Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	S. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated May 29, 2023 (GE-23-123)

Tribunal member:	Melanie Petrunia
Decision date:	August 16, 2023
File number:	AD-23-612

Decision

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

Overview

[2]   The Applicant, S. M. (Claimant), was suspended and then dismissed from her job because she did not comply with her 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 that the Claimant lost her job is considered misconduct. It disqualified her from receiving benefits.

[4]   The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant lost her job because she did not comply with the employer's vaccination policy. It decided that this reason is considered misconduct and the Claimant is disqualified from receiving benefits.

[5]   The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. She argues that the General Division misunderstood the evidence. However, she 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.

Issue

[7]   Does the Claimant raise any 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;

    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]

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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).
[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.

– **The General Division decision**

[12]   The Claimant's employer introduced a policy requiring vaccination against COVID-19. The initial deadline for vaccination in the policy was extended a number of times.[6] The Claimant told the employer that she would not be vaccinated. She was placed on an unpaid leave of absence on March 23, 2022, then dismissed on April 7, 2022.[7]

[13]   The General Division had to decide why the Claimant lost her job and whether this reason amounts to misconduct according to the *Employment Insurance* (EI) *Act*.

[14]   The General Division considered the Claimant's testimony, notes in the file from conversations that the Claimant had with Service Canada agents, and the reason that the employer had provided for dismissing the Claimant.[8] Based on this evidence, it found that the Claimant lost her job because she did not comply with her employer's vaccination policy.[9]

[15]   The General Division set out in its decision the key case law from the Federal Court and the Federal of Appeal concerning the issue of misconduct.[10] It then applied the legal test, as set out in the case law, to the Claimant's circumstances. It found that the Commission had proven that the Claimant lost her job due to misconduct for the following reasons:

- The Claimant knew about the vaccination policy;

- The Claimant knew that she could lose her job if she did not comply with the policy.

- The Claimant knew or ought to have known about the consequences of not complying.

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[6] General Division decision at para 4.
[7] See letters from employer at GD3-42 and GD3-43.
[8] General Division decision at paras 20 and 22.
[9] General Division decision at para 23.
[10] General Division decision at paras 25 to 32.

- The Claimant made a deliberate decision not to comply with the policy.

- The Claimant lost her job because she did not comply.[11]

[16]   General Division considered the Claimant`s arguments that the policy was coercive and breached her rights, that it was not part of her initial employment contract and that she should receive benefits for reasons of fairness and justice.[12] It found that these are not issues for it to decide.[13]

– **No arguable case that the General Division erred**

[17]   The Claimant did not indicate in her application for leave to appeal which error she believes the General Division made.[14] She argues that the General Division misunderstood the timeline of her employer's implementation of the vaccination policy.[15] The employer extended the deadline a number of times, with a final deadline of April 7, 2022 to comply.

[18]   The Claimant argues that she voluntarily left her employment prior to the final deadline because she decided not to be vaccinated. She says that her last day was March 23, 2022, and she provided her employer with ample notice. She says that her actions were not misconduct.[16]

[19]   The Claimant's arguments do not have a reasonable chance of success. The General Division took into consideration all the relevant evidence when it decided that the Claimant was suspended and then dismissed. I have reviewed the file material and the Claimant did not argue before the General Division that she voluntarily left her employment.

[20]   I can only decide whether there is an arguable case that the General Division erred based on the evidence and arguments that were before it. I cannot consider a

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[11] General Division decision at para 45.
[12] General Division decision at paras 42 to 44.
[13] General Division decision at paras 46 and 47.
[14] See AD1.
[15] See AD1-5 and AD1B-2.
[16] AD1B-2.

new argument at this stage. There was no evidence before the General Division that the Claimant voluntarily left her employment and there is no arguable case that the General Division based its decision on a factual error when it found that she was suspended and dismissed.

[21]   The General Division acknowledged that the employer extended the deadline in its policy a number of times.[17] It explained why it cannot make a decision about the conduct of the employer, whether the policy was coercive, or whether the Claimant's rights were violated.[18] The Claimant's arguments do not give rise to an arguable case that the General Division made any reviewable errors.

[22]   The General Division properly stated the law concerning misconduct. It found that the Claimant was suspended and dismissed because she did not comply with her employer's vaccination policy. It found that she was aware of the policy and the consequences of not complying.

[23]   The General Division considered all relevant facts and found that the Commission had proven that the Claimant lost her job because of misconduct.

[24]   The General Division cited a recent decision of the Federal Court, *Cecchetto v. Canada (Attorney General),* which confirmed that the Tribunal cannot consider the conduct of the employer or the validity of the vaccination policy.[19]

[25]   In *Cecchetto*, 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. The Court confirmed that the Tribunal is not permitted, by law, to address the merits, legitimacy or legality of the employer's policy.[20]

[26]   Aside from the Claimant's arguments, I have also considered the grounds of appeal. The Claimant has not pointed to any procedural unfairness on the part of the

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[17] General Division decision at para 4.
[18] General Division decision at paras 46 and 47.
[19] See *Cecchetto v. Canada (Attorney General),* 2023 FC 102.
[20] See Cecchetto *at paragraph 48, citing* Canada (Attorney General) v Caul*, 2006 FCA 251 and* Canada (Attorney General) v Lee*, 2007 FCA 406.*

General Division and I see no evidence of procedural unfairness. There is no arguable case that the General Division made an error of jurisdiction. I have not identified any errors of law and there is no arguable case that the General Division based its decision on an important mistake about the facts.

[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