Citation: *IL v Canada Employment Insurance Commission*, 2023 SST 635

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: I. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 17, 2023 (GE-22-3068)

Tribunal member: Janet Lew

Decision date: May 26, 2023
File number: AD-23-266

Decision

[1] Leave (permission) to appeal is refused. The appeal will not be going ahead.

Overview

[2] The Applicant, I. L. (Claimant), is appealing the General Division decision. The General Division dismissed the Claimant's appeal. It found that the Respondent, the Canada Employment Insurance Commission (Commission) had proven that the Claimant lost her job because of misconduct. In other words, it found that she had done something that caused her to lose her job. The General Division found that the Claimant did not comply with her employer's vaccination policy.

[3] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[4] The Claimant argues that the General Division made important mistakes about the facts. She denies that there could have been any misconduct. She argues that her employer did not have a vaccination policy. Or, if it did, her employer did not communicate it to her, so she could not have been aware of the consequences of not complying with the policy.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.[1] If the appeal does not have a reasonable chance of success, this ends the matter.[2]

[6] 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.

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[1] *Fancy v Canada (Attorney General)*, 2010 FCA 63.
[2] Under section 58(2) of the *Department of Employment Social Development* (DESD) *Act,* I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issue

[7] Is there an arguable case that the General Division made an important mistake about any of the facts?

I am not giving the Claimant permission to appeal

[8] 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]

[9] 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.

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

[10] The Claimant argues the General Division made important mistakes about the facts.

– **The Claimant argues that her employer did not have a vaccination policy**

[11] The Claimant argues that the General Division overlooked the fact that her employer did not have its own formal vaccination policy and that it relied on a Provincial Health Order (PHO). Even so, she says that her employer was required to have its own vaccination policy and that it failed to provide her with a copy of it. Her employer followed the PHO on vaccination. She claims that it was merely a practice, rather than a policy that she had to follow.[4]

[12] The Claimant says that this is important because (1) if her employer did not have a policy or (2) her employer did not provide her with its policy, she could not possibly

[3] See section 58(1) of the DESD Act.
[4] See Application to the Appeal Division: Employment Insurance, at AD 1-7.

have known what was required of her or what consequences could result if she did not comply with the policy.

[13] The Claimant correctly notes that the evidence on file at the General Division includes a COVID-19 vaccination policy for public service employees that was last updated on June 27, 2022.[5] The file did not include a copy of any earlier policies.

[14] The Claimant states that the first time she became aware of this policy was on February 7, 2023. By then, her employer had already dismissed her from her employment in January 2022. (Until then, she claims that she was only aware of her employer's influenza vaccination policy.)

[15] The General Division acknowledged the Claimant's arguments.[6] The General Division also accepted that the policy on file is dated after the Claimant's dismissal from her employment.

[16] However, the General Division found that the Claimant's employer did have a vaccination policy, even if it had relied on and adopted the PHO. The General Division also found the following, that:

- the Claimant's employer told the Claimant its expectations for vaccination
- the employer spoke to the Claimant several times to communicate what it expected, and
- the Claimant knew or should have known the consequences of not following the employer's vaccination policy.[7]

[17] The General Division stated that it relied on the Claimant's testimony, her application for Employment Insurance benefits, and the employer's report to the Commission, in coming to these findings.

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[5] See COVID-19 vaccination policy, at GD 3-34.
[6] General Division decision, at paras 6, 11, 22, 25 and 26.
[7] General Division decision, at para 33.

[18] It is unclear what part(s) of the application for Employment Insurance benefits upon which the General Division relied. The Claimant denied that she had ever received a specific policy, other than to be told that her employer agreed with the PHO. The Claimant denied that the PHO applied to her.[8]

[19] Curiously, when asked on the application whether her employer had a policy or practice for employees, the Claimant neither denied nor acknowledged that her employer had a practice or policy.[9]

[20] Yet, when the Claimant spoke with the Commission on May 25, 2022, she reportedly stated that she had been dismissed for not adhering to her employer's mandatory vaccination policy.[10]

[21] When the Claimant spoke with the Commission again on August 9, 2022, she reportedly confirmed that there had been a vaccination policy. She also reportedly advised that she was aware of the vaccination policy and the consequences of not complying with it. She reportedly stated that she was informed of the policy through her work e-mail about a month before her employer implemented a policy.[11]

[22] In the hearing at the General Division, the Claimant testified that she had received a copy of the PHO.[12] It was lengthy. She did not know whether the PHO was presented as a policy or a recommendation.

