



Citation: *RD v Canada Employment Insurance Commission*, 2022 SST 1348

**Social Security Tribunal of Canada
Appeal Division**

Leave to Appeal Decision

Applicant: R. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated September 20, 2022
(GE-22-1505)

Tribunal member: Janet Lew

Decision date: November 23, 2022

File number: AD-22-757

Decision

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

Overview

[2] The Applicant, R. D. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was suspended from his employment because of misconduct. In other words, it found that he did something that caused him to be suspended. He had not complied with the COVID-19 vaccination policy that applied on the project on which he was working.¹

[3] Having determined that there was misconduct, the General Division found that the Claimant was disentitled from receiving Employment Insurance benefits.²

[4] The Claimant argues that the General Division overlooked important evidence. He argues that, if it had not overlooked this evidence, it would have found that there was no misconduct.

[5] Before the Claimant can move ahead with his appeal, I have to decide whether the appeal has a reasonable chance of success.³ Having a reasonable chance of success is the same thing as having an arguable case.⁴ If the appeal does not have a reasonable chance of success, this ends the matter.

¹ As the General Division explained, the Claimant's employer was a subcontractor on a project for another corporation. The contractor had a mandatory COVID-19 vaccination policy, although the Claimant's employer did not have such a policy. However, the contractor required everyone working on the project to be fully vaccinated or to have an approved exemption, otherwise they would not be allowed to work on the project.

² At paragraph 56, the General Division found that the Claimant was disqualified from receiving Employment Insurance benefits, but under section 31 of the *Employment Insurance Act*, a claimant who is suspended from their employment because of misconduct is disentitled, rather than disqualified, from receiving Employment Insurance benefits. In the following paragraph, the General Division then properly concluded that the Claimant was disentitled to benefits.

³ Under section 58(2) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."

⁴ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[6] I am not satisfied that the appeal has a reasonable chance of success. The appeal will not be going ahead.

Issue

[7] The issue is as follows: Is there an arguable case that the General Division overlooked the Claimant's request for accommodation under the contractor's vaccination policy?

Analysis

[8] The Appeal Division must grant permission to appeal unless it has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.⁵

[9] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.

[10] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

Is there an arguable case that the General Division overlooked the Claimant's request for accommodation under his employer's vaccination policy?

[11] The Claimant argues that the General Division overlooked important evidence. He argues that the General Division focused on the contractor's vaccination policy, without considering "how poorly the accommodation request was handled".⁶ He maintains that the contractor should have granted him an accommodation. If it had done

⁵ See section 58(1) of the DESD Act.

⁶ See Application to the Appeal Division: Employment Insurance, filed October 18, 2022, at AD1-6.

so, he would have been compliant with the contractor's policy and there would have been no misconduct on his part.

[12] Whether the contractor should have accommodated the Claimant was not a relevant consideration in the context of whether there was misconduct under the *Employment Insurance Act*.

[13] *Mishibinijima*⁷ involved a claimant who lost his employment because of his misconduct. He repeatedly failed to show up or arrived late for work because he drank heavily. The Board of Referees found that Mr. Mishibinijima's alcohol dependence was a "disability" under the *Canadian Human Rights Act* (CHRA). The Board found that his employer should have accommodated his alcohol dependency. For that reason, the Board concluded that the applicant's dismissal was not justified.

[14] The Umpire set aside the Board's decision. It found that the issue of whether alcoholism was a disability under the CHRA or whether the employer had a duty to accommodate were not relevant considerations.

[15] The Federal Court of Appeal found that the Umpire did not make an error when it concluded that whether the employer met its duty of accommodation was not a relevant consideration. The Court determined that the issue was, whether in light of all of the relevant circumstances, misconduct was the cause of the applicant's dismissal.

[16] In following *Mishibinijima*, whether the employer (or contractor) met its duty of accommodation to the Claimant was irrelevant to the misconduct issue. So, the General Division did not have to address the fact that the Claimant's employer might have failed in its duty to accommodate him, or that it had poorly handled the accommodation request.

[17] I am not satisfied that the Claimant has an arguable case on this point.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. The General Division also referred to this decision.

Conclusion

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

Janet Lew
Member, Appeal Division