Citation: *TC v Canada Employment Insurance Commission*, 2023 SST 184

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated November 28, 2022 (GE-22-2512)

Tribunal member:	Melanie Petrunia
Decision date:	February 18, 2023
File number:	AD-22-951

Decision

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

Overview

[2] The Applicant, T. C. (Claimant), was placed on an unpaid leave of absence from her job 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 suspension was misconduct. It disentitled the Claimant 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. The Claimant argues the General Division based its decision on an important error of fact.

[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.

Issue

[7] Does the Claimant raise any reviewable errors of the General Division on which the appeal might succeed?

I am not giving the Claimant permission to appeal

[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 argue her case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.[5]

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[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.
[5] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.

– There is no arguable case that the General Division based its decision on an error of fact

[12] In her application for leave to appeal, the Claimant argues that the General Division based its decision on an important mistake about the facts. She says that the Covid-19 vaccine conflicts with her sincerely held religious beliefs. She argues that she could not comply with the policy to be vaccinated because of her religious beliefs. She says that she was not able to apply for an exemption on this basis.[6]

[13] The General Division had to decide if the Claimant was suspended from her job because of misconduct. It found that the reason for her suspension was that she did not comply with her employer's vaccination policy.[7] It then considered whether this reason amounted to misconduct.

[14] The General Division noted that the EI Act does not define misconduct. It set out the test for misconduct from case law. The General Division noted that the Claimant does not have to have wrongful intent for her behaviour to be misconduct. The conduct has to be wilful, meaning that it is conscious, deliberate or intentional.[8]

[15] The General Division also said that there is misconduct if the Claimant knew or should have known that her conduct could interfere with her performing her duties and there was a chance that she could be let go.[9] A deliberate violation of the employer's policy is considered to be misconduct.[10]

[16] The General Division's role is not to judge the severity of the employer's penalty but rather to decide whether the Claimant was guilty of misconduct and whether this misconduct led to her dismissal.[11]

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[6] AD1-5
[7] General Division decision at para 17.
[8] General Division decision at para 24.
[9] General Division decision at para 25.
[10] General Division decision at para 26 citing *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[11] *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General),* 2006 FCA 16.

[17] The General Division acknowledged that the case law says it cannot make decisions about other laws.[12] It has to focus on the EI Act only. It cannot decide whether the employer should have made reasonable accommodations, or whether the Claimant might have remedies under other laws.[13]

[18] The General Division considered the evidence and found that the Claimant was aware of the employer's policy requiring vaccination by December 16, 2021. She was aware that employees who were not vaccinated and did not have a medical exemption would be sent home.[14]

[19] The General Division found that the Claimant did not comply with the policy and that her decision was conscious, deliberate and wilful. It found that the Claimant knew that she would be sent home for not complying with the policy.

[20] The General Division considered the Claimant's arguments that she could not be vaccinated because of her religious beliefs. It considered her argument that the employer's policy did not allow for exemptions for religious reasons.[15] The General Division found that its role is not to consider whether the policy was a violation of the Claimant's human rights. It said that there are other forums for her to raise these claims.[16]

[21] A recent decision from the Federal Court considered the issue of misconduct and a claimant's refusal to follow the employer's COVID-19 vaccination policy.[17] The Court confirmed that the Tribunal is not permitted to address these questions.

[22] In an earlier case, the Federal Court considered circumstances where a claimant was refused EI benefits because of misconduct. That claimant argued that the

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[12] General Division decision at para 28.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[14] General Division decision at para 41.
[15] General Division decision at para 34.
[16] General Division decision at para 37.
[17] *Cecchetto v Canada (Attorney General*), 2023 FC 102.

employer's policy violated his rights under the Alberta Human Rights Act. The Federal Court found it was a matter for another forum.[18]

[23] The Claimant is making the same argument in her application for leave to appeal that she made before the General Division. The General Division considered and addressed this argument in its decision. I see no reviewable error made by the General Division when it decided the issue of misconduct based on case law from the Federal Court and the Federal Court of Appeal, which has defined misconduct under the EI Act.

[24] The General Division found that the Claimant did not apply for or have an exemption from the employer's policy. She chose not to comply with that policy knowing that she could be suspended. There is no arguable case that the General Division based its decision on an important mistake about the facts.

[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. I have not identified any errors of law.

[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.

Conclusion

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

Melanie Petrunia
Member, Appeal Division

[18] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.