Citation: *MH v Canada Employment Insurance Commission*, 2023 SST 191

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. H.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 8, 2022 (GE-22-2322)

Tribunal member:	Janet Lew
Decision date:	February 21, 2023
File number:	AD-22-972

Decision

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

Overview

[2] The Applicant, M. H. (Claimant), is appealing the General Division decision. The General Division found that the Canada Employment Insurance Commission (Commission) had proven that the Claimant had been suspended from his employment because of misconduct. He had not complied with his employer's vaccination policy. As a result, the Claimant was disentitled from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made several jurisdictional, procedural, legal, and factual errors. He denies that there was any misconduct in his case. He says that the General Division failed to consider the reasonableness of his employer's vaccination policy.

[4] Before the Claimant can move ahead with this appeal, I have to decide whether the appeal has a reasonable chance of success.[1] Having a reasonable chance of success is the same thing as having an arguable case.[2] In other words, is there a chance any of the Claimant's arguments could succeed at the appeal? If the appeal does not have a reasonable chance of success, this ends the matter.

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

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[1] See section 58(2) of the *Department of Employment and Social Development Ac*t (DESD Act). I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."
[2] See *Fancy v Canada (Attorney Genera)*, 2010 FCA 63.

Issues

[6] The issues are as follows:

a) Is there an arguable case that the General Division member exhibited bias?

b) Is there an arguable case that the General Division misinterpreted what constitutes misconduct?

c) Is there an arguable case that the General Division mischaracterized some of the evidence and arguments?

I am not giving the Claimant permission to appeal

[7] 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.[3]

[8] 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.

[9] 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 member exhibited bias?

[10] The Claimant argues that the General Division member was biased because she was unprepared to consider his concerns over the efficacy and safety of the COVID-19 vaccines. He says this led her to be wholly dismissive of his arguments. The Claimant writes:

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

> [The member] insists she has no particular stance on the issue, and further, that verifying the truth of my claims would not be necessary to establish whether or not my actions should be considered misconduct under the law. I find this claim disingenuous. It is clear from the language in the ruling that [the member] did not consider the events from a neutral stance or allow for the possibility that the allegations I make could in fact be true. It is my sincere view, that if [the member] had approached this from a neutral standpoint, she would have arrived at a different ruling.
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> In other words, I am suggesting that [the member] allowed her personal bias (her blind faith in the infallibility of government and of the healthcare establishment) to cloud her judgment with respect to the law, and with respect to the applicability of law.[4]

[11] The Claimant also writes:

> … Again, I have taken great pains to explain why the policy in question had nothing whatsoever to do with vaccination. By her own admission, not being a medical doctor, [the member] is in her view not qualified to ascertain whether the medication is a vaccine or not. Her assertion that this was a "vaccination policy" is therefore merely an affirmation of her personal bias.[5]

[12] The Claimant also points out the following statement from the member as proof of bias:

> I could agree that if there is irrefutable evidence that if an employer's requiring injection of a lethal medication, that would be problematic.[6]

[13] The Claimant says that the member's response is inadequate. The Claimant says that her statement shows that she is unable to look beyond her own bias. He questions whether she would "trivialize such a grave concern if she considered the reasons for the concern potentially legitimate?"[7]

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[4] See Claimant's application to the Appeal Division, at AD 1-8.
[5] See Claimant's application to the Appeal Division, at AD 1-11.
[6] See Claimant's application to the Appeal Division, at AD 1-12.
[7] See Claimant's application to the Appeal Division, at AD 1-12

[14] In a recent case called *Murphy v Canada (Attorney General)*,[8] the Federal Court reviewed the case law on the issue of bias. The Court noted that bias is a very serious allegation and that there is a strong presumption of impartiality that cannot be easily rebutted. The Court noted the test set out in *Committee for Justice and Liberty et al v National Energy Board et al*, in determining whether there is actual bias or a reasonable apprehension of bias. There, the Supreme Court of Canada determined that:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude" [9]

[15] The Federal Court then reviewed the test set out by the Federal Court of Appeal in *Firsov v Canada (Attorney General)*. The test is whether:

> an informed person, viewing the matter realistically and practically—and having thought the matter through--… [would] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General),* 2015 SCC 25 at paras 20 to 21, 26.[10]

[16] The Federal Court found that Ms. Murphy had failed to produce any evidence that could meet the high threshold necessary to rebut the presumption of judicial integrity and impartiality. The Court held that the grounds for an apprehension of bias must be substantial and not related to a sensitive conscience.

[17] The Court acknowledged that Ms. Murphy disagreed with the findings of the Associate Justice in that case. But the Court found that that did not justify an allegation of bias. The Court wrote, "the fact that a [decision-maker] clearly disagrees with and rejects the arguments of an applicant is not, in and of itself, bias."[11]

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[8] See *Murphy v Canada (Attorney General)*, 2023 FC 57.
[9] See *Committee for Justice and Liberty et al v National Energy Board et al,* 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at pages 394 and 395.
[10] See *Firsov v Canada (Attorney General)*, 2022 FCA 191.
[11] See *Murphy*, at para 25.

[18] I find that to be the situation in this case. The General Division member found that it was beyond her role to make any findings about the vaccine, whether the Claimant's employer violated the Claimant's rights, or whether the employer should have changed the terms and conditions of the Claimant's employment. There was nothing in her language or in the manner in which she conducted the hearing that would meet the high threshold necessary to meet the test for bias or a reasonable apprehension of bias.

