Citation: *NM v Canada Employment Insurance Commission*, 2023 SST 666

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated December 30, 2022 (GE-22-3510)

Tribunal member:	Solange Losier
Decision date:	May 31, 2023
File number:	AD-23-118

Decision

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

Overview

[2] N. M. is the Claimant in this case. She worked as nurse care-coordinator. When she stopped working, she applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that she could not get EI regular benefits because she had been suspended and dismissed from her job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It said that the Claimant was aware of the employer's Covid-19 vaccination policy and knew the consequences if she did not comply.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division.[3] She argues that the General Division made a mistake about the facts of her case. She says that the General Division did not consider the medical or religious exemptions she asked for. As well, she says that the employer did not provide her with any direction about how to comply with the policy, besides being vaccinated for Covid-19.[4]

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.

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[1] See reconsideration decision at pages GD3-603 to GD3-604. Section 30(1) of the *Employment Insurance Act* (EI Act) says you are disqualified from receiving EI benefits if you lose your job due to your own misconduct.
[2] See the General Division decision at pages ADN1A-1 to ADN1A-6.
[3] See the Application to the Appeal Division at pages ADN1-1 to ADN1-5.
[4] See page ADN1-3.

Issue

[7] Is there are arguable case that the General Division based its decision on an important error of fact?

Analysis

[8] An appeal can proceed only if the Appeal Division gives permission to appeal.[5]

[9] I must be satisfied that the appeal has a reasonable chance of success.[6] This means that there must be some arguable ground upon which the appeal might succeed.[7]

[10] The possible grounds of appeal to the Appeal Division are that the General Division:

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- made an error of law
- based its decision on an important error of fact.[8]

[11] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

[12] An error of fact happens when the General Division has "based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it".[9]

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[5] See subsection 56(1) of the DESD Act.
[6] See section 58(2) of the DESD Act.
[7] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[8] See section 58(1) of the DESD Act.
[9] See section 58(1)(c) of the DESD Act.

[13] This means that I can intervene if the General Division based its decision on an important mistake about the facts of the case. This involves considering some of the following questions:[10]

- Does the evidence squarely contradict one of the General Division's key findings?
- Is there no evidence that could rationally support one of the General Division's key findings?
- Did the General Division overlook critical evidence that contradicts one of its key findings?

[14] Not all errors of fact will allow me to intervene. For example, if the General Division made a mistake about a minor fact in this case that does not impact the outcome of the case, then I can't intervene.

I am not giving the Claimant permission to appeal

[15] There is no arguable case that the General Division based its decision on an important mistake about the facts of the case, so I am not giving the Claimant permission to appeal. My reasons are below.

[16] The Claimant argues two main things in this appeal.

- First, she says that the General Division made an important error about the facts by not considering that she had asked the employer for a medical and religious exemption from the policy.[11]
- Second, she argues that the General Division did not consider how the employer failed to provide information on how to comply with the policy, other than taking the vaccine.

[10] This is a summary of the Federal Court of Appeal's decision in *Walls v Canada (Attorney General)*, 2022 FCA 47 at paragraph 41.
[11] See page ADN1-3.

– It is not arguable that the General Division overlooked the fact that the Claimant asked the employer for a medical and religious exemption from the policy

[17] The General Division had to decide whether the Commission had proven that the Claimant was suspended and later fired, for misconduct.

[18] Misconduct is not defined in the *Employment Insurance Act* (EI Act) but the Courts have provided some guidance. The Federal Court of Appeal defines "misconduct" to be conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[12] Misconduct also includes conduct that is so reckless that it is almost wilful.[13]

[19] The Court has also said there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty to the employer and that dismissal was a real possibility.[14]

[20] The General Division relied on the Court's definition of misconduct.[15] It focused on whether the Claimant had failed to comply with the employer's policy and if she knew the consequences of non-compliance.

