



Citation: *KJ v Canada Employment Insurance Commission*, 2023 SST 1347

Social Security Tribunal of Canada Appeal Division

Leave to Appeal Decision

Applicant: K. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated July 18, 2023
(GE-23-318)

Tribunal member: Janet Lew

Decision date: October 6, 2023

File number: AD-23-770

Decision

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

Overview

[2] The Applicant, K. J. (Claimant), is seeking leave (permission) to appeal the General Division decision. The General Division dismissed the Claimant's appeal.

[3] The General Division found that the Claimant lost her job because of misconduct. In other words, it found that she had done something that caused her to lose her job. The General Division found that the Claimant had not complied with her employer's vaccination policy.

[4] As a result of the misconduct, the Claimant was disqualified from receiving Employment Insurance benefits.

[5] The Claimant argues that the General Division member made a legal error about when misconduct arises. She says that misconduct does not arise when an employee is entitled to a religious accommodation. She also argues that the General Division overlooked some of the facts.

[6] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success. In other words, there has to be an arguable case.¹ If the appeal does not have a reasonable chance of success, this ends the matter.²

[7] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving permission to the Claimant to move ahead with her appeal.

¹ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

² Under section 58(2) of the *Department of Employment and Social Development (DESD) Act*, I am required to refuse permission if I am satisfied "that the appeal has no reasonable chance of success."

Issues

[8] The issues are as follows:

- a) Is there an arguable case that the General Division made a legal error about when misconduct arises?
- b) Is there an arguable case that the General Division overlooked some of the facts?

I am not giving the Claimant permission to appeal

[9] The Claimant asks for a re-evaluation of her case. Before she is entitled to a re-evaluation of her case, the Appeal Division has to be satisfied that the appeal has a reasonable chance of success.

[10] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if the General Division arguably made a jurisdictional, procedural, legal, or certain type of factual error.³

[11] For factual errors, the General Division had to have based its decision on an error that it made in a perverse or capricious manner, or without regard for the evidence before it.⁴

Is there an arguable case that the General Division made a legal error about when misconduct arises?

[12] The Claimant argues that the General Division made a legal error about when misconduct arises. She says that the General Division should have recognized that she did not commit any misconduct. She says that misconduct does not arise when someone is entitled to a religious accommodation.

³ Section 58(1) of the DESD Act.

⁴ Paragraph 58(1)(c) of the DESD Act.

[13] The Claimant says that her employer should have accommodated her under its vaccination policy. She could have performed her usual duties from home, used personal protective equipment, undergone daily symptoms check or testing, or other.

[14] But, as the Federal Court of Appeal stated in a case called *Mishibinijima*,⁵ an employer's lack of accommodations is not relevant to the misconduct issue, even if the Claimant's employer had previously accommodated her for several months.

[15] The General Division did not make a legal error when it determined that it could not consider whether the Claimant's employer should have made reasonable arrangements or ongoing accommodations or for her. For this reason, I am not satisfied that there is an arguable case that the General Division made a legal error over the accommodation issue.

Is there an arguable case that the General Division overlooked some of the evidence?

[16] The Claimant argues that the General Division overlooked some of the evidence. She says that the General Division should have recognized the differences between her accommodation period and the point when her employer no longer accommodated her.

[17] However, this would have made no difference to the General Division's finding as to whether there was misconduct because the accommodation issue was irrelevant to the misconduct question.

[18] The Claimant also suggests that, because her employer led her to believe that it would continue to accommodate her, she was unaware and did not know that her employer could dismiss her from her employment for not complying with its vaccination policy.

[19] The General Division addressed this point. The General Division noted the evidence, that on April 20, 2022, the employer wrote and asked whether the Claimant

⁵ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

still qualified for an accommodation.⁶ The General Division also noted that the employer wrote on May 17, 2022, advising that it would not continue her accommodation after May 31, 2022. If she was not fully vaccinated by then, it would suspend her. And, if she did not have a plan or intention to get vaccinated by July 4, 2022, it would dismiss her from her employment.⁷

[20] It is clear from the evidence that the employer let the Claimant know that if she did not comply with her employer's vaccination policy or receive an accommodation, that the employer would place the Claimant on an unpaid administrative leave effective June 1, 2022. The employer also let her know that, if by July 4, 2022, the Claimant had no plan or any intention to become fully immunized, it would terminate her employment for not complying with its vaccination policy. The evidence also shows that the employer did not hold out to the Claimant that she could expect an ongoing accommodation.

[21] Given the evidence before it, the General Division was entitled to conclude that the Claimant knew or should have known that, unless she received an accommodation or complied with her employer's vaccination policy, that dismissal was a possibility.

[22] This is not to say that the Claimant is without any recourse. She says that her employer breached her rights, but her options to pursue any remedies lie outside the Social Security Tribunal.

Conclusion

[23] I am not satisfied that the appeal has a reasonable chance of success. Permission to appeal is refused. This means that the appeal will not be going ahead.

Janet Lew
Member, Appeal Division

⁶ General Division decision, at para 24, referring to the employer's letter dated April 20, 2022, at GD 6-3.

⁷ Employer's letter dated May 17, 2022, at GD 6-8.