[23] The Claimant also testified that she was aware that if she did not get vaccinated, she would be placed on an unpaid leave.[13] The Claimant also testified that she was aware that, if she remained unvaccinated after three months, her employer could terminate her.[14]

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[8] Application for Employment Insurance benefits, at GD 3-12.
[9] Application for Employment Insurance benefits, at GD 3-9.
[10] Supplementary Record of Claim dated May 25, 2022, at GD 3-25.
[11] Supplementary Record of Claim dated August 9, 2022, at GD 3-52.
[12] At approximately 21:23 of the audio recording of the General Division hearing.
[13] At approximately 22:47 of the audio recording of the General Division hearing.
[14] At approximately 23:05 of the audio recording of the General Division hearing.

[24] The Claimant also confirmed that she met with her employer on December 1, 2021, and again on January 24, 2022. During these meetings, the Claimant asked for the employer's policy. She states that she never received the employer's policy. They also discussed the employer's vaccination requirements and how she could save her employment.[15]

[25] The evidence also shows that the Claimant sought an exemption from getting vaccinated.

[26] The Claimant's statements to the Commission, her testimony at the General Division evidence, and her efforts at getting an exemption indicate that she had to have been aware that, at the very least, her employer required vaccination under the PHO. And, if she did not get vaccinated, this could affect her employment.

[27] On top of this, the Claimant's employer also confirmed that it had a vaccination policy. The employer also stated that it had notified employees of the policy through their union representatives, human resources, and managers.[16]

[28] It is unclear from the evidence when the Claimant's employer introduced its own formal vaccination policy. Even so, the Claimant's employer had adopted the PHO as its own policy and the Claimant was aware of the PHO, the employer's vaccination requirements under the PHO, and the consequences that could result if she did not comply with the employer's requirements under the PHO.

[29] Although the evidence did not include the PHO or any of the employer's written notices, both the employer and the Claimant confirmed the existence of the PHO and at least one written notice from the employer about its vaccination requirements.

[30] Given this, I am not satisfied that there is an arguable case that the General Division made a factual mistake that it overlooked the fact that the employer did not

[15] At approximately 27:35 of the audio recording of the General Division hearing. The General Division member referred the Claimant to her application for Employment Insurance benefits that set out this information, at GD 3-11.
[16] Supplementary Record of Claim dated August 9, 2022, at GD 3-33.

have its own formal vaccination policy. The General Division was aware of this fact. But it also found that the employer had relied on and adopted the PHO as its own vaccination policy, of which the Claimant was aware.

– **The Claimant's other arguments**

[31] The Claimant also makes the following arguments:

- At paragraph 19 of its decision, the General Division referred to "the Act." The Claimant argues that, as the *Employment Insurance Act* does not define misconduct, it must have been referring to the *Employment Standards Act*. In other words, she says that there was no misconduct because her actions would not have met the definition of misconduct under the *Employment Standards Act*.

- At paragraph 20, the Claimant argues that, if the *Employment Insurance Act* does not define "misconduct," then there is no way her actions could have been misconduct under the *Employment Insurance Act*.

- At paragraph 22, the Claimant argues that the General Division made a factual error when it said that the Provincial Health Officer denied her a medical exemption. The Claimant says that, although she did not receive an exemption, this was because she did not use the prescribed form. She claims that she should have received an exemption otherwise. Had she received an exemption, she would not have had to get vaccinated.

[32] The General Division defined what it meant when it wrote the "Act." At paragraph 15, the General Division wrote "The *Employment Insurance Act* (Act) …" which was a means of defining "Act" as the *Employment Insurance Act*. Using "Act" was a shorthand way of saying the *Employment Insurance Act*, without having to spell it out each time. The Claimant does not have an arguable case on this point.

[33] The *Employment Insurance Act* does not define misconduct. But the Courts have set out when misconduct arises. The Courts have provided a broad, general definition for misconduct.

[34] The General Division is required to follow decisions from the Federal Court and Federal Court of Appeal. The General Division wrote that it was doing just that. It looked to the case law to determine how the Courts have defined misconduct under the *Employment Insurance Act*. The General Division cited the legal principles that have emerged.[17]

[35] So, although the *Employment Insurance Act* does not define "misconduct," the General Division was following established case law when it decided whether misconduct arose in the Claimant's case. So, the Claimant does not have an arguable case on this point.

[36] Finally, the issue about whether the Claimant should have received a medical exemption (but for the fact she did not use the prescribed form), is irrelevant to the misconduct question.

[37] As the Federal Court of Appeal ruled in a case called *Mishibinijima*,[18] whether an employee should have received an accommodation is an irrelevant consideration. (This is not to suggest that the Claimant was not entitled to an exemption, or that her employer should have granted her an exemption, but any recourse lies elsewhere.)

Conclusion

[38] I am not satisfied that the appeal has a reasonable chance of success.

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

Janet Lew
Member, Appeal Division

[17] See General Division decision, at paras 16 to 18.
[18] *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 at para 17.