Citation: *FA v Canada Employment Insurance Commission*, 2024 SST 364

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

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

Decision under appeal:	General Division decision dated November 6, 2023 (GE-23-82)

Tribunal member:	Solange Losier
Decision date:	April 15, 2024
File number:	AD-23-1077

Decision

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

Overview

[2] F. A. is the Claimant in this case. He applied for Employment Insurance (EI) regular benefits.

[3] The Canada Employment Insurance Commission (Commission) decided that he could not get EI benefits because he was suspended from his job due to misconduct.[1]

[4] The General Division came to the same conclusion.[2] It decided that the Claimant was not entitled to get EI benefits because he was placed on leave from his job due to misconduct.

[5] The Claimant is now asking for permission to appeal the General Division decision to the Appeal Division. He argues that the General Division didn't decide an issue it should have.

[6] I am denying the Claimant's request for permission to appeal because it has no reasonable chance of success.[3]

Preliminary matters

[7] The Claimant applied to the Appeal Division on November 27, 2023 by emailing the Tribunal. He didn't fill out the usual forms, but explained in an email that he needed more time to prepare his appeal because he was working in a remote area.[4]

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[1] See reconsideration decision at pages GD3-67 to GD3-68.
[2] See General Division decision at pages AD1A-1 to AD1A-8.
[3] See section 58(2) of the *Department of Employment and Social Development* (DESD Act).
[4] See pages AD1-1 to AD1-3.

[8] On March 1, 2024, I wrote to the Appellant to ask for more information about his appeal. I asked him to identify the reasons for his appeal based on what the Appeal Division can consider.[5] The deadline to reply was March 8, 2024.

[9] On March 7, 2024, the Claimant contacted the Tribunal by telephone asking for an extension. The Navigator assigned to the file gave him an additional two week extension. So, the new deadline to reply was March 22, 2024.

[10] The Claimant emailed the Tribunal on March 20, 2024.[6] He explained that he needed more time because he was working night shift. He asked for an additional extension to reply, until April 15, 2024.

[11] I gave the Claimant an additional extension to reply for three weeks only. The new deadline was April 12, 2024.[7] The Claimant replied and said that the General Division did not decide an issue that was crucial to decide. His main argument is that he was put on a leave of absence due to misconduct, but only because the government was trying to force and coerce him into taking a vaccination shot that could have caused him harm or death.

Issue

[12] Is there an arguable case that the General Division made an error of jurisdiction or error of law when it decided the issue of misconduct?

The test for getting permission to appeal

[13] An appeal can proceed only if the Appeal Division gives permission to appeal.[8]

[5] These are called the grounds of appeal and are found at section 58(1) of the DESD Act.
[6] See pages AD1B-1 to AD1B-2.
[7] See pages AD2-1 to AD2-3.
[8] See section 56(1) of the DESD Act.

[14] I must be satisfied that the appeal has a reasonable chance of success.[9] This means that there must be some arguable ground upon which the appeal might succeed.[10]

[15] The possible grounds of appeal to the Appeal Division are that the General Division:[11]

- proceeded in a way that was unfair
- acted beyond its powers or refused to exercise those powers
- made an error of law
- based its decision on an important error of fact

[16] For the Claimant's appeal to proceed, I have to find that there is a reasonable chance of success on one of the grounds of appeal.

I am not giving the Claimant permission to appeal

[17] The Claimant argues that the General Division didn't decide an issue that was "crucial."[12] Specifically, he says the following in his application to the Appeal Division:

- The General Division should have decided that he was forced and coerced to commit misconduct because of barriers put in place by the government.
- It was not misconduct to refuse a jab [Covid-19 vaccination] that could have caused him long term harm or death.
- The Tribunal should have looked at his work history to see if he was ever fired for misconduct, or fired at all.

[9] See section 58(2) of the DESD Act.
[10] See *Osaj v Canada (Attorney General),* 2016 FC 115.
[11] See section 58(1) of the DESD Act.
[12] See pages AD1B-1 to AD1B-5.

- He was placed on a leave of absence because he would not go along with the barriers imposed by the government. He shouldn't be denied EI benefits for making that choice.

- His conduct did not get in the way of carrying out his duties and he was not aware of the consequences of not getting the shots.

[18] I understand the Claimant's argument to mean that the General Division failed to exercise its jurisdiction when it decided the issue of misconduct. Also, some of his arguments suggest that the General Division made an error of law in its interpretation of misconduct.

[19] So, this decision will consider whether there is an arguable case that the General Division made an error of jurisdiction or an error of law.[13]

– There is no arguable case that the General Division made an error of jurisdiction or an error of law

[20] An error of jurisdiction means that the General Division didn't decide an issue it had to decide or decided an issue it did not have the authority to decide.[14]

[21] An error law happens when the General Division does not apply the correct law or uses the correct law but misunderstands what it means or how to apply it.[15]

[22] The General Division had to decide whether the Commission had proven that the Claimant was suspended due to misconduct according to the *Employment Insurance Act* (EI Act).[16]

[23] The law says that a Claimant who is suspended because of misconduct is not entitled to receive EI benefits.[17]

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[13] See sections 58(1)(a) and 58(1)(b) of the DESD Act.
[14] See section 58(1)(a) of the DESD Act.
[15] See section 58(1)(b) of the DESD Act.
[16] See reconsideration decision at pages GD3-67 to GD3-68. See section 113 of the Employment Insurance Act (EI Act).
[17] See section 31 of the EI Act. This is called a disentitlement to EI benefits.

