Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 415

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated January 3, 2023 (GE-22-3509)

Tribunal member:	Janet Lew
Decision date:	April 12, 2023
File number:	AD-23-108

Decision

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

Overview

[2] The Applicant, S. M. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission, had proven that the Claimant had been suspended and then lost her job because of misconduct. In other words, it found that she did something that caused her to be suspended and then dismissed. The Claimant had not complied with her employer's COVID-19 vaccination policy.

[3] As a result, the Claimant was disentitled from receiving Employment Insurance benefits during her suspension, from October 18, 2021 to October 29, 2021. The Claimant was also disqualified from receiving Employment Insurance benefits as of October 30, 2021, the effective date of dismissal from her employment.

[4] The Claimant argues that the General Division made both legal and factual errors. She says the General Division made a factual error when it found that she worked from home. She says that the General Division made a legal error when it said that her conduct amounted to misconduct.

[5] Before the Claimant can move ahead with her 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] If the appeal does not have a reasonable chance of success, this ends the matter.

[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.

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[1] Under section 58(1) of the *Department of Employment and Social Development Act* (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 General)*, 2010 FCA 63.

Issues

[7] The issues are:

a) Is there an arguable case that the General Division made a mistake about whether the Claimant worked from home?

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

I am not giving the Claimant permission to appeal

[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.[3]

[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 the Appeal Division 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 mistake about whether the Claimant worked from home?

[10] The Claimant argues that the General Division made an important factual error about whether she worked from home. The General Division found that the Claimant worked from home.[4] The Claimant denies that she ever stated that she worked from home.

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[3] See section 58(1) of the DESD Act. 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.
[4] See General Division decision, at paras 15, 25 and 26.

[11] The General Division misstated the Claimant's evidence. None of the evidence showed that the Claimant had been working from home. At most, the Claimant had indicated that she had the ability to work from home as an alternative to vaccination.[5]

[12] However, the Appeal Division does not intervene and provide remedies for every factual error. The *Department of Employment and Social Development Act* says that the Appeal Division may intervene and provide possible remedies for only certain types of factual errors.

[13] The only time the Appeal Division may intervene when there are factual errors is when the General Division based its decision on that error, **and** if it made that error in a perverse or capricious manner, or without regard for the evidence before it.

[14] The General Division did not base its decision on whether the Claimant had been working from home. The General Division found that this issue was irrelevant. The General Division wrote that whether the Claimant worked from home or not was irrelevant. The General Division explained that no matter where the Claimant worked, the "duty [the Claimant] owed to her employer was to comply with the vaccination policy, which was a condition of continued employment (citation omitted)."[6]

[15] I am not satisfied that the Claimant has an arguable case on this point because the General Division did not base its decision on the factual error that it made.

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

[16] The Claimant argues that the General Division misinterpreted what misconduct means. She argues that misconduct arises only when an employee does any of the following:

a) Is negligent over safety procedures

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[5] See Claimant's Notice of Appeal – Employment Insurance – General Division, filed May 1, 2022, at GD 2-9, and Claimant's submissions filed August 14, 2022, at GD 7-4.
[6] See General Division decision, at para 36.

b) Falsifies qualifications

c) Is frequently absent from work

d) Breaches confidences

e) Engages in theft

f) Abuses substances such as drugs

g) Is insubordinate

h) Is involved in unethical relationships

i) Is physically violent

j) Is involved in illegal activities, or

k) Engages in wrong or immoral behaviour.[7]

[17] The Claimant says the last one on this list is particularly important. She says that an employer should never be empowered to mandate a medical procedure without getting an employee's informed consent.

[18] The Claimant argues that the employer's vaccination policy is wrong and immoral. She says that all of the background circumstances should be considered.

[19] The Claimant challenges her employer's claims that vaccination was for everyone's safety, including patients, their families, and staff. She says that early on, unvaccinated staff had to care for COVID-positive patients, relying on only personal protective equipment for safety. She questions why her employer admitted COVID-positive adults to a children's hospital if it was supposedly concerned about patient safety. She questions the logic in terminating employees who cared for those who had been COVID-positive.

[7] See Claimant's arguments filed March 3, 2023, at AD 3-6.

[20] The Claimant also argues that her employer should have respected her request for religious accommodation. She says that misconduct did not arise because she should have received a religious accommodation from her employer's vaccination policy.

[21] The General Division noted that the *Employment Insurance Act* does not define what misconduct means. So, the General Division turned to cases from the Federal Court of Appeal for guidance. The Federal Court of Appeal defined misconduct. The General Division wrote:

> [18] Case law says that to be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional. [citation omitted] Misconduct also includes conduct that is so reckless that it is almost wilful. [citation omitted] The Claimant doesn't have to have wrongful intent (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law. [citation omitted]
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> [19] There is misconduct if the Claimant knew or should have known that her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that. [citation omitted]
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> [20] The law doesn't say I have to consider how the employer behaved. [citation omitted] Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the [*Employment Insurance*] *Ac*t. [citation omitted]
>
> [21] … Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. [citation omitted]

[22] The Court of Appeal did not limit misconduct to the behaviours that the Claimant lists. The Court provided a broader, more general definition for misconduct.

[23] The General Division is required to follow court decisions. Therefore, it was appropriate that the General Division relied on and applied the Court's definition of misconduct to the facts.

[24] The Federal Court recently erased any doubt about whether misconduct exists if an applicant does not comply with their employer's vaccination policy. In a case called

Cecchetto,[8] the applicant was suspended and then terminated because he failed to comply with his employer's policy regarding vaccination and testing. The applicant argued that the policy was discriminatory and was without merit. He had not consented to the policy, and he argued that the vaccines were unsafe and ineffective. He denied that there was any misconduct simply because he had not complied with a policy with which he did not agree.

[25] The Court determined that neither the General Division nor the Appeal Division has any power to assess or rule on the merits, legitimacy, or legality of a vaccination policy. Their role is strictly to determine why an applicant is dismissed from their employment and whether that reason constitutes misconduct. The Court found that the General Division and Appeal Division did exactly that.

[26] The General Division was following established case law when it decided whether misconduct arose in the Claimant's case. For that reason, I am not satisfied that the Claimant has an arguable case that the General Division misinterpreted what misconduct means.

[27] Finally, the Claimant says that her employer should have given her a religious exemption. But, as the Federal Court of Appeal ruled in a case called *Mishibinijima*,[9] the issue of whether an employer has a duty to accommodate an employee is an irrelevant consideration when it comes to the question of misconduct.

Conclusion

[28] 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

[8] See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.
[9] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.