



Citation: *MD v Canada Employment Insurance Commission*, 2023 SST 862

Social Security Tribunal of Canada Appeal Division

Extension of Time and Leave to Appeal Decision

Applicant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 18, 2023
(GE-22-3096)

Tribunal member: Melanie Petrunia

Decision date: June 29, 2023

File number: AD-23-251

Decision

[1] An extension of time to apply to the Appeal Division is granted. Leave (permission) to appeal is refused. The appeal will not proceed.

Overview

[2] The Claimant, M. D. (Claimant), was placed on an unpaid leave of absence (suspended) from his job because he did not comply with his employer's vaccination policy. The Claimant applied for employment insurance (EI) regular benefits.

[3] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's suspension is considered misconduct. It disentitled the Claimant from receiving EI benefits. It also decided that the Claimant was not entitled to benefits because he had not proven his availability for work during the period of his suspension.

[4] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division allowed the appeal on the issue of availability but dismissed it on the issue of misconduct. It found that the Claimant was suspended from his job because he did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct and he is disentitled from receiving EI benefits.

[5] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. 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 in this appeal are:

- a) Was the application to the Appeal Division late?

- b) Does the Claimant raise any reviewable error of the General Division upon which the appeal might succeed?

Analysis

The application was not late

[8] The General Division decision was issued on January 18, 2023. The Claimant says that it was not sent to him until February 16, 2023.¹ The Claimant filed his application for leave to appeal on March 11, 2023.

[9] An application for leave to appeal must be made within 30 days after the General Division decision and reasons are communicated to a claimant.² In this case, the decision is dated January 18, 2023, but it appears that the decision was not communicated to the Claimant until February 16, 2023. The Claimant filed his application for leave within 30 days after this date, so it was not late.

I am not giving the Claimant permission to appeal

[10] 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?³

[11] 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).⁴

[12] 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 AD1C

² See section 57(1)(a) of the *Department of Employment and Social Development Act*.

³ 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.

⁴ 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;⁵ or

d) made an error in law.⁶

[13] 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.⁷

No arguable case that the General Division erred

[14] In his application for leave to appeal, the Claimant argues that his employer and the Commission made numerous errors.

[15] The Claimant says that he was discriminated against and his human rights were violated. He states that he filed multiple human rights complaints and they were all denied. The Claimant argues that he cannot be vaccinated for religious reasons and the EI agent ignored this.⁸

[16] The Claimant also argues that mistakes were made about his pastor's comments. He says that it is untrue that he was not willing to provide documents but

⁵ 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.

⁶ This paraphrases the grounds of appeal.

⁷ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁸ AD1-8

that he chose not to provide documents because his faith is more important. He states that he gives permission for his pastor to be contacted to verify his religious beliefs.⁹

[17] The Claimant's application for leave to appeal outlines the errors he feels that his employer and the Commission made in his case by discriminating against him and trying to force him to be vaccinated. He has not specified the errors that he believes the General Division made, but I have considered whether the Claimant's arguments give rise to any potential errors by the General Division.

[18] The Claimant argues that his rights were violated and he was discriminated against by his employer. He says that his religious exemption request should have been granted and there were mistakes made in the way that his request was dealt with.¹⁰

[19] The Claimant made these arguments before the General Division as well.¹¹ The General Division found that it could not consider the conduct of the employer when deciding whether the Claimant's actions amounted to misconduct. It acknowledged that the Claimant argued he was discriminated against and his religious exemption request should have been granted. However, it found that these issues were not within its jurisdiction to decide.¹²

[20] There is no arguable case that the General Division erred. It cited the key decisions from the Federal Court and the Federal Court of Appeal that apply to questions of misconduct.¹³ It applied the principles from these cases and found that the Claimant's actions amounted to misconduct because he was aware of the employer's policy and the consequences of not complying. It found that he made a conscious decision not to comply with the policy, knowing that he could be suspended.¹⁴

⁹ AD1-8 to AD1-9

¹⁰ AD1-8 to AD1-11

¹¹ General Division decision at para 8.

¹² General Division decision at paras 26 and 27.

¹³ General Division decision at paras 20 to 22.

¹⁴ General Division decision at para 25.

[21] The General Division acknowledged the Claimant's arguments and explained its reasons for not considering the employer's conduct or whether the Claimant was discriminated against.

[22] A recent decision from the Federal Court, *Cecchetto v. Canada (Attorney General)*, confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.¹⁵ In that case, 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 claimant could pursue his claims that he was wrongfully dismissed or his human rights were violated in other forums.

[23] Aside from the Claimant's arguments, I have also considered the other grounds of appeal. The Claimant has not pointed to any errors of law or jurisdiction, and I see no evidence of such errors. The General Division properly cited and applied the law concerning misconduct. There is no arguable case that it failed to follow procedural fairness or based its decision on an important error of fact.

[24] 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

[25] An extension of time is granted. Permission to appeal is refused. This means that the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division

¹⁵ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.