



Citation: *KS v Canada Employment Insurance Commission*, 2023 SST 89

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: K. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated November 17, 2022
(GE-22-2140)

Tribunal member: Melanie Petrunia

Decision date: January 30, 2023

File number: AD-22-928

Decision

[1] I am refusing permission to appeal. The appeal will not proceed.

Overview

[2] The Applicant, K. S. (Claimant), was suspended from her job because she did not comply with her 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 was misconduct. It decided that the Claimant was disentitled from receiving benefits. The Claimant requested a reconsideration and the Commission maintained its decision.

[4] The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was suspended from her job because of misconduct and she is disentitled 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.

[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 matters

– New evidence

[7] With her application for leave to appeal, the Claimant has included new documents that were not before the General Division.¹

[8] I will not consider this new evidence. It is well established that the Appeal Division cannot consider new evidence because the Appeal Division isn't rehearing the case. The Appeal Division decides whether the General Division made certain errors, and if so, how to fix those errors. In doing so, the Appeal Division looks at the evidence that the General Division had when it made its decision.

[9] There are some exceptions to this general rule, but none apply in this case.² So, I have not considered the Claimant's new evidence.

Issue

[10] Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

Analysis

[11] 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?³

[12] 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).⁴

¹ See AD1-1 to AD1-49.

² Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal described in *Sharma v Canada (Attorney General)*, 2018 FCA 48 at paragraph 8.

³ 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.

⁴ DESD Act, s 58(2).

[13] 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;⁵ or
- d) made an error in law.⁶

[14] 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.⁷

I am not giving the Claimant permission to appeal

– Background

[15] The Claimant's employer introduced a policy requiring vaccination against COVID-19. Employees could request accommodation for religious or medical reasons. The Claimant did not make a request for accommodation.

[16] The policy allowed employees who were not vaccinated to continue working until December 31, 2021 if they tested negative for COVID-19 twice weekly. After December

⁵ 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.

⁶ This paraphrases the grounds of appeal.

⁷ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

31, 2021, unvaccinated employees without an exemption would be placed on leave without pay.

[17] The Claimant did not comply with the policy and was placed on a leave of absence. She applied for EI benefits. The Commission told her that she was disentitled from receiving benefits because her misconduct was the reason for her suspension. The Claimant appealed this decision to the General Division.

– **The General Division decision**

[18] The General Division found that the employer placed the Claimant on a leave of absence. It found that this is considered a suspension for the purposes of the EI Act.⁸

[19] The General Division found that the Claimant was suspended because she didn't comply with the employer's vaccination policy. She did not get vaccinated and did not have an exemption for medical or religious reasons.⁹

[20] It also found that the Claimant was aware of the policy and made a conscious, deliberate and willful decision not to comply. She knew that this could lead to her suspension.¹⁰ The General Division found that Commission had proven that the Claimant was suspended from her job due to her own misconduct.

– **There is no arguable case that the General Division erred**

[21] In her application for leave to appeal, the Claimant argues that it is against the law to force a person to participate in an experimental drug or to force medical procedure/medication on a person. She argues that her employer took away her right to provide for herself. She also says that she has been discriminated against and her employer has divided her and her fellow co-workers.¹¹

[22] The Claimant also argues that the employer kept changing the date by which she had to comply and so she believed that it would be extended again. She asks why she

⁸ General Division decision at para 12.

⁹ General Division decision at para 21.

¹⁰ General Division decision at para 41.

¹¹ AD1-53

was not able to continue wearing PPE and testing. She was prepared to pay for her own tests.¹²

[23] The Claimant argues that the vaccination policy was not part of her contract of employment. She says that it wasn't about health, or everyone should have been tested, not just the unvaccinated. She had medical reasons for refusing the vaccine, but these did not meet the exemptions. The Claimant also argues that there have been side effects to the vaccine.¹³

[24] The Claimant made these arguments at the General Division and they were considered in its decision. The General Division noted that the Claimant argued:

- that she thought the deadline would be pushed back again;
- she is a member of a union and filed a grievance;
- that no one has the right to tell her what to inject in her body;
- that she should have been able to continue with testing and wearing PPE;
- that she had medical concerns that did not meet the criteria for an exemption;
and
- that she should have been allowed to continue working if she wasn't sick.¹⁴

[25] The General Division had to decide whether the Claimant was suspended because of her misconduct. It acknowledged that misconduct does not imply that it is necessary that the breach of conduct be the result of wrongful intent; it is sufficient that the misconduct be conscious, deliberate, or intentional.¹⁵

[26] The General Division's role is not to judge the severity of the employer's penalty or to determine whether the employer was guilty of misconduct by dismissing the

¹² AD1-53

¹³ AD1-53

¹⁴ General Division decision at para 39.

¹⁵ General Division decision at para 24.

Claimant in such a way that his dismissal was unjustified. It must rather decide whether the Claimant was guilty of misconduct and whether this misconduct led to his dismissal under the EI Act.

[27] The General Division also found that it has to focus only on the EI Act and cannot make decisions about whether the Claimant has options under other laws, or her collective agreement.¹⁶

[28] The General Division found that the Claimant made a conscious, deliberate a willful decision not to comply with the employer's policy. It also found that she knew this could lead to her suspension.¹⁷ It noted that the Claimant was aware that policy did not allow her to continue testing and that she did not have an approved exemption.¹⁸ It found that she was aware she had to either be vaccinated or have an approved exemption by December 31, 2021.¹⁹

[29] The Claimant did not specify what errors she believes the General Division made. I have considered whether or not her arguments raise an arguable case that the General Division made any of the errors I can consider. The Claimant has made the same arguments that were made before the General Division and considered in its decision. The General Division considered relevant facts and properly cited and applied the law.

[30] 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. I have not identified any errors of law and there is no arguable case that the General Division made an important mistake about the facts in its decision.

¹⁶ General Division decision at para 28.

¹⁷ General Division decision at para 41.

¹⁸ General Division decision at para 43.

¹⁹ General Division decision at para 44.

[31] 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

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

Melanie Petrunia
Member, Appeal Division