[21] The General Division decided that the Claimant was suspended and then lost her job due to wilful misconduct because she failed to comply with the employer's Covid-19 vaccination policy.[16] It said that the Claimant was aware of the employer's Covid-19 vaccination policy and knew the consequences of failing to comply with the policy.[17]

[22] The General Division found that the employer's Covid-19 vaccination policy said that employees who failed to comply with the policy would be subject to progressive discipline up-to and including an unpaid leave and termination of employment.[18]

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[12] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[13] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[14] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36.
[15] See paragraphs 14-16 of the General Division decision.
[16] See paragraph 9 of the General Division decision.
[17] See paragraph 19 of the General Division decision.
[18] See paragraph 19 of the General Division decision and the employer's vaccination policy at pages GD3-34 to GD3-37.

[23] In this case, it is undisputed that the Claimant failed to comply with the policy.[19] That means the Claimant was not vaccinated and was not granted a medical or religious exemption from the vaccination requirement.

[24] The General Division was aware that the Claimant had requested a medical and religious exemption and that it had been denied by the employer.[20] Even so, it wasn't required to mention the exemption requests specifically. It is not required to refer to each and every piece of evidence, but is presumed to have reviewed and considered the totality of the evidence.[21]

[25] So, there's no arguable case that the General Division overlooked the Claimant's medical and religious exemption requests. If the Claimant had obtained an approved exemption from the employer, she would have complied with the employer's policy. Instead, it was clear that she failed to comply with the policy, knowing the potential consequences of her actions.

– **It is not arguable that the General Division overlooked the employer's failure to provide additional information about how to comply with the policy**

[26] The Claimant argues that the General Division should have considered the fact that the employer did not give her information on how to comply with the policy, other than taking the Covid-19 vaccine.

[27] The Claimant doesn't seem to rely on any authority in support of this duty. Instead, the Claimant seems to be arguing that the policy was unfair and unreasonable.

[28] The General Division decided that it did not have jurisdiction to decide whether the policy was fair or reasonable.[22]

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[19] See paragraph 11 of the General Division decision.
[20] See paragraph 21 of the General Division decision.
[21] See *Simpson v Canada (Attorney General),* 2012 FCA 82 at paragraph 9 and *Sibbald v Canada (Attorney General)*, 2022 FCA 157 at paragraph 46.
[22] See paragraph 19 of the General Division decision.

[29] The Court has said that it is the conduct of the employee that is in question when deciding whether misconduct has occurred, not the conduct of the employer.[23] Whether the employer should have provided her with other options was not for the General Division to decide.

[30] There is a recent Federal Court case with similar facts involving another person who applied for EI benefits. He also lost his job for not complying with his employer's Covid19 vaccination policy.[24]

[31] In that particular case, the Court confirmed the Tribunal's narrow and special role. It said that the Tribunal has to decide whether a claimant was dismissed from their job and whether that reason was misconduct. The Court said that the Tribunal is not permitted by law to address the legal, ethical and factual questions that the claimant was raising because it was beyond the scope of the Tribunal's mandate.[25]

[32] The General Division correctly recognized its narrow role and was right to say that these arguments are beyond its jurisdiction to decided.

[33] An appeal to the Appeal Division is not a new hearing. I cannot reweigh the evidence in order to decide that the employer should have granted her exemptions or given her other options in order to come to a different conclusion more favourable for the Claimant.[26]

[34] There is no arguable case that the General Division made an error of fact on this issue.

– **There are no other reasons for giving the Claimant permission to appeal**

[35] I also reviewed the file, listened to the audio recording of the General Division hearing, and examined the General Division decision.[27] I am satisfied that the General

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[23] See *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[24] See *Cecchetto v Canada (Attorney General),* 2023 FC 102.
[25] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 46.
[26] See *Garvey v Canada (Attorney General)*, 2018 FCA 118.
[27] The Federal Court has said that I should do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.

Division considered all the relevant evidence that it needed to consider. I did not find any evidence that it might have ignored or misinterpreted.

Conclusion

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

Solange Losier
Member, Appeal Division