



Citation: *TB v Canada Employment Insurance Commission*, 2023 SST 600

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: T. B.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 10, 2023
(GE-22-2524)

Tribunal member: Janet Lew

Decision date: May 17, 2023

File number: AD-23-145

Decision

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

Overview

[2] The Applicant, T. B. (Claimant), is appealing the General Division decision. The General Division found that the Respondent, the Canada Employment Insurance Commission, had proven that the Claimant lost her job because of misconduct. In other words, it found that she did something that caused her to be dismissed. The Claimant had not complied with her employer's COVID-19 vaccination policy. As a result, the Claimant was disqualified from receiving Employment Insurance benefits.

[3] The Claimant argues that the General Division made procedural, legal, and factual errors.

[4] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. Having a reasonable chance of success is the same thing as having an arguable case.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

[5] 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.

Issues

[6] The issues are:

- a) Is there an arguable case that the General Division made any procedural errors?

¹ See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) 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."

- b) Is there an arguable case that the General Division made a legal error in finding that there was misconduct?
- c) Is there an arguable case that the General Division made a legal error in finding that the Claimant was disqualified from receiving Employment Insurance benefits although she had paid premiums?
- d) Is there an arguable case that the General Division made any factual mistakes?

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] 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 made any procedural errors?

[9] The Claimant argues that the General Division process was unfair. She writes, “It was hypocritical to have a one-sided decision. It states it was misconduct on my part, yet no other parties are held accountable for their misconduct and discrimination.”⁴

[10] From this, I understand that the Claimant is essentially arguing that the General Division member was biased by focusing on only the Claimant’s conduct. She suggests that the General Division should have also focused on her employer’s conduct. She

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 it made in a perverse or capricious manner, or without regard for the evidence before it.

⁴ See Claimant’s Application to the Appeal Division – Employment Insurance, at AD 1-3.

says her employer discriminated against her because it did not grant her a religious exemption.

[11] The General Division member acted properly by focusing on the Claimant's conduct, rather than on employer's conduct or omissions. The General Division simply does not have any authority to decide whether an employer acted appropriately.⁵ The issue before the General Division was whether the Claimant's conduct amounted to misconduct and whether the misconduct resulted in the loss of her employment. Hence, the General Division had to focus on the Claimant's conduct.

[12] I am not satisfied that the appeal has a reasonable chance of success on this issue.

Is there an arguable case that the General Division made a legal error in finding that there was misconduct?

[13] The Claimant argues that the General Division made a legal error in finding that there was misconduct in her case. Essentially, she is saying that the General Division misinterpreted what misconduct means.

[14] The Claimant has a medical condition. She says that her manager was aware of her medical condition. Yet, her manager still required her to get vaccinated. She says this was discriminatory. So, she says that there was no misconduct.

[15] The General Division pointed out that the *Employment Insurance Act* does not define what misconduct means. So, it turned to the Federal Court and Federal Court of Appeal for guidance. The General Division noted that court decisions set out the legal test and requirements for misconduct to arise.

[16] The General Division wrote:

[23] I have to focus on what the Claimant did or failed to do, and whether that conduct amounts to misconduct under the [*Employment Insurance*] Act. [citation

⁵ See, for instance, *Canada (Attorney General) v Marion*, 2002 FCA 185, and *Fleming v Canada (Attorney General)*, 2006 FCA 16.

omitted] I can't consider whether the employer's policy is reasonable, or whether suspension and dismissal were reasonable penalties. [citation omitted]

[24] The Claimant doesn't have to have wrongful intent. In other words, she doesn't have to mean to do something wrong for me to decide her conduct is misconduct. [citation omitted] To be misconduct, her conduct has to be wilful, meaning conscious, deliberate, or intentional. [citation omitted] And misconduct also includes conduct that is so reckless that it is almost wilful. [citation omitted]

[25] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer, and knew or should have known there was a real possibility of being let go because of that. [citation omitted]

[17] The Courts have provided a broad, general definition for misconduct. The Courts have not gone so far as to require employers to provide protections for their employees from discrimination before misconduct can exist. (This is not to say that claimants do not have any protection, but this is not the appropriate forum to pursue relief from any discrimination.)

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

[19] I note that there has been one case in which the Federal Court examined whether misconduct could exist if an applicant did not comply with their employer's vaccination policy.

[20] In *Cecchetto*,⁶ Mr. Cecchetto had been 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.

⁶ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

[21] Ultimately, the Court determined that the Appeal Division's decision, much like the General Division's decision, was "rooted in the interpretation of the term 'misconduct' in this area of the law."⁷ The Court of Appeal confirmed that for an action to rise to the level of misconduct, it had to be performed consciously, deliberately, or intentionally.⁸

[22] Here, the General Division was following established case law when it decided whether misconduct arose in the Claimant's case. The General Division recognized that it could not decide whether the Claimant's employer discriminated against her, for the purposes of determining whether there was misconduct. The General Division decided that there was misconduct, as long as the Claimant's behaviour was conscious, deliberate, or intention.

[23] I am not satisfied that the Claimant has an arguable case that the General Division because the General Division was following established case law when it decided whether there was any misconduct.

Is there an arguable case that the General Division made a legal error in disqualifying the Claimant from receiving Employment Insurance benefits although she had paid premiums?

[24] The Claimant argues that the General Division made a legal error in disqualifying her from receiving Employment Insurance benefits. She argues that she was entitled to receive benefits because she paid Employment Insurance premiums. Alternatively, she says that she should be entitled to opt out of paying any premiums.

[25] Claimants do not automatically receive Employment Insurance benefits after a separation from their employment. The *Employment Insurance Act* has qualifying requirements that a claimant has to meet. Additionally, if certain circumstances arise, a claimant may be disentitled or disqualified from receiving benefits.

⁷ See *Cecchetto*, at para 37.

⁸ See *Cecchetto*, at para 37, citing *Canada (Attorney General) v Bellavance*, 2005 FCA 87, at para 9.

[26] I am not satisfied that there is an arguable case that the General Division made a legal error on this point.

Is there an arguable case that the General Division made any factual mistakes?

[27] The Claimant argues that the General Division made factual mistakes. She says the General Division overlooked the following, that:

- a) her employer was aware of her medical condition but, despite this, still required her to get vaccinated,
- b) her employer discriminated against her, and
- c) COVID-19 vaccines are experimental and harmful.

- The Claimant says her employer should have granted her an exemption

[28] I understand that the Claimant is saying that her employer should have granted her a medical exemption from having to get vaccinated. 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.

- The Claimant says her employer discriminated against her

[29] The Claimant argues that the vaccines are experimental and harmful. So, for that reason, she says she should be able to refuse vaccination and says that refusal should not be considered misconduct. She says being forced to get vaccinated was discriminatory in her case.

[30] In *Cecchetto*,¹⁰ the Federal Court determined that neither the General Division nor the Appeal Division has any power to assess or rule on the merits, legitimacy, or

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.

¹⁰ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

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.

[31] It is clear that it is beyond the General Division's authority to consider whether the Claimant's employer might have discriminated against her. So, if it did not have any authority to address these arguments, then it cannot be said that the General Division overlooked this issue and any supporting evidence that the Claimant had. The Claimant does not have an arguable case on this point.

- The Claimant says COVID-19 vaccines are experimental and harmful

[32] Similarly, the General Division did not have any authority to address the Claimant's arguments that COVID-19 vaccines are experimental and harmful. So, the appeal does not have a reasonable chance of success on this point.

- Summary on whether the General Division made any factual mistakes

[33] 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 made factual mistakes.

Conclusion

[34] 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