Citation: *AB v Canada Employment Insurance Commission*, 2023 SST 110

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	A. B.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated March 10, 2023 (GE-22-2557)

Tribunal member:	Candace R. Salmon
Decision date:	September 21, 2023
File number:	AD-23-337

Decision

[1] I am refusing leave (permission) to appeal because the Claimant doesn't have an arguable case. The appeal will not proceed.

Overview

[2] A. B. is the Claimant. She was suspended from her job because she didn't comply with her employer's mandatory COVID-19 vaccination policy.

[3] She applied for Employment Insurance (EI) regular benefits. The Canada Employment Insurance Commission (Commission) decided she was not entitled to benefits because she lost her employment due to her own misconduct. The General Division agreed with this finding.

[4] The Claimant wants to appeal the General Division decision to the Appeal Division. She needs permission for the appeal to move forward. She says that the General Division made errors of law and errors of fact.

[5] I am refusing permission to appeal because the appeal has no reasonable chance of success.

Issues

[6] Is there an arguable case that the General Division made an error of law when it failed to follow a previous Tribunal decision?

[7] Is there an arguable case that the General Division made an error of fact when it overlooked important evidence about the employer's policy?

[8] Is there an arguable case that the General Division made any other type of reviewable error?

Analysis

The test for getting permission to appeal

[9] An appeal can only proceed if the Appeal Division gives permission to appeal.[1] I must be satisfied that the appeal has a reasonable chance of success.[2] This means that there must be some arguable ground upon which the appeal might succeed.[3]

[10] To meet this legal test, the Claimant must establish that there is an arguable case that the General Division may have made an error recognized by the law.[4] If the Claimant's arguments do not deal with one of these specific errors, the appeal has no reasonable chance of success and I must refuse permission to appeal.[5]

There's no arguable case that the General Division made an error of law when it failed to follow a previous Tribunal decision

[11] The Claimant submitted that the General Division made an error of law when it failed to follow the legal principles in *AL v Canada Employment Insurance Commission*, 2022 SST 1428 (*AL*).[6]

[12] The law says that an error of law happens when the General Division makes a legal mistake in its decision.[7] Legal mistakes can take many forms, including applying the wrong legal test, misinterpreting a statutory provision, and making findings without evidence.[8]

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[1] Section 58(1) of the *Department of Employment and Social Development Act* (DESD Act) says that I must refuse leave to appeal if I find the "appeal has no reasonable chance of success." This means that I must refuse permission for the appeal to move forward if I find there isn't an arguable case (*Fancy v Canada (Attorney General)*, 2010 FCA 63 at paragraphs 2 and 3).
[2] See section 58(2) of the DESD Act.
[3] See, for example, *Osaj v Canada (Attorney General)*, 2016 FC 115.
[4] The relevant errors, formally known as "grounds of appeal," are listed under section 58(1) of the DESD Act. These errors are also explained on the Notice of Appeal to the Appeal Division.
[5] This is the legal test described in section 58(2) of the DESD Act.
[6] See AD1-3.
[7] See section 58(1)(b) of the DESD Act.
[8] See *Canada (Attorney General) v Nguyen,* 2001 FCA 348; *Murphy v Canada (Attorney General)*, 2016 FC 1208; *Canada (Attorney General) v Trochimchuk*, 2011 FCA 268.

– The AL decision

[13] The Claimant says that the General Division found it wasn't bound by other Tribunal decisions, but "should explain how that decision doesn't apply to the employee's situation."[9]

[14] The General Division explained why it didn't give much weight to *AL*. It said that it didn't agree with the reasoning in *AL*, and explained why it found the Claimant committed misconduct and why the employer's policy was an express condition of her employment.[10]

[15] The General Division also explained that it didn't follow *AL* because it didn't agree with how the Tribunal Member addressed the issue of a collective agreement. In *AL*, the Tribunal Member analysed the collective agreement. The Tribunal Member in this case found that he didn't have the jurisdiction to apply the collective agreement.[11]

[16] The General Division explained in its decision why it didn't give *AL* much weight and didn't follow its reasoning. Further, Tribunal Members are not required to follow the decisions of other Tribunal Members. These decisions are not precedent. There is no arguable case that the General Division made an error of law by not following the decision in *AL*.

– Other arguments relating to an error of law

[17] The Claimant also said that the General Division used case law to support its findings, but she didn't believe the case law applied to her. She said the cases were all about appellants who breached their existing employment contracts. She says that since she didn't agree to the new employment terms, she could not have breached a contract.

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[9] See AD1-9.
[10] See General Division decision at paragraph 63.
[11] See General Division decision at paragraphs 63 to 67.

[18] The General Division addressed the cases in its decision. It discussed *McNamara, Paradis, and Mishibinijima*, and explained how it found the cases relevant.[12] It recognized that the cases were not exactly on point, and did not relate to vaccination. However, it found that the cases were relevant because they instructed the General Division to consider what the Appellant did or did not do and whether that amounted to misconduct. The cases also support that the General Division shouldn't look at the employer's conduct or policies or make a decision about whether the employer was correct to suspend their employee.[13]

[19] There is no arguable case that the General Division made an error of law by considering these cases. The cases relate to the meaning of misconduct, and are a direction from a higher court to the Tribunal. The General Division explained the cases in its decision, and addressed why it found them relevant.

[20] The Claimant also submitted that she works in a unionized job, so she works under a collective agreement and the General Division should have applied a different test to her case because of her union status.[14]

[21] The General Division recognized that the Claimant was part of a union and it addressed that in its decision. It said that it didn't agree with the approach of considering the collective agreement as part of the misconduct analysis.[15] It added that it didn't have the jurisdiction to consider the collective agreement, and clearly addressed its reasons for not analyzing or considering it.

