



Citation: *EP v Canada Employment Insurance Commission*, 2022 SST 1518

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: E. P.
Representative: P. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated October 25, 2022
(GE-22-2964)

Tribunal member: Melanie Petrunia

Decision date: December 28, 2022
File number: AD-22-855

Decision

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

Overview

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

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

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues the General Division based its decision on important errors of fact and made an error of law.

[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.

Issues

[7] The issues are:

- a) Is there an arguable case that the General Division based its decision on an important error of fact by not accepting that COVID-19 injections cannot be considered vaccines?

- b) Is there an arguable case that the General Division made an error of law?
- c) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

Analysis

[8] 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

[9] 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

[10] 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

[11] 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

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).

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.

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 based its decision on an important mistake about the facts

[12] At the General Division, the Claimant argued that the employer's vaccination policy was unfair and a violation of her human rights. She said that her request for an exemption based on religious belief was not approved and her employer had a duty to accommodate her. She also submitted documents and videos concerning the COVID-19 vaccine.

[13] In her application for leave to appeal, the Claimant says that the General Division did accept the fact that COVID-19 injections cannot be considered vaccines. She refers to the videos and other materials that she provided at the General Division about the definition of a vaccine and the efficacy of the Covid-19 vaccine.⁶

[14] The General Division considered the Claimant's arguments that the injection should not be considered a vaccine and the information in the videos and other material about efficacy.⁷ The General Division accepted that the Claimant refused to be vaccinated because of her concerns about the safety of the vaccine and her religious beliefs.⁸

[15] The General Division found that it had to focus on the Claimant's actions when considering whether there was misconduct.⁹ It found that the Claimant lost her job because she failed to comply with the employer's vaccination policy.¹⁰ It also found that the Claimant was aware that failing to comply with the employer's policy could lead to her dismissal.¹¹

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

⁶ AD1-4

⁷ General Division decision at para 20.

⁸ General Division decision at para 27.

⁹ General Division decision at para 15 and 20.

¹⁰ General Division decision at para 10.

¹¹ General Division decision at para 29.

[16] The Claimant was unvaccinated and did not have an approved exemption. The General Division found that the Claimant could not work and carry out her duties to her employer because she was not in compliance with its policy.¹² It decided that the Commission had proven that there was misconduct.¹³

[17] There is no arguable case that the General Division based its decision on an important error of fact. The General Division considered the Claimant's arguments about the nature and efficacy of the vaccine. It took the Claimant's evidence into consideration but properly found that it had to consider the actions of the Claimant when deciding whether or not there was misconduct.

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

[18] The Claimant argues that she provided a written decision of the Supreme Rabbinical Court, which prohibits her from getting the vaccine. She asks why the decision of her religious leaders is not important and argues that this is a violation of her constitutional rights.¹⁴

[19] The Claimant says that the General Division acknowledged this but said it wasn't important because it is related to human rights. She states that she disagrees with the unlawful decision of her employer to fire her and she will never agree to a violation of the constitutional rights.¹⁵

[20] The General Division considered the Claimant's arguments that the vaccination policy went against her religious beliefs and that it was a violation of her human rights.¹⁶ It found that that it is required to focus on the *Employment Insurance Act* only, and cannot make decisions about whether the Claimant has options under other laws.¹⁷

¹² General Division decision at para 31.

¹³ General Division decision at para 28.

¹⁴ AD1-4

¹⁵ AD1-4

¹⁶ General Division decision at para 19.

¹⁷ General Division decision at para 16.

[21] The General Division found that issues such as whether the Claimant was wrongfully dismissed, or whether her employer should have accommodated her religious beliefs are not for it to decide.¹⁸ The General Division found that the only issue it had to decide was whether the Claimant lost her job because of misconduct.¹⁹

[22] The General Division cited a decision of the Federal Court.²⁰ This decision states that the conduct of the employer is not relevant to the issue of misconduct.²¹ There is no arguable case that the General Division made an error of law by not considering the employer's conduct in denying the Claimant's religious exemption and enforcing the policy.

[23] 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.²²

[24] I find that there is no arguable case that the General Division based its decision on an important mistake about the facts of the case or made an error of law.

[25] Aside from the Claimant's arguments, I have also considered other grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction.

[26] 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.

¹⁸ General Division decision at para 16.

¹⁹ General Division decision at para 16.

²⁰ General Division decision at footnote 8 references *Paradis v Canada (Attorney General)*, 2016 FC 1281 (*Paradis*).

²¹ See *Paradis* at para 31.

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Conclusion

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

Melanie Petrunia
Member, Appeal Division