Citation: *PA v Canada Employment Insurance Commission*, 2023 SST 612

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: P. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 17, 2023 (GE-22-3057)

Tribunal member: Melanie Petrunia

Decision date: May 22, 2023
File number: AD-23-275

Decision

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

Overview

[2] The Applicant, P. A. (Claimant), was placed on an unpaid leave of absence (suspended) and then dismissed from his job because he did not comply with his employer's vaccination policy. The Claimant reached an agreement with the employer that his departure was a dismissal without cause. This was reported on his Record of Employment (ROE).

[3] The Claimant applied for employment insurance (EI) regular benefits. The Respondent, the Canada Insurance Employment Commission (Commission) decided that the Claimant lost his job due to his own misconduct and could not be paid benefits.

[4] The Claimant appealed this decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant was suspended and then dismissed because he did not follow his employer's vaccination policy. It found that the Commission proved that this is misconduct under the law.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. He argues that the General Division made errors of law and based its decision on important factual errors. However, he needs permission for his appeal to move forward.

[6] 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

[7] The issues are:

a) Is there an arguable case that the General Division based its decision on an important factual error when it found that the Claimant lost his job because he did not comply with the vaccination policy?

b) Is there an arguable case that the General Division made an error of law when it found that it could only consider and apply the *Employment Insurance Act* (EI Act)?

c) 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

[8] 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]

[9] 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]

[10] 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;

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[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).

c) based its decision on an important factual error;[3] or

d) made an error in law.[4]

[11] 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 based its decision on factual errors

[12] The Claimant argues that the General Division made the factual errors when deciding the reason for the Claimant's suspension and dismissal. He says that the reason was not non-compliance with the employer's policy. He argues that the reason the employment was terminated was a release by agreement, without cause.[6]

[13] The General Division had to determine why the Claimant was no longer working. The Claimant had advised a Service Canada agent that he contact legal counsel after he was suspended, and a settlement was reached which provided for a dismissal without cause.[7]

[14] While the Claimant and the employer may have agreed to a dismissal without cause, the Tribunal is not bound by the way the parties characterize the suspension and dismissal. It must apply the EI Act.

[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.
[4] This paraphrases the grounds of appeal.
[5] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[6] AD1-6
[7] GD3-25

[15] The General Division made a finding that the reason for the Claimant's suspension and dismissal was his non-compliance with the employer's policy.[8] This finding is supported by the evidence. The Claimant was suspended for not complying with the policy prior to seeking legal counsel.

[16] There is no arguable case that the General Division based this decision on an important factual error.

[17] The Claimant also argues that the General Division made a factual error because there was no evidence to support that refusing to abide by a new policy, implemented without notice and consideration can be considered misconduct.[9]

[18] I find that this argument does not have a reasonable chance of success. The General Division set out its reasons for finding that there was misconduct in this case. It found:

a) The Claimant knew about the vaccination policy and that he had to be fully vaccinated or have a valid exemption by the deadline.

b) He knew he could be suspended or terminated for failing to comply.

c) The Claimant made a deliberate decision not to comply with the policy and he was suspended and then terminated.[10]

[19] These findings by the General Division are supported by the evidence. The General Division correctly noted that it cannot consider the conduct of the employer or make a decision about whether the policy was reasonable.[11]

[20] There is no arguable case that the General Division based its decision on any factual errors.

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[8] General Division decision at para 20.
[9] AD1-6
[10] General Division decision at para 49.
[11] General Division decision at para 43.

There is no arguable case that the General Division made an error of law

[21] The Claimant argues that the General Division erred in law when it stated that it cannot make a decision about other laws and can only decide whether the Claimant's conduct is misconduct under the EI Act. He says that the EI Act is not the highest law in Canada and is subject to the Constitution, human right legislation and international treaties.[12]

[22] There is no arguable case that the General Division erred in law by only considering the EI Act. The Federal Court and the Federal Court of Appeal have repeatedly found that the role of the Tribunal is to look at the conduct of the Claimant and determine whether or not there was misconduct. There are other forums for determining whether a claimant was wrongfully terminated, or subject to a human rights violation.[13]

[23] 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.[14] In that case, the Court agreed that an employee who made a deliberate decision not to follow's his employer's vaccination policy had lost his job due to misconduct.

[24] There is no arguable case that the General Division made an error of law. It properly stated and applied the law concerning misconduct. It supported its findings with the evidence and did not ignore any relevant evidence.

[25] In its decision, the General Division outlined all of arguments that the Claimant put forward.[15] It found that it could not address most of them.[16] The Claimant argues

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[12] AD1-6
[13] n *Paradis v Canada (Attorney General)*, 2016 FC 1282, the Claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found it was a matter for another forum; See also *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36, stating that the employer's duty to accommodate is irrelevant in deciding misconduct cases.
[14] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.
[15] General Division decision at para 29.
[16] General Division decision at para 39.

that the General Division did not explain why it wasn't addressing these arguments. I find that the General Division did explain why when it outlined that it is limited to deciding whether the Claimant's conduct is considered misconduct under the EI Act.[17]

[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 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] General Division decision at paras 40 to 50.