[24] Misconduct is not defined in the EI Act. The Federal Court of Appeal (Court) in *Mishibinijima* decision defines "misconduct" as conduct that is wilful, which means that the conduct was conscious, deliberate, or intentional.[18]

[25] The Court says that there is misconduct if the Claimant knew or should have known the conduct could get in the way of carrying out their duty owed to the employer and that dismissal (or suspension in this case) was a real possibility.[19]

[26] In its decision, the General Division stated the relevant law and the issues that needed to be decided.[20]

[27] The General Division found that the Claimant was put on a leave of absence because of misconduct. It said that he didn't comply with the employer's policy to be fully vaccinated or have an approved exemption.[21]

[28] The General Division said that the employer had notified the Claimant several times that he needed to be vaccinated.[22] He did not have an exemption either.[23] It found that the Claimant chose not to follow the vaccine mandate of the employer, so the employer decided not to bring him back to the job site.[24]

[29] The General Division ultimately decided that he wilfully breached the employer's vaccination policy, knew the consequences and that his conduct led to his suspension from work, resulting in his misconduct.[25] Because of this, he was not entitled to get EI benefits.

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[18] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[19] See *Mishibinijima v Canada (Attorney General),* 2007 FCA 36, at paragraph 14.
[20] See paragraphs 16-17 of the General Division decision.
[21] See paragraph 19 of the General Division decision.
[22] See paragraph 30 of the General Division decision.
[23] See paragraph 36 of the General Division decision.
[24] See paragraphs 32, 33, 47 and 50 of the General Division decision.
[25] See paragraphs 3, 24 and 55 of the General Division decision.

[30] The General Division correctly focused its analysis on the Claimant's conduct and not the employer's conduct.[26] This is what the case law says to do.[27]

[31] The Court confirmed in *McNamara* that the focus is not on the behaviour of the employer, but rather on the behaviour of the employee. In paragraph 23 of *McNamara,* it said:

> …there are, available to an employee wrongfully dismissed, remedies available to sanction the behaviour of an employer other than transferring the costs of that behaviour to the Canadian taxpayers by way of unemployment benefits.[28]

[32] In some parts of the General Division decision, it referred to some older case law in its decision about misconduct. This wasn't an error because many of the general legal principles from those cases still apply. However, there is more **recent** case law that is applicable because it directly deals with misconduct, the EI Act, Covid-19 vaccinations and the Tribunal's jurisdiction.

[33] For example, the *Cecchetto* decision confirms the Tribunal's limited jurisdiction. Mr. Cecchetto was suspended and dismissed from his job because he didn't comply with the employer's Covid-19 policy. The Court said the following in paragraph 32 of its decision:

> While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

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[26] See paragraph 13 of the General Division decision.
[27] See *Paradis v Canada (Attorney General),* 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[28] See *Canada (Attorney General) v McNamara*, 2007 FCA 107, at paragraph 23.

[34] The Court confirms in *Cecchetto* that the Tribunal has a narrow and specific role and that involves determining why a claimant has stopped working and whether that reason was due to misconduct.[29]

[35] There are other recent decisions from the Court as well.

[36] In *Sullivan*, the Court said this Tribunal is not a forum to question employer policies and the validity of employment dismissals.[30] Similarly, in *Butu*, the Court said that determining whether the employer's vaccination policy is reasonable, is not within the jurisdiction of the Commission or this Tribunal.[31] The Court noted that determining whether the employee was wrongfully terminated is also not within the jurisdiction of the Commission or this Tribunal.

[37] The General Division has to follow what the Court says. Given the above cases, the General Division correctly outlined its jurisdiction by deciding that it could only focus on the EI Act and it could not decide whether the Claimant had other options under other laws.[32]

[38] Some of the Claimant's arguments to the Appeal Division focus on the government's conduct, but that is not something the General Division (and Appeal Division) has the power to decide. As well, the Tribunal has no authority to look into the Claimant's work history to see if he has ever been dismissed before, and it wouldn't be relevant anyway.

[39] If the Claimant feels that the government (and, in turn his employer) forced or coerced him by imposing Covid-19 vaccinations and that resulted in his suspension from work, then there are other forums for him to pursue those actions. The Tribunal cannot deal with those particular issues.

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[29] See *Cecchetto v Canada (Attorney General),* 2023 FC 102, at paragraph 47.
[30] See *Sullivan v Canada (Attorney General),* 2024 FCA 7, at paragraphs 6 and 14.
[31] See *Butu v Canada (Attorney General),* 2024 FC 321, at paragraph 89.
[32] See paragraph 44 of the General Division decision.

[40] For these reasons, it is not arguable that the General Division made an error of jurisdiction because it only decided the issues that it had the power to decide. As well, there is no arguable case that the General Division made an error of law when it determined that the Claimant's conduct was misconduct based on the EI Act and applicable case law. There is no reasonable chance of success on either of these grounds.

– **There are no other reasons for giving the Claimant permission to appeal**

[41] I reviewed the file and examined the General Division decision.[33] I did not find any relevant evidence that the General Division might have ignored or misinterpreted.

Conclusion

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

Solange Losier
Member, Appeal Division

[33] The Federal Court has recommended that I do this in decisions like *Griffin v Canada (Attorney General),* 2016 FC 874 and *Karadeolian v Canada (Attorney General),* 2016 FC 615.