD11-2 to GD11-3.

employees requesting an exemption were required to provide their manager with a pending request in the form of a response from the Office of the PHO or a Medical Health Officer, confirming that the request was made in compliance with the Order.[7]

[20] The Claimant did not dispute that she received the October 15, 2021, email from the employer.[8]

[21] The Claimant's evidence before the General Division was that she had been having health issues and had been off work. She asked her family doctor to put her on a medical leave and provide a medical exemption from vaccination but her doctor would not provide that.[9] The Claimant did not, therefore, seek out a medical deferral or exemption from the PHO, as she required a doctor to complete the form.[10]

[22] The General Division found as a fact, therefore, that the employer's policy applied to the Claimant.

[23] The General Division found as a fact that the Claimant was terminated because she did not comply with the employer's mandatory vaccination requirement. [11] The Claimant did not dispute the reason for termination.

[24] The General Division had to decide if the Claimant was terminated due to her own misconduct.

[25] The EI Act provides for disqualification from benefits where a claimant has lost their job because of their misconduct.[12]

[26] Misconduct is not defined in the EI Act. However, the courts have come to a settled definition about what this term means.

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[7] GD11-3.
[8] See paragraph 31 of the General Division decision.
[9] See paragraphs 35 to 37 of the General Division decision.
[10] See paragraph 39 of the General Division decision.
[11] See paragraph 14 of the General Division decision.
[12] See section 30(1) of the *Employment Insurance Act* (EI Act).

[27] Misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[13] Misconduct also includes conduct that is so reckless that it is almost wilful.[14]

[28] Another way to put this is that there is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.[15]

[29] The General Division found as a fact that being vaccinated was a duty owed to the Claimant's employer because the Order from the PHO and the Claimant's employer's direction made clear she could not work if she were unvaccinated without a medical exemption. Being unable to work meant she could not carry out duties owed to her employer.[16]

[30] The General Division found as a fact that the Claimant made her own choice not to get vaccinated, as her family doctor would not support an application for medical exemption.

[31] The Claimant told the General Division that she was aware that by not getting vaccinated or having an exemption, that she could be terminated. However, she hoped she would be given longer to comply or that there would be a different consequence.[17]

[32] The General Division found, therefore, that the Claimant knew termination was a real possibility.[18]

[33] So, the General Division concluded the Claimant's conduct in not following the mandatory vaccination policy amounted to misconduct.

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[13] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[14] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See paragraph 45 of the General Division decision.
[17] See paragraph 46 of the General Division decision.
[18] See paragraph 46 of the General Division decision.

[34] The Claimant is now asking to appeal the General Division's decision to the Appeal Division. She submits that the General Division made an error of law and an error of jurisdiction when it decided her actions were misconduct.

[35] The Claimant argues that the PHO Order provided for an exemption request process but there was no viable process to apply. She says applying through the website didn't work. The Claimant also says that the PHO said their office was not processing medical or religious exemption requests and to the best of her knowledge, no terminated health care worker in her province was able to apply for an exemption request.

[36] It is not arguable that the General Division overlooked the Claimant's evidence about the exemption request process.

[37] The General Division acknowledged the Claimant's testimony that the PHO was sending out responses to exemption requests saying that "no exemptions are being considered due to high request volume and lack of staff for processing." However, the General Division noted that even though the Claimant told the General Division she could provide documentation to support that assertion, nothing she provided as a post-hearing submission showed that.[19]

[38] The General Division also pointed out that, even if the PHO had been receiving exemptions, since the Claimant's family doctor was not supporting her exemption, and since the Claimant did not approach any other doctors, the Claimant could not have applied for an exemption anyway as it required documentation from a doctor supporting the request.

[39] The General Division did not ignore or overlook the Claimant's evidence about the exemption process. The General Division simply found it was not relevant, given the Claimant could not have applied for an exemption anyway, without her doctor's support. I see no arguable error in this finding.

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[19] See paragraph 40 of the General Division decision.

