



Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 904

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: R. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated February 20, 2023
(GE-22-3638)

Tribunal member: Melanie Petrunia

Decision date: July 12, 2023

File number: AD-23-281

Decision

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

Overview

[2] The Applicant, R. L. (Claimant), was placed on an administrative leave of absence without pay because he did not follow his employer's vaccination policy. He applied for employment insurance (EI) benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant was suspended from 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 Commission had proven that the reason for the Claimant's suspension is considered misconduct under the *Employment Insurance Act* (EI Act).

[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 an error of law in its decision. 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 erred in law by failing to consider how the Claimant's non-compliance hindered the performance of his duties or violated the conditions of his employment?

- b) Does the Claimant raise any other errors of the General Division that have a reasonable chance of success?

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;
- 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

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).

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.

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 did not follow procedural fairness

[12] The Claimant argues that the General Division made an error of law by not properly applying the legal test for misconduct. Specifically, the Claimant says that there was no evidence that not complying with the vaccine policy affected his ability to perform his job duties or infringed his employment contract.⁶

[13] The General Division considered the reasons for the Claimant's suspension. It noted that the employer adopted a COVID-19 vaccination policy requiring employees to attest to their vaccination status by October 29, 2021, and to be fully vaccinated by November 14, 2021.⁷

[14] The Claimant did not attest to his vaccination status by the deadline in the policy and was placed on a leave of absence on November 12, 2021. The General Division found that he was suspended for non-compliance with the policy.⁸

[15] The General Division then considered whether this reason for the Claimant's suspension is considered misconduct according to the EI Act. It set out the legal test for misconduct as established by case law from the Federal Court and the Federal Court of Appeal.⁹

[16] The General Division then applied the legal test, as established in the case law, to the Claimant's circumstances. It found that the Commission had proven that the Claimant was suspended due to misconduct for the following reasons:

⁵ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ ADN1-9

⁷ General Division decision at para 24.

⁸ General Division decision at para 27.

⁹ General Division decision at paras 29 to 32.

- The employer had a policy requiring employees to attest to their vaccination status and to be fully vaccinated by certain deadlines.
- The policy provided that employees who had not completed the attestation form or who were not fully vaccinated and/or were not granted an exemption would be placed on an administrative leave without pay.
- The Claimant testified that he read the policy, was aware of what was expected of him and knew the consequences of not complying.
- The Claimant intentionally did not comply with the policy when he did not complete the attestation form and was suspended.¹⁰

[17] In his application for leave to appeal, the Claimant argues that there was no evidence that his non-compliance was not compatible with carrying out the duties for which he was hired. He says he works from home and that the policy was never a condition of his employment.¹¹

[18] The Claimant argues that his situation does not meet the test for misconduct because did not affect his ability to perform his job duties or breach the conditions of employment for which he was hired. The Claimant also says that the case law relied on by the General Division does not apply to his circumstances.¹²

[19] I find that there is no arguable case that the General Division made an error of law. The Claimant made these arguments before the General Division and they were considered in its decision.

[20] The General Division considered the offer of employment submitted by the Claimant and his position that non-compliance did not violate the conditions of

¹⁰ General Division decision at paras 65 to 68.

¹¹ ADN1-8

¹² ADN1-8 to ADN1-9

employment that he agreed to.¹³ It found that other documents such as job descriptions and policies also impose a duty on an employee.¹⁴

[21] The General Division stated that it cannot consider whether the employer was right to create, implement and enforce a policy.¹⁵ It found that the vaccination policy became an express condition of the Claimant's employment once it was implemented.¹⁶

[22] The General Division also addressed the Claimant's arguments that he worked from home and his non-compliance did not impair his ability to perform his job duties. It found that it does not have the jurisdiction to decide whether it was reasonable or necessary for the employer to apply the policy to employees with a work-from-home arrangement.¹⁷

[23] The case law relied upon by the General Division may be based on factual scenarios that are very different from the Claimant's. However, the General Division properly relied on the general principles from these cases that are relevant to determining whether an employee is dismissed or suspended due to misconduct.

[24] The General Division considered and addressed all the arguments that the Claimant is making in his application for leave to appeal. It explained, with reference to binding case law, why it did not agree with the Claimant. I find that these arguments do not amount to any alleged errors by the General Division.

[25] The General Division discussed a recent decision of the Federal Court, *Cecchetto v. Canada (Attorney General)*, in its reasons. This decision confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.¹⁸ 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.¹⁹

¹³ General Division decision at para 57.

¹⁴ General Division decision at para 56.

¹⁵ General Division decision at para 52.

¹⁶ General Division decision at para 62.

¹⁷ General Division decision at para 64.

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

¹⁹ See *Cecchetto* at para 32.

[26] The Claimant's employer implemented a mandatory policy which provided for suspension for non-compliance. The policy became a condition of his employment. When the Claimant chose not to comply, his conduct interfered with his ability to perform his job because he would not be able to continue working.

[27] I understand the Claimant's position that being vaccinated or attesting to his vaccination status was not necessary for his to perform his job duties. However, as the General Division found, it is not within the Tribunal's jurisdiction to consider the merits of the employer's policy or whether it was reasonable to apply the policy to employees such as the Claimant.

[28] 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 based its decision on an important mistake about the facts or made an error of jurisdiction.

[29] 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

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

Melanie Petrunia
Member, Appeal Division