



Citation: *RE v Canada Employment Insurance Commission*, 2023 SST 8

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: R. E.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 16, 2022
(GE-22-1086)

Tribunal member: Melanie Petrunia

Decision date: January 3, 2023

File number: AD-22-774

Decision

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

Overview

[2] The Applicant, R. E. (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 suspension and dismissal was misconduct. It disentitled then disqualified the Claimant from receiving benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Claimant lost her job because of misconduct and she is disentitled and disqualified from receiving EI benefits.

[5] The Claimant now wants to appeal the General Division decision to the Appeal Division but she needs permission for her appeal to move forward. The Claimant argues that the General Division did not follow procedural fairness, erred in law and made an error of jurisdiction. She also argues that the General Division was biased.

[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 Matter

[7] At the General Division, the Claimant argued that the decision to deny her benefits violated the *Canadian Charter of Rights and Freedoms* (Charter). The General Division decided that the Claimant's Charter Challenge Notice did not meet the requirements to raise a constitutional issue before the Tribunal. It issued written reasons

for its decision before the hearing on the merits of the appeal (Charter decision). This is called an interlocutory decision.

[8] The hearing before the General Division proceeded and a decision was issued dismissing the appeal (merit decision). In the Claimant's request for leave to appeal, she argues that the General Division made errors of law and jurisdiction and didn't follow procedural fairness. I have considered both of the General Division decisions in deciding whether the Claimant raises an arguable case that the General Division erred.

Issues

[9] The issues are:

- a) Is there an arguable case that the General Division failed to follow procedural fairness by prejudging the Claimant's appeal or showing bias?
- b) Is there an arguable case that the General Division made an error of jurisdiction?
- c) Is there an arguable case that the General Division made an error of law by denying that the Claimant's rights were violated and not following Supreme Court of Canada jurisprudence?

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?¹

[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).²

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).

[12] 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

[13] 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

There is no arguable case that the General Division was biased

[14] The Claimant argues that the General Division was biased and her application for EI benefits was prejudged. She says that every employee of the Federal Government was required to comply with a mandatory vaccine policy.⁶

[15] The Claimant refers to the General Division's comments that she was not coerced to take the vaccine, but that there were unpleasant consequences. She argues

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.

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

⁶ AD1-2

that she could not be guaranteed impartial judgment by someone who was under the same coercion and threat of job loss.⁷

[16] The Claimant points to an announcement by the government before she was suspended, stating that employees who failed to be vaccinated would not be eligible for EI benefits. She claims that her application for EI benefits was prejudged by the government's actions.⁸

[17] In the Charter decision, the General Division had to decide whether the Claimant's Charter Challenge Notice complies with the requirements of the Social Security Tribunal Regulations.⁹ The Claimant had to identify the provisions of the EI legislation that violate the Charter and provide her arguments in support of the issues she raised.¹⁰

[18] The General Division decided that the Claimant identified sections 30 and 31 of the EI Act but her submissions did not support a constitutional argument.¹¹ It found that the Claimant's arguments referred to the British Columbia Provincial Health Officer's Order (Provincial Health Order) requiring mandatory COVID-19 vaccination, not the sections of the EI Act. It found that it does not have the jurisdiction to consider the validity of the Provincial Health Order.¹²

[19] In the merit decision, the General Division had to decide if the Claimant was suspended, and then dismissed because of her misconduct. It was required to consider the evidence before it, apply the relevant facts to the legal issue and render a decision that was fair, impartial and followed the law.

[20] The Claimant does not point to any evidence to support her allegation of bias. The Federal Court of Appeal has stated that an allegation of bias against a tribunal is a

⁷ AD1-2

⁸ AD1-3

⁹ See Interlocutory decision dated August 3, 2022.

¹⁰ See s. 20(1) of the *Social Security Tribunal Regulations*, SOR/2013-60, as am. S.C. 2013, c.40.

¹¹ See Interlocutory decision at para 7.

¹² See Interlocutory decision at para 13.

serious allegation and has to be supported by evidence showing that the conduct of the tribunal member demonstrated it was not impartial.¹³

[21] The Claimant's allegation that the General Division was biased because a mandatory vaccination policy applied to government employees is not supported by evidence. She refers to the fact that the General Division found that she was not coerced to be vaccinated, but there were unpleasant consequences for her. The General Division refers to the fact that there were consequences to the Claimant's decision not to be vaccinated. I do not find that these statements show bias.

