Citation: *DC v Canada Employment Insurance Commission*, 2023 SST 88

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated October 21, 2022 (GE-22-2179)

Tribunal member:	Janet Lew
Decision date:	January 27, 2023
File number:	AD-22-869

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, D. C. (Claimant), is appealing the General Division decision. The General Division found that the Claimant was suspended and then dismissed from her employment because of misconduct. The Claimant had not complied with her employer's COVID-19 vaccination policy. The General Division found that the Claimant was not entitled to receive Employment Insurance benefits.

[3] The Claimant argues that the General Division made an error of law. She argues that the General Division misinterpreted what misconduct means. She argues that misconduct did not arise in her case as vaccination was neither an express nor an implied duty in her contract of employment.

[4] The Claimant also intends to rely on new evidence. After the General Division issued its decision, her employer updated its vaccination policy. Vaccination was no longer mandatory. Further, her employer reinstated employees who were either unvaccinated or who did not disclose their vaccination status. They were reinstated into an unpaid leave. The Claimant intends to rely on this evidence to show that there was no misconduct in the first place.[1]

[5] Before the Claimant can move ahead with her appeal, I must decide whether the appeal has a reasonable chance of success.[2] Having a reasonable chance of success is the same thing as having an arguable case.[3] If the appeal does not have a reasonable chance of success, this ends the matter.

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[1] The Claimant brought an application to the General Division to rescind or amend its decision. The General Division denied the Claimant's application. The Claimant is currently appealing the General Division decision on the rescind or amend application.
[2] See section 58(2) of the *Department of Employment and Social Development Act* (DESD Act). I am required to refuse permission if I am satisfied, "that the appeal has no reasonable chance of success."
[3] *Fancy v Canada (Attorney General)*, 2010 FCA 63.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

Issues

[7] The issues are as follows:

a) Is there an arguable case that the General Division made a legal error about whether vaccination formed part of the Claimant's duties with which she was expected to comply?

b) Can the Claimant rely on new evidence?

Analysis

[8] The Appeal Division must grant permission to appeal unless the appeal 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.[4]

[9] For factual errors, the General Division had to have based its decision on an error that was 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 made a legal error about whether vaccination formed part of the Claimant's duties with which she was expected to comply?

[11] The Claimant argues that the General Division made a legal error when it found that her workplace duties included getting vaccinated for COVID-19.

[4] See section 58(1) of the DESD Act.

[12] The General Division wrote:

> I was not persuaded by the Claimant's argument that vaccination was not part of her initial employment contract. [Citation omitted] Even so, the Court has said that misconduct can include a breach of an express or implied duty in an employment contract. [Citation omitted] The employer imposed the policy at work because of the covid19 pandemic, so it became a condition of her continued employment. [Citation omitted]

[13] The Claimant argues that vaccination was neither an express nor implied duty in her employment contract. She denies that she ever breached her contract. Therefore, she says that her employer had no basis to dismiss her, and she denies that misconduct even arose.

[14] The General Division did not explicitly identify the Claimant's duties, but it noted that they were set out in her contract of employment. Under her contract, the Claimant was required to be familiar with and comply with all of her employer's applicable policies, which included Occupational Health and Safety.[5]

[15] As it explained in its policy, the employer considered health and safety a priority. It explained that it was committed to taking every precaution reasonable in the circumstances for the protection of the health and safety of workers from the hazard of COVID-19. It described vaccination as a critical control measure. Hence, it required vaccination of its employees, as well as students and volunteers.[6]

[16] It is clear that the employer's vaccination policy was part of its occupational health and safety requirements to ensure workplace health and safety. The Claimant's employment contract was wide enough to extend to and include the employer's vaccination policy, as it was part of the employer's occupational health and safety policy. That being the case, then the Claimant had to be familiar with and comply with her employer's vaccination policy.

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[5] See contract of employment dated January 11, 2018, at GD 6-12 to GD 6-15.
[6] See employer's vaccination policy, at GD 3-31 to 3-34.

[17] I am not satisfied that there is an arguable case that the General Division made a legal (or factual) error in finding that vaccination did not form part of the Claimant's initial employment contract. The employment contract was fairly broad and allowed the Claimant's employer to introduce policies that were consistent with its underlying obligations to ensure the health and safety of the workplace. And, as the Claimant had to comply with the employer's health and safety policies, the vaccination policy necessarily formed part of her duties.

[18] I note that the Claimant relies on *A.L. v Canada Employment Insurance Commission* [*A.L.*].[7] (This arises in the context of her other appeal of a General Division decision denying her application to rescind or amend the October 21, 2022 decision,[8] but the arguments seem more relevant here than in that appeal.) The Claimant argues that the General Division failed to follow the legal principles set out in the *AL* decision.

[19] In *A.L.*, the General Division found that there was no basis upon which an employer could unilaterally impose new conditions to a collective agreement without consultation with and acceptance by parties to the agreement. The General Division was also unable to find any evidence in that case that suggested vaccination was an implied duty.

[20] Given that the vaccination policy formed part of the Claimant's duties, *AL* is of no relevance.

Can the Claimant rely on new evidence?

[21] The Claimant also intends to rely on new evidence that shows that her employer lifted its vaccination policy in late 2022 and then reinstated her. The Claimant says that this shows that there was no misconduct in the first place.

[22] The courts have consistently accepted that generally the Appeal Division does not consider new evidence. As the Federal Court of Appeal said in *Gittens*:

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[7] *A.L. v Canada Employment Insurance Commission*, 2022 SST 1428.
[8] The Claimant filed a copy of this decision as part of another application to the Appeal Division. Some of the arguments that the Claimant made in that application may be more relevant to this application.

> [13] … under the rules set by Parliament, hearings before the Appeal Division are not redos based on updated evidence of the hearing before the General Division. They are instead reviews of General Division decisions based on the same evidence.[9]

[23] In a more recent case, the Court of Appeal set out the circumstances when the Appeal Division might allow fresh evidence. These are when that evidence assists in providing general background information, or exceptionally, in cases where both parties have agreed that an important document should be considered.[10] These circumstances do not exist here such as to enable me to consider this evidence.

[24] New evidence may be appropriate for the General Division to consider in the context of an application to rescind to amend.[11] As I noted above, the Claimant filed an application to the General Division to rescind or amend its October 21, 2022 decision. The General Division denied the rescind or amend application, but the Claimant is currently appealing that decision.

[25] I do not know what the outcome of that appeal might be. But it seems that, if the Claimant's employer has since reinstated her into an unpaid leave of absence, that could at least have some implications on whether she is disentitled or disqualified from receiving benefits (if the disentitlement remains on the period of the unpaid leave of absence).

Conclusion

[26] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am refusing permission to appeal. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

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[9] See *Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 13.
[10] See *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at para 39.
[11] Section 66 of the DESD Act gave parties the chance to make applications to rescind or amend decisions, up to December 4, 2022. That section has since been repealed, so the section is no longer available to parties.