Citation: *RS v Canada Employment Insurance Commission*, 2024 SST 237

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated August 31, 2023 (GE-23-1265)

Tribunal member:	Melanie Petrunia
Decision date:	March 10, 2024
File number:	AD-23-833

Decision

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

Overview

[2] The Applicant, R. S. (Claimant), was suspended and then dismissed from his job as a pilot. His employer said that he was dismissed because he did not comply with its COVID-19 vaccination policy.

[3] The Claimant applied for regular employment insurance (EI) benefits. The Respondent, the Canada Employment Insurance Commission (Commission), decided that the Claimant was suspended and terminated due to his own misconduct. The Claimant requested a reconsideration, and the Commission maintained its decision.

[4] The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant lost his job because of misconduct could not be paid 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. The Claimant argues the General Division made numerous errors in its decision.

[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 are:

a) Is there an arguable case that the General Division was biased?

b) Is there an arguable case that the General Division based its decision on an important error of fact by failing to consider that the employer's policy violated the employment agreement?

c) Is there an arguable case that the General Division failed to consider the unlawful actions of the Claimant's employer in its misconduct analysis?

d) Is there an arguable case that the General Division made an error of fact about the Claimant's testimony?

e) Does the Claimant raise any other 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;

---

[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).

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 his case and possibly win. I should also be aware of other possible grounds of appeal not precisely identified by the Claimant.[5]

– Background

[12] The Claimant's employer introduced a policy concerning vaccination against COVID-19. The policy required employees to be vaccinated against COVID-19 or have a valid exemption. Employees who did not comply would be subject to discipline up to and including termination for cause.[6] The Claimant requested a religious accommodation, but the employer denied his request.[7]

[13] The Claimant was suspended and then dismissed. The Commission decided that the reason for the Claimant's dismissal was misconduct. The General Division dismissed the Claimant's appeal. It found that the Commission had proven that the Claimant was suspended and dismissed for misconduct.[8]

---

[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.
[6] GD3-37
[7] GD3-83
[8] General Division decision at para 52.

– **No arguable case that the General Division was biased**

[14] The Claimant argues that the General Division was biased and points to two examples. First, he says that the bias is evident because the General Division was unable to read terms of the Interim Order that addressed religious exemptions.[9] Second, the Claimant argues that the General Division was unable to see that the vaccine policy was a new condition of employment.[10]

[15] The Claimant also argues that the General Division recognized the Commission's investigation into the employer's vaccine policy rather than acknowledging that the Commission failed to look into whether his accommodation request was properly processed by the employer.[11]

[16] The threshold for a finding of bias is high, and the party making the allegation has the burden of proof. An allegation of bias cannot rest on suspicion, pure conjecture, insinuations, or mere impressions.[12] The Supreme Court of Canada has said that the test for bias is: "What would an informed person, viewing the matter realistically and practically and having thought the matter through conclude?"[13]

[17] The General Division accepted the Claimant's evidence concerning his request for a religious exemption, his suspension and his dismissal.[14] It acknowledged the Claimant's arguments concerning the Commission's failure to examine the employer's conduct and that the vaccine policy violated his collective agreement.[15] The General Division explained that these arguments are not relevant to the misconduct analysis in the EI context.[16]

---

[9] The Claimant references the federal government's *Interim Order for Civil Aviation during COVID-19 (No 43).*
[10] ADN1-7
[11] ADN1-7
[12] See *Arthur* v *Canada (Attorney General),* 2001 FCA 223.
[13] See *Committee for Justice and Liberty* v *National Energy Board*,1976 CanLII 2 (SCC), [1978] 1 SCR 369.
[14] General Division decision at para 46.
[15] General Division decision at para 53.
[16] General Division decision at paras 37 and 53.

[18] The General Division also considered the Claimant's arguments concerning the Interim Order. It explained that these terms of the Interim Order don't change the fact that the Claimant was told by the employer about the consequences of not following the vaccine policy.[17]

[19] There is no arguable case that the General Division was biased against the Claimant. The General Division considered the Claimant's arguments and evidence. The Claimant disagrees with the conclusions that the General Division reached, but this does not amount to bias.