[40] The Claimant also submits that failure to comply with a new policy is not the same as wilful misconduct. She argues that her refusal to disclose her vaccine status did not have any impact on her job performance. She says that current data shows Covid-19 vaccines do not prevent infection or transmission in any meaningful way. Also, she says that refusing to disclose a medical treatment is not the same as refusing to perform work duties or refusing to attend at work.

[41] Whatever the impact of the vaccination requirement on the Claimant's actual job tasks as a respiratory therapist, duties owed to an employer are broader than just the job tasks themselves.

[42] The Federal Court of Appeal has said that breach of an express or implied duty resulting from a contract of employment can amount to misconduct.[20] In this case, the General Division decided that the vaccination requirement was a duty that the Claimant owed to her employer.

[43] The General Division's finding in this regard was consistent with the evidence on file. Both the Order from the PHO and the employer required, absent an exemption granted or pending, that the Claimant had to be vaccinated to be able to work. So, the vaccination requirement clearly had become an essential duty of her employment. Having no exemption, without vaccination, the Claimant was unable to perform her job duties.

[44] The Federal Court of Appeal has said that a deliberate violation of an employer's policy can also be considered misconduct. [21]That is what happened here. The Claimant was aware of the requirements of the policy but chose not to follow the policy, knowing she was putting her employment at risk.

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[20] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA 314.
[21] See *Attorney General of Canada v Secours*, A-352-94; See also *Canada (Attorney General) v Bellavance*, 2005 FCA 87; See also *Canada (Attorney General) v Gagnon*, 2002 FCA 460. See also *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII).

[45] The Claimant distinguishes her actions from other types of misconduct such as refusing to perform work duties or being absent. However, the Claimant doesn't have to have wrongful intent for her behaviour to be misconduct under the law.[22] As above, a deliberate breach of an employer's policy can amount to misconduct.

[46] The Claimant also says it is inappropriate for the General Division to take the employer's characterization of misconduct when the termination of health care workers under the PHO are being challenged by the union and a private challenge is being brought in the BC Supreme Court by a group of doctors and nurses.

[47] The General Division did not, however, simply accept the employer's characterization of misconduct. The General Division stated and applied the legal test for misconduct under the EI Act, as that has been described by the Federal Court of Appeal.[23]

[48] The test for wrongful termination under a collective agreement is not the same test as whether the Claimant was terminated for misconduct under the EI Act. The General Division was obliged to follow the definition of misconduct as set out by the Federal Court of Appeal, which it did.[24]

[49] It is also not the role of the General Division to determine whether the dismissal was justified, or was the appropriate sanction.[25]

[50] I see no arguable case that the General Division misinterpreted what misconduct means under the EI Act and the General Division's decision was supported by the evidence.

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[22] See *Attorney General of Canada v Secours*, A-352-94.
[23] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[24] The General Division applied the test for misconduct from *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[25] See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[51] The Claimant is essentially repeating the same arguments she made before the General Division. However, the Appeal Division is not a forum to reargue the case and hope for a different outcome.

[52] Aside from the Claimant's arguments, I have reviewed the documentary file, and listened to the audio tape from the General Division hearing. I did not find any key evidence that the General Division might have ignored or misinterpreted.[26]

[53] The Claimant has not pointed to any procedural unfairness by the General Division and I see no evidence of any procedural unfairness.

[54] Although the Claimant checked off the box that said "error of jurisdiction" on her Application to the Appeal Division, she had not explained an error of jurisdiction.

[55] The General Division had to decide whether the Commission had proven the Claimant was terminated due to her own misconduct and it decided the Commission had proven that. The General Division did not decide any issue it did not have authority to decide. So, there is no arguable error of jurisdiction.

[56] Since the Claimant has not raised an arguable case that the General Division made a reviewable error, her appeal cannot move forward.

[57] Having regard to the record, the decision of the General Division and considering the arguments made by the Claimant in her Application to the Appeal Division, I find that the appeal has no reasonable chance of success. So, I am refusing leave to appeal.

Conclusion

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

Charlotte McQuade
Member, Appeal Division

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