



Citation: *SC v Canada Employment Insurance Commission*, 2023 SST 884

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: S. C.
Representative: J. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 16, 2023
(GE-22-2195)

Tribunal member: Melanie Petrunia

Decision date: July 5, 2023
File number: AD-23-280

Decision

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

Overview

[2] The Applicant, S. C. (Claimant), was placed on an administrative leave of absence by her employer. The employer introduced a policy requiring employees to attest to their COVID-19 vaccination status. The policy required employees to be vaccinated or have an approved exemption by a certain date. The Claimant was placed on leave without pay because she did not comply with the policy by the deadline.

[3] The Claimant applied for employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was suspended from her job because of her own misconduct. It disentitled her from receiving 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 from her job because of misconduct.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division made several errors of law, fact, and jurisdiction. The Claimant needs permission for her 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 erred by failing to decide an issue?
- b) Is there an arguable case that the General Division made an error of law by failing to consider whether the Claimant had just cause for not following the policy?
- c) Is there an arguable case that the General Division made an error of law by failing to recognize the Claimant's rights?
- d) Is there an arguable case that the General Division made an error of law by failing to consider the actions of the employer?
- e) 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;

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).

b) failed to decide an issue that it should have, or decided an issue that it should not have;

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 her 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 erred by failing to consider an issue

[12] The Claimant argues that the General Division made an error of jurisdiction when it found that it cannot rule on the merits of government directives or policies that address the COVID-19 pandemic. She cites the DESD Act and argues that the Tribunal has the authority to decide any question of law or fact necessary to dispose of an appeal.⁶

[13] The Claimant says that the General Division should have decided whether the vaccination policy was legitimate in order to determine whether or not her actions met the definition of misconduct.⁷

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; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ See AD1-10 and section 64 of the DESD Act.

⁷ AD1-10

[14] I find that there is no arguable case that the General Division erred by not deciding this issue. It has been well established in case law that questions about the conduct of the employer, which includes the legitimacy of a policy introduced by the employer, are to be addressed in another forum.⁸

[15] The legislation referred to by the Claimant says that the Tribunal may decide any issue of fact or law necessary to decide the appeal.⁹ It does not require the Tribunal to make a decision on every issue raised by a Claimant. In this case, it was not necessary for the disposition of the appeal, for the General Division to make a decision about the merits of the employer's vaccination policy. As confirmed by the General Division, questions about the validity of the policy are not within its jurisdiction to decide.

No arguable case that the General Division made an error of law by failing to consider whether the Claimant had just cause

[16] The Claimant relies on section 29 of the *Employment Insurance Act* (EI Act) and says that the General Division erred by failing to consider whether she had just cause for not following the employer's policy.¹⁰

[17] The section of the EI Act relied on by the Claimant applies to situations where a claimant voluntarily leaves their job, not when they are suspended or dismissed for misconduct. The General Division did not err by failing to consider whether or not the Claimant had just cause for not complying with the policy. This issue is not relevant to the analysis of misconduct.

[18] The Claimant's arguments on the issue of just cause are related to her right to refuse to comply with the policy because it is illegal and violates her bodily autonomy.¹¹ These points are addressed below.

⁸ *Canada (Attorney General) v Marion*, 2002 FCA 185; *Fleming v Canada (Attorney General)*, 2006 FCA 16; *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

⁹ See section 64 of the DESD Act.

¹⁰ AD1-11

¹¹ AD1-12

No arguable case that the General Division erred by failing to recognize the Claimant rights

[19] Many of the Claimant's arguments centre around her position that the General Division failed to recognize her rights. She cites a number of decisions from the Supreme Court of Canada concerning the rights of an individual to refuse or decline medical treatment and informed consent.

[20] The Claimant argues that the General Division set aside Supreme Court of Canada cases that she cited in support of her position. These cases deal with an individual's right to decline medical treatment and that threat, coercion and duress applied to an individual is not legal. The Claimant also argues that the General Division failed to recognize the Canadian Bill of Rights.

[21] There is no arguable case that the General Division failed to consider the Claimant's right to refuse medical treatment. The General Division discussed the cases raised by the Appellant from the Supreme Court of Canada and her argument that she has a right to bodily autonomy.¹²

[22] The General Division explained in its decision that questions of bodily autonomy, consent and the validity of the policy are not within its jurisdiction to decide.¹³ It referenced and explained relevant case law from the Federal Court and the Federal Court of Appeal that support this determination.

[23] The General Division also considered the Claimant's argument that the policy had to conform to the Bill of Rights.¹⁴ It explained that issues concerning alleged violations of an individual rights are decided by other tribunals and courts.¹⁵

[24] The General Division thoroughly addressed the Claimant's arguments and the case law that she relied on. It explained why it was not persuaded by these arguments

¹² General Division decision at paras 44 to 48.

¹³ General Division decision at para 87.

¹⁴ General Division decision at paras 50 to 53.

¹⁵ General Division decision at para 91.

and did not find the case law relevant to the question of misconduct. There is no arguable case that the General Division erred.

Nor arguable case that the General Division erred by failing to consider the actions of the employer

[25] The Claimant argues that she did not owe a duty to her employer because the vaccination policy was not legal. She says that the General Division did not analyse how the employer was allowed to apply threats, coercion, and duress to the Claimant. The Claimant argues that it was an error of law not to explain how the Commission established that there was a duty owed to the employer.¹⁶

[26] The General Division considered the Claimant's arguments. It found, based on binding case law, that it cannot consider or make decisions about the conduct of the employer.¹⁷ It had to look at the Claimant's conduct and determine whether it amounted to misconduct.

[27] The General Division found that the employer has a right to manage its day-to-day operations. When it implemented the vaccination policy, it became an express condition of the Claimant's employment. The General Division explained in its reasons why it found that the Claimant did owe a duty to her employer.¹⁸ There is no arguable case that the General Division made an error of law in making this determination.

[28] The General Division discussed a recent decision of the Federal Court *Cecchetto v. Canada (Attorney General)*, in its reasons. The appellant in that case raised similar issues concerning bodily autonomy and the right of the employer to implement a vaccine policy. This decision confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.¹⁹

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

¹⁶ AD1-11

¹⁷ General Division decision at paras 83 to 85.

¹⁸ General Division decision at para 98.

¹⁹ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

claimant also made arguments about bodily autonomy safety. The Court confirmed that these are not issues that the Tribunal is permitted, by law, to address.²⁰

[30] Aside from the Claimant's arguments, I have also considered the other ground 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.

[31] 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

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

Melanie Petrunia
Member, Appeal Division

²⁰ See *Cecchetto* at para 32.