– **No arguable case that the General Division erred by not considering that the policy violated the employment contract**

[20] The Claimant says that case law shows that there has to be a relationship between the conduct and the employment contract for a finding of misconduct. He argues that the vaccine policy had to be added to his collective agreement to be binding. He points to attempts to negotiate adding it to the collective agreement as evidence of this.[18]

[21] The General Division recognized this argument by the Claimant. It explained that a recent decision of the Federal Court made it clear that this was not an issue that it is required to consider.[19]

[22] The Federal Court and the Federal Court of Appeal have since issued a number of decisions concerning misconduct and vaccine policies.[20] The Courts have reiterated several times that this Tribunal does not have the authority to assess or rule on the merits, legitimacy, or legality of the employer's vaccination policy.

---

[17] General Division decision at para 58.
[18] ADN1-7
[19] General Division decision at paras 37 and 53.
[20] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134; *Davidson v Canada (Attorney General)*, 2023 FC 1555; *Matti v Canada (Attorney General)*, 2023 FC 1527; *Francis v Canada (Attorney General)*, 2023 FCA 217; *Sullivan v Canada (Attorney General)*, 2024 FCA 7; *Abdo v Canada (Attorney General)*, 2023 FC 1764.

[23] There is no arguable case that the General Division erred by not considering the legitimacy of the vaccine policy or its relationship to the Claimant's collective agreement.

– No arguable case that the General Division failed to consider the actions of the Claimant's employer

[24] The Claimant argues that his employer had an obligation to uphold labour and human rights laws. He says that it failed to do so and that the Commission and the General Division are supporting these unlawful acts. He argues that he did not know that the employer would fail to follow the law and therefore he did not know that he could be fired.[21]

[25] The General Division recognized these arguments. It found that the Claimant was told in the vaccination policy, an update email and the suspension letter that he could be terminated.[22] It found that even if the Claimant's interpretation of the employer's obligation led him to believe that he could not be terminated, he still should have known what the consequences of his action could be.[23]

[26] There is no arguable case the General Division made an error of law or based its decision on an important error of fact. It considered the Claimant's arguments and evidence on this point and explained, with reference to the evidence, why it did not agree with the Claimant.

– No arguable case the General Division misstated the Claimant's evidence

[27] The Claimant argues that the General Division was wrong in its decision when it stated the reason that the Claimant gave for his dismissal. He argues that he did not say that his employer suspended and then dismissed him for insisting on informed consent for the vaccination and challenging the employer's right to his private information.[24]

---

[21] ADN1-7
[22] General Division decision at para 48.
[23] General Division decision at para 51.
[24] ADN1-7

[28] I have listened to the hearing before the General Division. Near the beginning of the hearing, the General Division asked the Claimant to confirm the issues and told him that it had reviewed all of the documents on this file. It stated that it understood from the evidence, that this was the reason the Claimant had previously stated for his suspension and dismissal. The Claimant did not disagree.

[29] The General Division may have been imprecise when it stated that the Claimant testified to this fact, but it can be inferred from the evidence. Furthermore, for this ground of appeal, the General Division has to have based its decision on a finding of fact that ignored or misunderstood relevant evidence or made a finding that does not rationally follow from the evidence.[25]

[30] I find that there is no arguable case that the General Division based its decision on a factual error. The Claimant has been consistent throughout his matter as to the events that led to his termination. When stating the reason that the Claimant believed he was suspended and terminated, the General Division provided references to evidence in the file.[26] The General Division accepted the Claimant's evidence but disagreed that his conduct did not amount to misconduct.

[31] The General Division applied the proper legal test and followed binding case law from the Federal Court and the Federal Court of Appeal. It considered the Claimant's evidence and arguments and did not take into account any irrelevant evidence. There is no arguable case that the General Division made any reviewable errors in its decision.

[32] 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.

---

[25] See section 58(1)(c) of the EI Act which states "the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it."

[2626] General Division decision at para 19.

Conclusion

[33] Permission to appeal is refused. This means the appeal will not proceed.

Melanie Petrunia
Member, Appeal Division