



Citation: *ZH v Canada Employment Insurance Commission*, 2023 SST 1121

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: Z. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated May 23, 2023
(GE-22-3934)

Tribunal member: Melanie Petrunia

Decision date: August 16, 2023

File number: AD-23-614

Decision

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

Overview

[2] The Applicant, Z. H. (Claimant), went on sick leave from her job as a nurse on October 15, 2021. She applied for and received employment insurance (EI) sickness benefits until February 12, 2022, and then requested to convert her claim to EI regular benefits.

[3] The Claimant's employer introduced a policy requiring vaccination against COVID-19. Employees were required to have a first dose by October 26, 2021, and be fully vaccinated by November 14, 2021. The Claimant was suspended and then dismissed because she did not comply with the employer's COVID-19 vaccination policy.

[4] The Respondent, the Canada Employment Insurance Commission (Commission), decided that the reason for the Claimant's suspension and dismissal was misconduct. It disentitled then disqualified the Claimant from receiving EI regular benefits.¹ The Claimant requested a reconsideration, and the Commission maintained its decision.

[5] The Claimant appealed the Commission's decision to the Tribunal's General Division. The General Division dismissed the Claimant's appeal. It found that the Claimant lost her job because of misconduct, and she is disqualified from receiving EI regular benefits.

¹ The Claimant's disqualification did not prevent payment of the sickness benefits that she received but meant that she could not be paid regular benefits when she requested to convert her claim when her sickness benefits were exhausted.

[6] The Claimant now wants to appeal the General Division decision to the Appeal Division, but she needs permission for her appeal to move forward. The Claimant argues that the General Division based its decision on important factual errors.

[7] 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

[8] The issues are:

- a) Is there an arguable case that the General Division erred by not reviewing the Claimant's collective agreement?
- b) Is there an arguable case that the General Division erred by not deciding whether the employer breached a term in the employment contract?
- c) Is there an arguable case that the General Division based its decision on a factual error when it found that the Claimant could not perform the duties owed to her employer?
- d) 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

[9] 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?²

² 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.

[10] 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).³

[11] 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;⁴ or
- d) made an error in law.⁵

[12] 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.⁶

The General Division decision

[13] The General Division found that the reason the Claimant was suspended and then dismissed from her job was because she did not comply with her employer's vaccination policy.⁷ The Claimant did not want to be vaccinated for religious reasons

³ DESD Act, s 58(2).

⁴ 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.

⁵ This paraphrases the grounds of appeal.

⁶ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁷ General Division decision at para 10.

and requested an exemption from the Provincial Health Authority, as provided for in the policy. Her request was denied.⁸

[14] The Claimant was first placed on an unpaid leave of absence for three weeks and then dismissed. The General Division found that the reason that the Claimant lost her job was because she went against her employer's policy. The General Division then considered whether this reason amounts to misconduct according to the *Employment Insurance Act* (EI Act).

[15] The General Division set out the relevant case law from the Federal Court and the Federal Court concerning questions of misconduct.⁹ 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 that there was a mandatory vaccination policy;¹⁰
- The Claimant knew that the policy required employees to either be vaccinated or have an approved exemption;¹¹
- The Claimant did not have an exemption and made a deliberate decision not to be vaccinated or inform her employer of her vaccination status;¹²
- The Claimant's non-compliance meant that she could not go to work and carry out her duties to her employer;¹³ and
- The Claimant knew that there was a real possibility she could lose her job for not complying with the policy.¹⁴

⁸ General Division decision at para 12.

⁹ General Division decision at paras 15 to 26.

¹⁰ General Division decision at para 72.

¹¹ General Division decision at para 73.

¹² General Division decision at para 72.

¹³ General Division decision at para 74.

¹⁴ General Division decision at para 75.

No arguable case that the General Division erred

[16] In her application for leave to appeal, the Claimant argues that the General Division made important factual errors.¹⁵ She says the General Division did not review her collective agreement, even though she testified that it does not have any provisions concerning COVID-19 vaccination.¹⁶ The Claimant argues that there was no express duty to be vaccinated arising out of her employment contract.

[17] The Claimant argues that her employer unilaterally imposed a new condition of employment without the agreement of her or her bargaining agent. She says that she has filed a grievance with her union concerning her termination but has not received an update.¹⁷

[18] I find that there is no arguable case that the General Division erred by not considering the collective agreement. The Claimant made these arguments before the General Division, and they are addressed in its decision.¹⁸ The General Division explained that questions about the collective agreement are outside of its authority.¹⁹

[19] The Claimant also argues in her application for leave to appeal, that the General Division erred by not deciding whether the employer breached the employment contract.²⁰ The Claimant relied on another decision from the General Division, *A.L. v. Canada Employment Insurance Commission* (A.L.) and she refers to that decision in her application for leave to appeal.²¹

[20] The General Division explained that it is not bound by other General Division decisions and explained its reasons for not following the reasoning in A.L.²² I note that

¹⁵ AD1-3

¹⁶ AD1-8

¹⁷ AD1-8

¹⁸ General Division decision at para 56.

¹⁹ General Division decision at para 66.

²⁰ AD1-9 and AD1-10

²¹ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

²² General Division decision at paras 57 to 66.

this decision was appealed to the Appeal Division and the appeal was recently allowed.²³

[21] The Claimant says that the General Division made a factual error when it found that she could not perform the duties owed to her employer. She says that the General Division assumed that she could not perform her duties as a nurse even though she was willing and capable of performing her job before the policy was implemented. She argues that her vaccination status does not affect her ability to perform her duties.²⁴

[22] The General Division found that the Claimant's non-compliance with the policy meant that she was placed on a leave of absence. By not being able to go to work, the Claimant could not perform her job.

[23] I find that there is no arguable case that the General Division made a factual error. It was not deciding that the Claimant needed to be vaccinated in order to perform the duties of a nurse, but that she could not perform those duties if she was on a leave of absence. Her leave was a result of her non-compliance with the policy.

[24] The General Division considered and addressed all the arguments that the Claimant is making in her 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.²⁵ 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.²⁶

²³ *Canada Employment Insurance Commission v AL*, 2023 SST 1032.

²⁴ AD1-10

²⁵ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

²⁶ See *Cecchetto* at para 32.

[26] 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 made an error of law or an error of jurisdiction.

[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