[22] The Claimant's arguments that her application for EI benefits was prejudged because of announcements by the federal government do not point to any errors by the General Division. The Claimant takes issue with the conduct of the government in her arguments that her application for EI benefits was prejudged.

[23] I have not found any evidence that the General Division was biased. The member listened to the Claimant's evidence and rendered a decision supported by its factual findings. I find that this ground has no reasonable chance of success.

There is no arguable case that the General Division made an error of jurisdiction

[24] The General Division found that the employer's conduct is not relevant to a determination of misconduct and that it did not have the jurisdiction to decide whether the vaccine is effective or if the employer acted reasonably in instituting a vaccination policy.¹⁴ The Claimant argues that, if this is true, the Commission and Tribunal could not then decide whether her religious convictions are sufficient or reasonable.¹⁵

¹³ See *Arthur v. Canada (Attorney General)*, 2001 FCA 223 at para 8.

¹⁴ See General Division decision at para 34.

¹⁵ AD1-3

[25] The Claimant says that the government has the burden to prove that the restrictions imposed on her rights and freedoms were reasonable. She argues that the government did not prove that the restrictions were reasonable.¹⁶

[26] I find that the Claimant's arguments do not raise any potential errors of jurisdiction by the General Division.

[27] The General Division considered the Claimant's arguments that the government violated her Charter rights and did not prove that the restriction was reasonable. It found that it isn't within the jurisdiction of the Tribunal to decide whether the employer's policy was fair or reasonable. The General Division noted that it also does not have the jurisdiction to make a determination about the fairness of the Public Health Order.¹⁷

[28] The General Division cited a decision of the Federal Court.¹⁸ This decision states that the Tribunal has to decide whether the conduct of the employee amounted to misconduct. There is no arguable case that the General Division made an error of jurisdiction by not considering the government or the employer's conduct in requiring mandatory vaccination against COVID-19.

[29] Both the Federal Court and Federal Court of Appeal have said that it is not the employer's conduct that is in issue when considering misconduct and these issues can be dealt with in other forums.¹⁹

There is no arguable case that the General Division made an error of law

[30] The Claimant argues that the Commission denied her religious exemption because it decided her personal interpretation of religious text was insufficient, it was a personal decision not to be vaccinated and she was not counselled by a religious leader

¹⁶ AD1-3

¹⁷ General Division decision at para 35.

¹⁸ General Division decision at footnote 11 references *Canada (Attorney General) v. Marion*, 2002 FCA 185.

¹⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36, *Canada (Attorney General) v McNamara*, 2007 FCA 107 and *Paradis v Canada (Attorney General)*, 2016 FC.

to refuse the vaccine. She says that she refuted these reasons in her Charter Challenge Notice.²⁰

[31] The Claimant argues that the General Division made errors of law by deciding that her Charter Challenge Notice did not meet the requirements to raise a constitutional issue and by not following case law from the Supreme Court of Canada. She says that her religious exemption would have been allowed if the case law was followed.²¹

[32] I find that the Claimant's arguments do not have a reasonable chance of success. In the Charter decision, the General Division considered these arguments and the case law cited by the Claimant.²² It found that the Claimant's concerns were with the Public Health Order, not the EI legislation.²³ There is no arguable case that the General Division made an error of law.

[33] The General Division considered this case law in its decision on the merits of the Claimant's appeal as well. The General Division found that the Claimant was aware of Public Health Order and that her employer required all employees to be vaccinated. It found that the Claimant was aware that she could be dismissed and consciously chose not to be vaccinated. There was an exemption available for medical reasons but the Claimant did not apply for this exemption.²⁴

[34] The General Division found that it was not within its jurisdiction to modify the employer's policy or the Public Health Order. It was not within its jurisdiction to allow the Claimant an exemption for religious reasons, which the employer's policy did not allow for.²⁵

[35] Both the Federal Court and Federal Court of Appeal have said that the question of whether an employer has failed to accommodate an employee is not relevant to the

²⁰ AD1-4

²¹ AD1-4

²² See Interlocutory decision at para 14.

²³ See Interlocutory decision at para 13.

²⁴ See General Division decision at paras 25 to 29.

²⁵ See General Division decision at para 32.

question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and these issues can be dealt with in other forums.²⁶

[36] I find that there is no arguable case that the General Division made an error of law. Aside from the Claimant's arguments, I have also considered the other ground of appeal. The Claimant has not pointed to any factual errors of fact and I have not identified any such errors.

[37] 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

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

Melanie Petrunia
Member, Appeal Division

²⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.