



Citation: *MB v Canada Employment Insurance Commission*, 2023 SST 218

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. B.
Representative: M. B.
Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated November 23, 2022
(GE-22-2766)

Tribunal member: Melanie Petrunia
Decision date: February 28, 2023
File number: AD-22-968

Decision

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

Overview

[2] The Applicant, M. B. (Claimant), was placed on an unpaid leave of absence and then dismissed from her job as a health nurse because she did not comply with the employer's mandatory 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 unpaid leave and later dismissal was misconduct. It disentitled the Claimant from receiving benefits for the period from December 12, 2021 to June 18, 2022 and disqualified her from receiving benefits starting June 19, 2022.

[4] The Claimant requested a reconsideration, and the Commission maintained its decision. The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Commission had proven that the Claimant was suspended and then lost her job because of misconduct.

[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 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] Is there an arguable case that the General Division made a reviewable error when it concluded that the Claimant was suspended and then dismissed due to misconduct?

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

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; *Joseph v Canada (Attorney General)*, 2017 FC 391.

I am not giving the Claimant permission to appeal

– The General Division decision

[12] The General Division had to decided whether the Claimant was placed on an unpaid leave and then dismissed due to her misconduct.

[13] The *Employment Insurance Act* (EI Act) says that a claimant who is suspended because of their misconduct is disentitled to benefits.⁶ A claimant who has lost their job because of misconduct is disqualified from receiving benefits.⁷

[14] In its decision, the General Division considered the reason why the Claimant was suspended and then dismissed. It found that the Claimant did not comply with her employer's mandatory vaccination policy.⁸ The General Division noted that the Claimant did not dispute that this was the reason she was suspended and then dismissed. She said that she did not want to take the vaccine for health reasons.⁹

[15] The General Division then considered whether this reason is considered misconduct under the law. It set out the legal principles that apply when determining whether an employee's actions constitute misconduct.¹⁰ The General Division considered the Claimant's argument that there was no misconduct because she was forced to take the vaccine or risk losing her job.¹¹

[16] The General Division found that the Commission had proven there was misconduct for the following reasons:

- a) The Claimant was aware that she would be placed on an unpaid leave and dismissed if she did not comply with the employer's policy;

⁶ See Section 31 of the *Employment Insurance Act*.

⁷ See Section 30 of the *Employment Insurance Act*.

⁸ General Division decision at para 13.

⁹ General Division decision at para 12.

¹⁰ General Division decision at paras 15 to 17.

¹¹ General Division decision at para 19.

- b) The policy stated that failing to comply would lead to discipline “up to and including termination of employment;” and
- c) The Claimant testified that she had health reasons for not taking the vaccine but she did not file a request for a medical exemption.¹²

[17] The General Division considered the Claimant’s position that she was being forced to either get the vaccine or lose her job. It noted that it is not the role of the Tribunal to decide whether the employer’s vaccination policy was fair or reasonable. It said that there were other avenues for the Claimant to make these arguments.

It is not arguable that the General Division erred

[18] In her application for leave to appeal, the Claimant argues that the General Division made an error of law. She says that she did not commit misconduct by not complying with her employer’s coercion.¹³

[19] The Claimant argues that the vaccines were not fully tested and therefore experimental. She says that coercing anyone to take the vaccine violates the Nuremburg Code and is illegal. The Claimant argues that the allegation of misconduct is moot.¹⁴

[20] There is no arguable case that the General Division made an error of law. The Claimant made the argument at the General Division that she was being coerced to take the vaccine or lose her job. The General Division correctly acknowledged that it is not allowed to consider whether the employer’s policy is fair or reasonable.

[21] The General Division cited a decision of the Federal Court.¹⁵ This decision states that the conduct of the employer is not relevant to the issue of misconduct.¹⁶ There is no

¹² General Division decision at para 20.

¹³ AD1-3

¹⁴ AD1-3

¹⁵ General Division decision at footnote 7 references *Paradis v Canada (Attorney General)*, 2016 FC 1281 (*Paradis*).

¹⁶ See *Paradis* at para 31.

arguable case that the General Division made an error of law by not considering the employer's conduct in enforcing the policy.

[22] 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.¹⁷

[23] 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 or based its decision on an important mistake about the facts.

[24] 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

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

Melanie Petrunia
Member, Appeal Division

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.