[22] There is no arguable case that the General Division made an error of law because its decision is supported by case law stating that the Tribunal has a narrow

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[12] See General Division decision at paragraphs 22 to 27 for reference to *Canada (Attorney General) v McNamara*, 2007 FCA 107, *Paradis v Canada (Attorney General)*, 2016 FC 1282, *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 .
[13] See General Division decision at paragraph 27 for this analysis.
[14] See AD1-9.
[15] See General Division decision at paragraph 65.

role. The Court has said that the Tribunal must decide whether a claimant was dismissed from their job and whether that reason was misconduct.[16]

There's no arguable case that the General Division made an error of fact by overlooking important evidence about the employer's policy

[23] The Claimant says the General Division made an error of fact when it overlooked that the employer's policy provided an attestation deadline of two-weeks after the date when the employee was informed of their accommodation denial.[17]

[24] The General Division addressed the Claimant's submission that the employer didn't follow its own policy, and specifically that the policy provided a two-week period after denying an accommodation to provide a vaccination attestation.[18]

[25] There is no arguable case that the General Division made an error of law by overlooking important evidence about the employer's policy because the General Division addressed the evidence at length. The Claimant may not agree with the General Division's findings, but disagreement itself is not a ground of appeal.

– Other alleged errors of fact

[26] The Claimant submits that the General Division made two other factual mistakes. She said that the General Division made a mistake when it decided that emails from her employer were considered part of or an extension of the policy.[19] She submits that her manager didn't have the authority to extend the policy, and says that the policy could have been arbitrarily applied by each manager.

[27] The General Division stated that the Claimant argued that she complied with her employer's policy because she submitted an accommodation request. This was allowed

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[16] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 46.
[17] See AD1-8.
[18] See General Division decision at paragraphs 15, 29 to 33, and 38 to 45.
[19] See General Division decision at paragraph 44.

under the policy. She said that her employer didn't follow its own policy because it suspended her before it considered her accommodation.[20]

[28] The General Division explained why it didn't agree with the Claimant. It said that the evidence showed the employer directly told the Claimant that she couldn't submit an accommodation request unless she did other things beforehand. It said that the Claimant's manager sent emails, stating that employees who do not attest to their vaccination status would be considered unvaccinated, that the Claimant had to complete the attestation form and share her vaccination status to be considered for an accommodation, and that the Claimant had to acknowledge the privacy statement on the attestation form to request an accommodation and could not modify the form to provide her preferred options for response.[21]

[29] After these emails, the Claimant emailed a different person in her organization asking for clarification about how to proceed with an accommodation request. There was no evidence that the employer replied to these additional emails.

[30] The General Division found that it was reasonable to find that the employer's lack of further response supported the previous position communicated to the Claimant: that she had to complete certain tasks before requesting an accommodation. It recognized that the policy itself was silent on whether employees had to attest to their vaccination status before they could request an accommodation. However, it also found that it was reasonable to find the emails from the Claimant's manager could be considered part of the policy because they were sent by someone in a senior role who was familiar with the policy and how it applied.

[31] There is no arguable case that the General Division made an error of fact in its consideration of the accommodation process. It acknowledged that the policy didn't explain whether the vaccination attestation had to be completed before an

[20] See General Division decision at paragraph 38.
[21] See General Division decision at paragraph 39.

accommodation request could be made, but also explained why it believed the employer's communication with the Claimant should be relied upon to explain the policy.

[32] The Claimant also submits that the General Division made a mistake when it found that her actions led to her suspension, because she deliberately chose not to acknowledge the employer's privacy statement or share her vaccination status.[22] She says that there is no requirement to agree to a privacy statement if the options on the form are only "yes" or "no" as this implies there is a choice. She adds that the request to complete a privacy statement or attest to vaccination status is irrelevant to her accommodation request.

[33] The General Division addressed the policy and its relationship to the accommodation request and the employer's directions to the Claimant (about what she had to do to make an accommodation request). This is discussed above. If the Claimant believes her privacy was violated, that is a matter for another forum. As already noted, the Tribunal's area of authority is narrow and the General Division only has the power to make decisions under the *Employment Insurance Act* and its supporting regulations.

[34] There is no arguable case that the General Division made an error of fact when it decided the Claimant was suspended from her job due to misconduct. It considered the case law explaining what misconduct means, and its findings are supported by law.

The Claimant's appeal has no reasonable chance of success

[35] The Tribunal must follow the law, including the *Department of Employment and Social Development Act* (DESD Act). It provides rules for appeals to the Appeal Division. The Appeal Division does not provide an opportunity for the parties to re-argue their case. It determines whether the General Division made an error under the DESD Act.

[22] See General Division decision at paragraph 83.

[36] I acknowledge that the Claimant disagrees with the General Division's decision, but that is not enough for me to intervene. I cannot reweigh the evidence to come to a conclusion more favourable for the Claimant.[23]

[37] I am satisfied that the General Division did not misinterpret the law or fail to properly consider any relevant evidence.[24] There is no arguable case that the General Division made an error.

Conclusion

[38] This appeal has no reasonable chance of success. For that reason, I'm refusing permission to appeal.

[39] This means that the appeal will not proceed.

Candace R. Salmon
Member, Appeal Division

[23] See *Garvey v Canada (Attorney General)*, 2018 FCA 118 at paragraph 6.
[24] See *Karadeolian v Canada (Attorney General)*, 2016 FC 165, at paragraph 10.