Citation: *DS v Canada Employment Insurance Commission*, 2022 SST 1387

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	D. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated August 29, 2022 (GE-22-1438)

Tribunal member:	Charlotte McQuade
Decision date:	November 21, 2022
File number:	AD-22-687

Decision

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

Overview

[2] D. S. is the Claimant. She worked as a Registered Practical Nurse at a hospital. The Claimant made a personal medical choice to refuse vaccination for Covid-19, as required by her employer's policy. As a result, the Claimant's employer terminated her.

[3] After her termination, the Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided the Claimant had lost her employment for reason of her own misconduct so disqualified her from benefits from October 31, 2021.

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

[5] The Claimant submits the General Division misinterpreted misconduct when it decided that refusing to comply with her employer's policy based on a personal medical decision was misconduct. She says the refusal of EI benefits on the basis of her medical decision is discrimination and an abuse of her constitutional rights.

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

Issues

[7] It is arguable that the General Division made a reviewable error when it concluded the Claimant's conduct amounted to misconduct?

Analysis

[8] 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.

[9] 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. These are:[2]

- 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.

[10] 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]

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

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

[12] The Claimant worked as a registered practical nurse at a hospital. Her employer implemented a Covid-19 vaccination policy. The policy provided that the reason for the policy was to reduce the risk of serious infection and transmission of infection to co-

[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.

workers and patients and to meet the requirements of the *Public Hospitals Act 1990*, Regulation 965 and the Ministry of Health Directive 6.[4]

[13] The employer's policy required employees to have received a first Covid-19 vaccination by September 22, 2021, unless they provided medical evidence showing they could not medically tolerate the vaccine or they had a human rights code exemption. The policy noted that both exemptions required review and approval by the hospital.[5]

[14] The employer's policy explained the consequences for failing to comply with it. It said that employees who had not received their first vaccination by September 22, 2021, would be placed on a two-week unpaid leave.[6]

[15] The policy provided further that employees who had been placed on leave and had not received their first vaccination by October 7, 2021, shall, as applicable, have their employment terminated; or their privileges suspended, or not be allowed into the hospital.[7]

[16] As the Claimant did not obtain the required vaccination, on September 22, 2021, the Claimant's employer place her on a two week unpaid leave.

[17] The Claimant had discussed a possible medical exemption with her employer. She had previously been infected with Covid-19 and testing showed she tested positive for antibodies. So, she believed the vaccination was not necessary for her to have. However, the employer denied her request.[8]

[18] On September 22, 2021, the Claimant then asked her employer for an exemption from the policy based on the human rights ground of creed. She explained this request

[4] GD3-29.
[5] GD3-30.
[6] GD3-30.
[7] GD3-30.
[8] GD3-22.

on the basis that she made the decision to refuse vaccination based on her beliefs, knowledge and personal health.[9]

[19] The employer responded on September 24, 2021, that her grounds for refusal did not fall within the exemptions provided for under the *Human Rights Code* or Directive 6 and she was still required to comply with the policy. The letter advised the Claimant again that if she had not received her first vaccination by October 7, 2021, along with an attestation that she would receive her second vaccination 28 days later, her employment would be terminated for cause.[10]

[20] As the Claimant did not obtain the required vaccination, on October 7, 2021, the Claimant was terminated for remaining in breach of the employer's policy.[11] She then applied for EI benefits.

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

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

It is not arguable that the General Division made an error of law or an error of jurisdiction

[23] The General Division had to decide whether the Claimant's conduct amounted to misconduct under the EI Act.

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

[25] Misconduct is not defined in the EI Act. However, the Federal Court of Appeal has come to a settled definition about what this term means.

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[9] GD3-37.
[10] GD3-38,
[11] GD3-39.
[12] See section 30(1) of the *Employment Insurance Act*.

[26] 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]

[27] The Federal Court of Appeal has explained that another way to put this is that there is misconduct if a claimant knew or should have known their conduct could get in the way of carrying out her duties toward their employer and there was a real possibility of being let go because of that.[15]

[28] There was no dispute before the General that the Claimant lost her job for failing to comply with the employer's Covid-19 policy by October 7, 2021.

[29] The General Division found as a fact that the Claimant was aware of the employer's policy, as she had confirmed in her testimony that she was aware of the employer's policy but chose not to comply for personal reasons.[16]

[30] The General Division also found as a fact that the employer had refused the Claimant's request for a medical exemption and her request for an exemption on the human rights ground of creed.[17]

[31] The General Division decided that the Commission had proven that the Claimant's conduct was misconduct because the Claimant was aware of the employer's policy and had made a personal decision not to comply with it. She was also aware of the date she needed to be vaccinated by, or be dismissed.[18]

[32] The Claimant disagrees with the General Division's conclusion. She argues that the General Division misinterpreted what misconduct means.

