Citation: *ED v Canada Employment Insurance Commission*, 2022 SST 1292

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated October 11, 2022 (GE-22-1321)

Tribunal member:	Charlotte McQuade
Decision date:	November 25, 2022
File number:	AD-22-819

Decision

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

Overview

[2] The Claimant worked as a subway operator. The employer put the Claimant on a leave of absence and dismissed him because he did not comply with its Covid-19 vaccination policy.

[3] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to receive EI benefits because he was suspended and lost his employment due to his own misconduct. Also, the Commission decided the Claimant had not proven his availability for work.

[4] The Claimant appealed the Commission's decisions to the Tribunal's General Division. The General Division decided the Claimant had proven his availability for work but the Commission had proven the Claimant had been suspended and lost his job due to his own misconduct. So, the Claimant could not be paid benefits.

[5] The Claimant is now asking to appeal the General Division's decision that his conduct was misconduct to the Appeal Division. However, he needs permission for his appeal to move forward.

[6] The Claimant submits that the General Division made an error of law and based its decision on important errors of fact when it concluded that his conduct was misconduct. His main argument is that there was no requirement for vaccination in his collective agreement and the employer implemented the vaccination policy outside the terms of his collective agreement so he didn't have to follow it.

[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 an error of law or based its decision on important errors of fact when it decided the Commission had proven the Claimant was suspended and lost his job due to 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]

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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.

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

The General Division decision

[13] The Claimant's employer implemented a mandatory Covid-19 vaccination policy. The Claimant did not comply with the policy. As a result, the Claimant's employer first suspended and then terminated him.

[14] The Commission decided that the Claimant was suspended and terminated from his employment due to his own misconduct. So, he could not be paid benefits.

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

[16] The General Division had to decide whether the Commission had proven the Claimant had been suspended and terminated for reasons of misconduct.

[17] The *Employment Insurance Act* (EI Act) provides for a disentitlement where a claimant has been suspended because of their misconduct.[4]

[18] The EI Act provides for disqualification from benefits where a claimant has lost their job because of their misconduct.[5]

[19] 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. When the Federal Court of Appeal decides what a term in the law means, the Tribunal has to follow that definition.

[20] Misconduct requires conduct that is wilful. This means that the conduct was conscious, deliberate, or intentional.[6] Misconduct also includes conduct that is so reckless that it is almost wilful.[7]

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[4] See section 31 of the *Employment Insurance Act* (EI Act)
[5] See section 30(1) of the EI Act.
[6] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[7] See *McKay-Eden v Her Majesty the Queen*, A-402-96

[21] Another way to put this is that there is misconduct if a claimant knew or should have known that their conduct could get in the way of carrying out their duties toward their employer and there was a real possibility of being let go because of that.[8]

[22] There was no dispute that the Claimant was put on a mandatory and unpaid leave of absence on November 21, 2021, and then terminated on December 31, 2021, because he did not comply with the employer's Covid19 vaccination policy.

[23] The General Division found as a fact that the employer's policy was communicated to the Claimant in early September 2021 and he was aware of the initial deadline dates and the extensions to the deadlines in the policy.

[24] The General Division also found as a fact that the Claimant had enough time to comply with the policy.

[25] The General Division found further that the Claimant has not shown that he was exempt from the policy. This was because he had not requested a medical exemption and the employer refused his request for a religious exemption.

[26] The General Division decided that the Claimant willfully and consciously chose to not to comply with the policy for his own personal reasons. He did not agree with the employer's implementation of the policy, so he chose not to comply with it.

[27] The General Division decided that the Claimant knew or ought to have known the consequences of not complying would lead to an unpaid leave of absence and dismissal as the employer was actively communicating with employees and letting them know that they would be put on a leave of absence effective November 21, 2021, and dismissed on December 31, 2021. The General Division noted those consequences were communicated to the Claimant on more than on occasion.

[28] The General Division therefore concluded the Commission had proven the Claimant had been suspended and terminated due to his misconduct.

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[8] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[29] The Claimant is now asking to appeal the General Division's decision to the Appeal Division. He says the General Division made an error of law and based its decision on errors of fact when it decided the Commission had proven his conduct amounted to misconduct.

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

[30] The Claimant submits that the General Division made an error of law when it decided he refused to follow the employer's policy for his own personal reasons. He says he was under no obligation to comply with the policy because it was arbitrarily implemented and not mentioned in his collective agreement. Therefore, the Claimant maintains, it had no force of law.

[31] The Claimant also argues that the General Division made an error law in saying the policy was a precondition of his employment. He argues that in unionized workplaces the collective bargaining agreement sets out the terms of employment between the employer and employee and his employer can't arbitrarily impose new work conditions or terms. He says this amounts to constructive dismissal and is not misconduct.

[32] It is not arguable that the General Division made an error of law when it decided the Commission had proven the Claimant was suspended and terminated due to misconduct.

[33] The General Division decided whether the Claimant's actions amounted to misconduct by applying the legal test for misconduct noted above, as described by the Federal Court of Appeal.[9]

[34] The evidence was that the Claimant deliberately decided not to follow his employer's policy, understanding that conduct could result in suspension and termination.