[19] The Claimant is of the position that what he describes as a medication does not qualify as a vaccine and that they are unsafe. The fact that the General Division member referred to the vaccine as a vaccine, and the employer's policy as a vaccination policy does not meet the test either.

[20] The General Division simply did not have the authority or expertise to examine the vaccine and make any decisions about whether it should be called a vaccine or other, or about whether the vaccine is safe. The General Division was entitled to describe the vaccine as a vaccine, given that it is widely referred to as a vaccine. And, as the Claimant's employer described its policy as a "Mandatory COVID-19 Vaccination for Employees," it was only natural to adopt the employer's name for its policy for ease of reference.

[21] Apart from these considerations, the General Division simply could not entertain the Claimant's concerns over the efficacy and safety of the vaccines or the reasonableness of his employer's vaccination policy. As the Federal Court recently held in a case called *Cecchetto v Canada (Attorney General)*, these considerations fall outside the scope of the General Division's assessment into whether misconduct arose.[12]

[22] I am not satisfied that the Claimant has an arguable case that the General Division member was biased or that there was a reasonable apprehension of bias. The evidence falls far short of meeting the test.

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[12] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

Is there an arguable case that the General Division misinterpreted what misconduct means?

[23] The Claimant argues that the General Division misinterpreted what misconduct means. He says that the General Division should have considered the reasonableness of his employer's vaccination policy. He claims that his employer's vaccination policy was unreasonable, and he therefore did not have to comply with it. And, if he did not have to comply with it, he says that misconduct did not arise.

[24] The Court in *Cecchetto* determined that it falls outside the mandate or jurisdiction of the Appeal Division or the General Division to assess or rule on the merits, legitimacy, or legality of an employer's vaccination policy.[13] So there was no role for the General Division to consider the reasonableness of the employer's vaccination policy or to determine whether the Claimant could disregard his employer's policy because he found it unreasonable.

[25] The General Division did not make an error on this point when it ruled against deciding on the safety or efficacy of the vaccine, and the reasonableness of the employer's policy. The General Division appropriately determined that these considerations did not factor into whether misconduct arose.

Is there an arguable case that the General Division mischaracterized some of the evidence and arguments?

[26] The Claimant argues that the General Division mischaracterized some of the evidence and arguments. As a result, he says that the General Division failed to appreciate that misconduct did not arise in his case.

[27] The Claimant says that the General Division made the following errors:

(a) at paragraph 27, when he reportedly claimed that an employer is not allowed to change the conditions of one's employment. The Claimant denies that he ever said this. Instead, he claims that he said that "surely there must exist a

[13] In *Cecchetto*, the employer did not have its own vaccination policy, but followed the rules set out in Directive 6, issued by Ontario's Chief Medical Officer of Health.

provision in the act outlining limitations as to how and why an employer can reasonably change the conditions of employment."

(b) At paragraph 34, where the General Division wrote that he did not apply for an exemption from his employer's vaccination policy. The Claimant explains that he did not seek an exemption because he did not qualify for one.

(c) At paragraph 38 and 40, where the General Division wrote that he described the vaccine as a "lethal medication". The Claimant states that, in fact, he described it as a "potentially lethal medication."

[28] If, as the Claimant argues, the General Division made these errors, I find that nothing turns on them. They would not have changed the outcome.

[29] The Claimant says the *Employment Insurance Act* must or should limit the circumstances when an employer can change the conditions of employment, particularly where misconduct is concerned.

[30] Even if the General Division understood the Claimant's argument that the *Employment Insurance Act* could limit any changes to his employment, the General Division would have determined that there are no provisions in the *Employment Insurance Act* that limit when an employer can reasonably change the conditions of employment. The *Employment Insurance Act* does not forbid or limit an employer from changing the conditions of employment.[14]

[31] Further, the General Division was not allowed to assess the reasonableness of the employer's changes to the Claimant's condition. As the Court held in *Cecchetto*, the General Division has a very narrow and specific role. As I have noted above, this does not extend to nor include examining the merits, legitimacy, or legality of an employer's new policy or rules that change the conditions of a claimant's employment.[15]

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[14] Section 29(c) of the *Employment Insurance Act* however may give a clamant just cause for voluntarily leaving an employment if they did not have any reasonable alternatives, for instance, where there is a significant change in work duties.
[15] See *Cecchetto*.

[32] The Federal Court noted that the role of the General Division and the Appeal Division involves determining why an applicant is dismissed from their employment and whether that reason constitutes misconduct.[16]

[33] As for the Claimant's explanation as to why he did not seek an exemption, the issue was irrelevant to the misconduct question. It did not matter why the Claimant did not seek an exemption from his employer's vaccination policy. The fact that he did not have an exemption meant that his employer expected him to comply with its vaccination policy, and his decision not to comply led his employer to suspend him from his employment.

[34] As for whether the General Division accurately set out how the Claimant described the vaccine as either "lethal" or "potentially lethal," it too would not have changed the outcome. It is clear that the General Division found the issue of the safety of the vaccine to be an irrelevant consideration.

[35] In essence, the General Division found that its role was not to judge the safety of the vaccine, but rather, whether the Claimant's conduct amounted to misconduct. The General Division did not make an error on this issue. Its decision was consistent with *Cecchetto*.

Conclusion

[36] The appeal does not have a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

[16] See *Cecchetto*, at para 47.