[33] The Claimant distinguishes a personal medical decision to refuse vaccination from other types of behaviour that would be considered misconduct. She argues that

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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 20 of the General Division decision.
[17] See paragraphs 20 and 22 of the General Division decision.
[18] See paragraph 20 of the General Division decision.

the definition of misconduct includes any inappropriate action, offence or professional fault committed willfully or deliberately while working for an employer such as threatening or violent behaviour or destroying company property on purpose.

[34] The Claimant also points out that the provincial government announced on November 4, 2021, that it would not be mandating Covid-19 vaccines for health care workers.

[35] The Claimant made a personal medical decision to not comply with her employer's policy. She did so, knowing she was putting her employment at risk. Deliberately engaging in conduct in which a claimant knows or ought to know puts their employment at risk is considered to be misconduct, as the Federal Court of Appeal has defined misconduct.[19] So, it is not arguable that the General Division misinterpreted what misconduct means under the law.

[36] I recognize that the Claimant sees a personal medical decision to refuse vaccination as different from other types of wrongful behaviour, which would be considered to be misconduct. But it is not necessary that a claimant have wrongful intent for their conduct to be considered misconduct under the EI Act.[20]

[37] Duties owed to an employer are broader than just the job tasks themselves. For example, a duty owed to an employer can include following safety policies.[21] Breaching an express or implied duty owed to an employer can result in a finding of misconduct.[22]

[38] In this case, the employer implemented a policy to reduce the risk of serious infection and transmission of infection to co-workers and patients. The policy required the Claimant to be vaccinated in order to be able to work. So, complying with the policy was an essential duty of the Claimant's employment.

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[19] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[20] See *Attorney General of Canada v Secours*, A-352-94
[21] See, for example, CUB 80774 and CUB 71744.
[22] See *Canada (Attorney General) v Brissette* 1993 CanLII 3020 (FCA); See also *Canada (AG) v Lemire*, 2010 FCA 314.

[39] The Federal Court of Appeal has said that a deliberate violation of an employer's policy can be considered to be misconduct.[23] That is what happened here. The Claimant deliberately breached her employer's policy, knowing she was putting her employment at risk by doing so.

[40] The Claimant told the General Division that she did not think vaccination was necessary, as she had natural antibodies. However, the General Division had no jurisdiction to decide on medical issues such as the necessity of the vaccine. The Claimant had discussed a medical exemption and requested a human rights exemption, from her employer, both which were refused. This meant the policy applied to the Claimant.

[41] When deciding misconduct under the EI Act, the focus is on the behaviour of the employee, not the employer.[24] The General Division did not have to decide whether the employer had failed to properly accommodate the Claimant under its own policy or under the *Ontario Human Rights Code*. The Federal Court has said that such questions are not relevant to the misconduct test and are to be determined in a different forum.[25]

[42] The Claimant points out that the provincial government said on November 4, 2021, that it would not mandate vaccines for health care workers. That may be. However, that was not relevant to the Claimant's conduct or her termination, as it happened after the Claimant's termination on October 7, 2021. In any event, it was the Claimant's conduct with respect to her employer that was at issue before the General Division.

[43] I see no arguable error of law or jurisdiction made by the General Division when it decided the Claimant's conduct amounted to misconduct. The General Division's decision was consistent with the law and the evidence before it.

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[23] 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).
[24] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[25] See *Paradis v Canada (Attorney General),* 2016 FC 1282.

[44] The Claimant also submits that the government's treatment of Canadians on their personal medical decision is a gross abuse of their bodily autonomy and constitutional rights. She argues that the government's egregious denial of EI benefits because of a medical decision is discriminatory against Canadians who refuse the Covid-19 vaccination. She submits there is no basis for this discrimination other than false public health information that the Covid-19 vaccination prevents transmission. She maintains that the vaccine is given to produce antibodies which she had already had, but which her employer refused to consider.

[45] I have reviewed the record and the audio tape from the General Division hearing. The Claimant did not raise any arguments about discrimination or a breach of her constitutional rights before the General Division. So, it is not arguable that the General Division made an error of law or an error of jurisdiction by failing to consider these issues. The General Division cannot be faulted for not considering arguments that were not made to it.

[46] The Appeal Division is not a rehearing of the case where parties can present new arguments and hope for a different outcome. The Appeal Division's role is to look for reviewable errors.

It is not arguable the General Division based its decision on an important error of fact or breached procedural fairness

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

[48] The Claimant has not identified any factual errors made by the General Division either. Aside from the Claimant's arguments, I have reviewed the documentary file, and listened to the audio recording from the General Division hearing. I did not find any key evidence that the General Division might have ignored or misinterpreted.[26]

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

[49] The Claimant has not raised an arguable case that the General Division made any reviewable errors.

[50] 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

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

Charlotte McQuade
Member, Appeal Division