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[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[35] The Federal Court of Appeal has said that a deliberate violation of an employer's policy is considered to be misconduct.[10]

[36] The Claimant argues that he didn't make a personal choice to not follow the policy and the policy was not a precondition to his employment. He maintains that since the vaccination requirement and policy were not part of his collective agreement and since his employer arbitrarily imposed new work conditions outside the collective agreement the policy had no legal force and effect. He says the employer's actions also amount to constructive dismissal.

[37] The General Division decided that the employer could choose to develop and impose policies at the workplace and in this case it imposed the vaccination policy because of the Covid-19 pandemic.

[38] I see no arguable reviewable error in this conclusion. Before the General Division, the Claimant did not point to any provision in his collective agreement or provide any other evidence to support his allegation that since the employer's vaccination requirement, as contained in its policy, was imposed outside his collective agreement, he did not have to follow the policy.

[39] Further, the Federal Court of Appeal has stated that, for the purposes of the misconduct test under the EI Act, it is irrelevant whether the employer's rule existed only as a term of employment under its policies, and not in any written employment contract between the claimant and the employer. The Court said this is because a term of employment "may be express or implied" and it may relate "to a concrete or more abstract requirement."[11]

[40] With respect to the Claimant's allegation that the employer's actions amounted to constructive dismissal, the General Division decided that it could not decide whether the

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[10] 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).
[11] See *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at paragraph 25.

dismissal or penalty was justified. The General Division said that its role was to decide whether the Claimant's conduct was misconduct under the EI Act.[12]

[41] I see no arguable error of law in that conclusion. The General Division was required to decide whether the Claimant's actions amounted to misconduct under the EI Act, not whether the employer's actions amounted to constructive dismissal or unjust dismissal.[13] The grievance and labour arbitration process are the forum to resolve issues concerning alleged breaches of the collective agreement and questions of unjust dismissal.

[42] It is not arguable that the General Division made any error of law. It applied settled law to the facts when it decided the Claimant's actions amounted to misconduct.

It is not arguable that the General Division based its decision on an important error of fact

[43] The Claimant argues that the General Division based its decision on factual errors concerning why he did not request a medical exemption from his employer, that he made a personal decision to not follow the employer's policy and that following the policy was a precondition of his employment.

[44] The Appeal Division can intervene only in certain kinds of errors of fact. The Appeal Division can only intervene only if the General Division based its decision on an erroneous finding of fact that it made perversely, capriciously, or without regard for the material before it.[14]

[45] If the General Division makes a factual finding that squarely contradicts or is unsupported by the evidence, its determination may be said to have been made perversely, capriciously, or without regard to the evidence.[15]

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[12] See paragraphs 55 and 56 of the General Division decision.
[13] See *Canada (Attorn*ey General*) v Marion*, 2002 FCA 185 (CanLII); See also *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107 (Can LII).
[14] See section 58(1)(c) of the DESD Act.
[15] See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

[46] The General Division's findings are consistent with the evidence. It is not arguable the General Division made a factual error.

[47] The Claimant objects to the General Division's finding of fact that the Covid-19 policy was a precondition to his employment.

[48] The employer's policy specifically provided that full vaccination was a precondition to employment and that employees were expected to comply with the policy as a condition of employment.[16] So, the General Division's finding of fact that the Covid-19 policy was a precondition of his employment was supported by the evidence.

[49] The Claimant also objects to the General Division's finding of fact that he willfully and consciously chose not to comply with the policy for his own personal reasons. The General Division's finding of fact was supported by the evidence. While the Claimant may have believed the policy to be unlawful, he still made a personal decision whether to follow it or not.

[50] The Claimant objects to the General Division's finding of fact that he didn't ask his employer for a medical exemption as he heard that few people were accepted. He says he didn't apply for his medical exemption, as his doctor refused to give him a medial note and he couldn't apply without it.

[51] I agree that the General Division made an error of fact about why the Claimant didn't apply for a medical exemption. I have listened to the audio recording from the General Division hearing and the Claimant did explain that the reason he did not apply for a medical exemption was that his doctor would not provide him a note.[17]

[52] However, this error of fact didn't affect the General Division's decision.

[53] The General Division had to decide if the employer's policy applied to the Claimant or whether he was exempt from it.

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[16] GD3B-24 and GD3B-26.
[17] I heard this from the audio recording of the General Division hearing at approximately 0:37:00.

[54] The General Division found the Claimant had not proven he was exempt from the policy as his request for religious accommodation was denied and he did not ask his employer for a medical accommodation.[18]

[55] So, the General Division did not base its decision on the fact concerning why the Claimant did not request a medical exemption, but rather the fact that he had not requested one. The General Division's decision about whether he was exempt from the employer's policy wouldn't have changed because of the reason the Claimant had not requested a medical exemption.

[56] There is no arguable case that the General Division based its decision on any error of fact.

[57] Aside from the Claimant's arguments, I have reviewed the documentary file, and listened to the audio recording from the General Division hearing.[19] I did not find any key evidence that the General Division might have ignored or misinterpreted.

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

[59] The Claimant has not pointed to any errors of jurisdiction and I have not identified any. The General Division decided the issue it had to decide, being whether the Claimant's actions amounted to misconduct under the EI Act and it did not decide any issues it did not have authority to decide.

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

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

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[18] See paragraph 52 of the General Division decision.
[19] See *Karadeolian v Canada (Attorney General),* 2016 FC 615, which recommends doing such a review.

Conclusion

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

Charlotte McQuade
Member, Appeal Division