



Citation: *DC v Canada Employment Insurance Commission*, 2023 SST 649

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

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| Applicant: | D. C. |
| Respondent: | Canada Employment Insurance Commission |
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| Decision under appeal: | General Division decision dated December 22, 2022 (GE-22-2889) |
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| Tribunal member: | Candace R. Salmon |
| Decision date: | May 29, 2023 |
| File number: | AD-23-87 |

Decision

[1] I am refusing leave (permission) to appeal. The appeal will not proceed

Overview

[2] D. C. is the Claimant. She worked in a warehouse for a hospital supplier. She was placed on a leave of absence and later terminated from her job because she refused to receive the COVID-19 vaccination. Her employer required employees to be vaccinated. She knew about the policy and knew that she could lose her job if she did not comply, but believed she had natural immunity and was concerned about how the vaccine might affect her various medical conditions.

[3] The Claimant applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided that she did not qualify for benefits because she lost her employment due to her own misconduct.

[4] The Claimant wants to appeal the General Division decision to the Appeal Division. She needs permission for the appeal to move forward. She says that the General Division made errors of jurisdiction, and says it didn't consider all of the facts.

[5] I am refusing permission to appeal because the Claimant's appeal has no reasonable chance of success.

Issue

[6] Is there an arguable case that the General Division made jurisdictional errors or any other type of error when it decided that the Claimant lost her job due to misconduct?¹

¹ Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) says that I must refuse permission to appeal if I find the "appeal has no reasonable chance of success." This means that I must refuse permission for the appeal to move forward if I find there's no arguable case (*Fancy v Canada (Attorney General)*, 2010 FCA 63 at paragraphs 2 and 3).

I am refusing the Claimant permission to appeal

[7] An appeal can only proceed if the Appeal Division gives permission to appeal.² I must be satisfied that the appeal has a reasonable chance of success.³ This means that there must be some arguable ground upon which the appeal might succeed.⁴

[8] To meet this legal test, the Claimant must establish that the General Division may have made an error recognized by the law.⁵ If the Claimant's arguments do not deal with one of these specific errors, the appeal has no reasonable chance of success, and I must refuse permission to appeal.⁶

The Claimant's appeal has no reasonable chance of success

[9] The Tribunal must follow the law, including the *Department of Employment and Social Development Act* (DESD Act). It provides rules for appeals to the Appeal Division. The Appeal Division does not provide an opportunity for the parties to re-argue their case. It determines whether the General Division made an error under the DESD Act.

[10] The Claimant said that the General Division made an error of jurisdiction, but she provided examples of errors that did not relate to jurisdiction.⁷ She says that the Tribunal didn't consider all the facts and the legislation. She says the following should be considered:

- A different General Division decision allowed EI benefits in a situation similar to hers and found that exercising the right to choose whether to accept medical treatment cannot be misconduct;⁸

² See section 56(1) of the DESD Act.

³ See section 58(2) of the DESD Act.

⁴ See, for example, *Osaj v Canada (Attorney General)*, 2016 FC 115.

⁵ The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act. These errors are also explained on the Notice of Appeal to the Appeal Division. See AD1B-3.

⁶ This is the legal test described in section 58(2) of the DESD Act.

⁷ See AD1B-3 and AD1B-4.

⁸ The Claimant mentions the decision in file GE-22-1889. It is published as *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

- The Justice Centre of Canada says that the treatment of vulnerable Canadians on the basis of their personal medical decisions is a gross abuse of their bodily autonomy and constitutional rights;⁹
- Vaccines don't stop the spread of COVID-19, and their efficacy wears off quickly;
- The Claimant always tested negative when she became ill and completed a COVID-19 blood panel showing she had antibodies against the virus; and
- The Claimant's employer didn't mandate the flu shot and no one should be coerced or forced to undergo a medical procedure to keep their job.¹⁰

[11] The first point raised by the Claimant is that another decision from the Tribunal's General Division made different findings about misconduct as it relates to COVID-19 vaccination policies. General Division decisions do not need to be followed by other Tribunal members. Further, all decisions are individual and based on the facts of the particular case. While Tribunal Members try to be consistent with one another, it is not an error just because different Members came to opposite conclusions in different cases.

[12] The remaining points raised by the Claimant are reiterations of arguments made to the General Division. The comments by the Justice Centre for Constitutional Freedoms, the efficacy of the COVID-19 vaccines, the Claimant's submission that she has natural immunity, and her position that a person shouldn't be punished for making a personal medical choice were all considered by the General Division.¹¹

[13] The General Division also clearly considered the Claimant's medical conditions and her submission that receiving the COVID-19 vaccination would be too risky for

⁹ While the Claimant submits this statement is from the Justice Centre of Canada, the file shows that it is the Justice Centre for Constitutional Freedoms. See General Division decision at paragraph 32 and GD3-33 to GD3-35.

¹⁰ See AD1B4.

¹¹ See General Division decision at paragraph 22.

her.¹² The Claimant hasn't really pointed to any errors in the General Division's conclusions are none are obvious to me either.

There are no other reasons to give the Claimant permission to appeal

[14] The General Division explained misconduct in its decision.¹³ It stated that the *Employment Insurance Act* (EI Act) doesn't say what misconduct means, but court decisions have explained the meaning.

[15] Courts say that misconduct means the conduct in question must be wilful, or so reckless that it is almost wilful.¹⁴ They add that the claimant doesn't have to mean to be doing something wrong for the conduct to be misconduct under the law.¹⁵ If a claimant knows or ought to have known that their conduct could get in the way of carrying out their duties towards the employer and that there is a real possibility of being fired from the job, then misconduct exists.¹⁶

[16] There is a recent Federal Court decision dealing with facts similar to this case. It too is about a person who couldn't receive EI benefits because he lost his job for not complying with his employer's COVID-19 vaccination policy.¹⁷

[17] In that case, the Court confirmed the Tribunal's narrow role. It said that the Tribunal must 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.¹⁸

¹² See General Division decision at paragraphs 28 and 29.

¹³ See General Division decision at paragraphs 15 to 20.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14 and *McKay-Eden v Her Majesty the Queen*, A-402-96 at paragraph 5 (unnumbered paragraphs).

¹⁵ See *Attorney General of Canada v Secours*, A-352-94 at paragraph 2 (unnumbered paragraphs).

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at paragraph 14.

¹⁷ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102. This decision was made after the General Division decision in GE-22-1889, which is the case the Claimant wants the Tribunal to follow and is mentioned at paragraph 10 and footnote 8 above. The *Cecchetto* case is binding precedent for the Tribunal.

¹⁸ See *Cecchetto v Canada (Attorney General)*, 2023 FC 102, at paragraph 46.

[18] I acknowledge that the Claimant disagrees with the General Division's decision, but that is not enough for me to intervene. I cannot reweigh the evidence to come to a conclusion more favourable for the Claimant.¹⁹

[19] In addition to the Claimant's arguments, I also reviewed the documents in the file and examined the decision under appeal. I am satisfied that the General Division did not misinterpret or fail to properly consider any relevant evidence.²⁰ There is no arguable case that the General Division made an error.

Conclusion

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

Candace R. Salmon
Member, Appeal Division

¹⁹ See *Garvey v Canada (Attorney General)*, 2018 FCA 118.

²⁰ See *Karadeolian v Canada (Attorney General)*, 2016 FC 165, at paragraph 10.