



Citation: *MT v Canada Employment Insurance Commission*, 2023 SST 547

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 12, 2023
(GE-22-2743)

Tribunal member: Melanie Petrunia

Decision date: May 2, 2023

File number: AD-23-263

Decision

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

Overview

[2] The Applicant, M. T. (Claimant), was suspended from his job. His employer introduced a COVID-19 vaccination policy. The Claimant did not confirm that he had received the vaccine by the deadline in the policy and his employer placed him on an unpaid leave.

[3] The Claimant applied for employment insurance (EI) regular benefits. The Respondent, the Canada Employment Insurance Commission (Commission), initially decided that the Claimant took a voluntary leave of absence without just cause.

[4] The Claimant requested a reconsideration and the Commission changed the reason for denying benefits. It decided that the Claimant was suspended for misconduct and was disentitled from receiving benefits.

[5] 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 his job because he did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct and he is disentitled from receiving EI benefits.

[6] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, he needs permission for his appeal to move forward.

[7] 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

[8] The issues are:

- a) Is there an arguable case that the General Division made an error of law by not considering the merits of the employer's policy?
- b) Does the Claimant raise any other reviewable error of the General Division upon which the appeal might succeed?

I am not giving the Claimant permission to appeal

[9] 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

[10] 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

[11] 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

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.

d) made an error in law.⁴

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

No arguable case that the General Division made an error of law

[13] The Claimant argues that the General Division made an error of law. He says that the General Division should have considered whether the employer's policy was scientifically valid, ethical, legal and moral. He argues that he took a stand against the policy and should have had EI benefits while he did so.⁶

[14] The Claimant argues that he should not have to undergo an experimental medical procedure or risk losing his income. He says that the government should protect his Charter right to security of the person.⁷

[15] I find that the Claimant's arguments do not have a reasonable chance of success. The General Division accurately set out the legal test for misconduct as established by case law from the Federal Court and the Federal Court of Appeal.⁸

[16] The General Division then applied the legal test, as set out in the case law, to the Claimant's circumstances. It found that the Commission had proven that the Claimant was suspended due to misconduct for the following reasons:

- The employer had a policy requiring employees to provide their vaccination status by a certain date and the Claimant was aware of this policy.⁹

⁴ This paraphrases the grounds of appeal.

⁵ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ AD1-3

⁷ AD1-3

⁸ General Division decision at paras 27 to 31.

⁹ General Division decision at para 33.

- The Claimant made an intentional decision not to comply with the policy.¹⁰
- The Claimant knew that he could be suspended for failing to comply.¹¹

[17] The General Division acknowledged and considered the Claimant's arguments that the vaccine did not prevent transmission of Covid-19 and he could have continued to work safely.¹²

[18] The General Division found that it does not have the jurisdiction to make decisions about the efficacy of the vaccine. It also does not have the authority to make decisions about the conduct of the employer and whether the suspension was reasonable or justified. The General Division cited a decision from the Federal Court of Appeal in support.¹³

[19] The Claimant also argued that the vaccination policy contravened his collective agreement and was illegal. He said that refusing to follow the policy was not misconduct.¹⁴

[20] The General Division found that it can only decide whether there was misconduct according to the EI Act and can't decide if the employer breached a collective agreement. It pointed to case law that makes this clear.¹⁵

[21] There is no arguable case that the General Division made an error of law. The General Division properly cited and applied the law when making its decision.

[22] As discussed above, the General Division explained its reasons for not deciding about the employer's policy or the efficacy of the vaccine.¹⁶ The General Division supported this decision with reference to case law.

¹⁰ General Division decision at para 35.

¹¹ General Division decision at para 45.

¹² General Division decision at paras 37 and 38.

¹³ General Division decision at para 39, citing *Canada (Attorney General) v Marion*, 2002 FCA 185 at paragraph 3.

¹⁴ General Division decision at para 42.

¹⁵ General Division decision at para 43 citing *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁶ General Division decision at paras 39 and 43.

[23] The Federal Court of Appeal has said that the question of whether an employer breached a collective agreement is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct which is in issue and these issues can be dealt with in other forums.¹⁷

[24] A recent decision from the Federal Court, *Cecchetto v. Canada (Attorney General)*, also confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.¹⁸ In that case, the Court agreed that an employee who made a deliberate decision not to follow his employer's vaccination policy had lost his job due to misconduct.

[25] The claimant in *Cecchetto* also made arguments about his bodily integrity, consent to medical testing and the safety and efficacy of the vaccine. The Court confirmed that these are not issues that the Tribunal is permitted, by law, to address.¹⁹

[26] Aside from the Claimant's arguments, I have also considered the 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 based its decision on an important mistake about the facts or made an error of jurisdiction.

[27] 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

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

Melanie Petrunia
Member, Appeal Division

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

¹⁸ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

¹⁹ See *Cecchetto* at para 32.