Citation: *KM v Canada Employment Insurance Commission*, 2024 SST 308

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	K. M.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated November 17, 2023 (GE-22-4184)

Tribunal member:	Melanie Petrunia
Decision date:	March 23, 2024
File number:	AD-23-1131

Decision

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

Overview

[2] The Applicant, K. M. (Claimant) was suspended and then dismissed from her job as a dietary aide. She said that she was dismissed because she did not comply with her employer's COVID-19 vaccination policy which she found unreasonable.

[3] The Claimant applied for regular employment insurance (EI) benefits after her termination. The Respondent, the Canada Employment Insurance Commission (Commission) initially paid the Claimant regular benefits. The Claimant later requested an antedate of her claim to the date of her suspension.

[4] The Commission considered why the Claimant lost her job and decided that she was suspended and terminated due to her own misconduct. The Claimant requested a reconsideration and the Commission maintained its decision.

[5] The Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal. It found that the Claimant lost her job because of misconduct could not be paid EI benefits.

[6] The Claimant is now asking to appeal the General Division decision to the Tribunal's Appeal Division. However, she needs permission for her appeal to move forward. The Claimant argues 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.

Preliminary matters

[8] The Claimant provided a letter with her application for leave to appeal which she referred to as supporting documentation.[1] The letter is dated December 18, 2023, after the General Division issued its decision. The letter was not in evidence before the General Division.

[9] I am not able to consider new evidence at the Appeal Division. There are a few exemptions to this rule, but none apply here.[2] The courts have consistently said that the Appeal Division does not accept new evidence. An appeal is not a redo based on new evidence, but a review of the General Division decision based on the evidence it had before it.[3]

[10] I have not considered the supporting document included with the application for leave to appeal.

Issues

[11] The issues are:

a) Is there an arguable case that the General Division based its decision on any important errors of fact?

b) 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

[12] 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?[4]

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[1] AD1-8
[2] Although the context is somewhat different, the Appeal Division normally applies the exceptions to considering new evidence that the Federal Court of Appeal described in *Sharma* v *Canada (Attorney General*), 2018 FCA 48 at paragraph 8.
[3] See *Gittens v. Canada (Attorney General),* 2019 FCA 256 at para 13.
[4] 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.

[13] 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).[5]

[14] 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;
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> b) failed to decide an issue that it should have, or decided an issue that it should not have;
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> c) based its decision on an important factual error;[6] or
>
> d) made an error in law.[7]

[15] 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.[8]

– The General Division decision

[16] The General Division noted that the Claimant was no longer taking issue with her disentitlement during the period that she was suspended from her job. It limited its decision to the issue of the Claimant's termination on October 12, 2021.[9]

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[5] DESD Act, s 58(2).
[6] 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.
[7] This paraphrases the grounds of appeal.
[8] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[9] General Division decision at para 8.

[17] The General Division found that the Claimant was terminated because she did not declare her vaccination status and refused to undergo regular antigen testing for COVID-19 as required by her employer. It based this finding on the Claimant's testimony and documentary evidence.[10]

[18] The General Division then considered whether this reason for dismissal amounts to misconduct for the purposes of the EI Act. It found that the Commission had proven that the Claimant lost her job due to her own misconduct for the follow reasons:

- The Claimant wilfully and intentionally chose not to undergo antigen testing;[11]
- The Claimant wilfully and intentionally chose not disclose her vaccination status to her employer;[12]
- The employer had issued a directive requiring employees to complete mandatory antigen testing or provide proof of full vaccination;[13]
- The employer's directive was communicated to the Claimant;[14] and
- The Claimant knew or ought to have known that her conduct could result in her termination.[15]

[19] The General Division considered the Claimant's argument that the employer had not finalized its policy before terminating her. It rejected this argument, explaining that the Claimant had received numerous documents setting out the employer's requirements and consequences of non-compliance.[16]

[20] The General Division also addressed the Claimant's argument that the employer failed to investigate her concerns. The Claimant said that the employer agreed to look

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[10] General Division decision at para 11.
[11] General Division decision at para 21.
[12] General Division decision at para 21.
[13] General Division decision at para 29.
[14] General Division decision at para 28.
[15] General Division decision at para 29.
[16] General Division decision at para 24.

into her concerns about the safety of the antigen tests but terminated her before doing so.[17]

[21] The General Division found the Claimant's testimony on this point inconsistent and lacking in detail. It noted that there was no documentation to support what the Claimant was saying, even though the employer seemed to value written correspondence. The General Division found that there was insufficient evidence to support the Claimant's position that she was terminated prematurely.[18]

[22] Finally, the General Division addressed additional arguments made by the Claimant that the employer's policy violated her employment agreement, the collective bargaining agreement and a Public Health Directive. The General Division explained that it was not persuaded by these arguments.[19]

No arguable case the General Division made factual errors

[23] In her application for leave to appeal, the Claimant argues that the General Division based its decision on important errors of fact. She says that the General Division had important facts wrong because it was prejudiced and repeatedly attacked her credibility. The Claimant says that the decision contains errors and inconsistent wording, including inaccurate dates and that important documents were overlooked.[20]

[24] There is no arguable case that the General Division based its decision on factual errors. I have reviewed the file material before the General Division. The Claimant did not specify what facts the General Division had wrong, or what dates were inaccurate in its decision. In my review of the file, I have not found any inaccurate facts or dates in the General Division decision.

[25] The General Division explained, with reasons, why it was not convinced by the Claimant's testimony on certain points. Where there is evidence that contradicts a claimant's testimony, the General Division must decide whether the claimant is credible.

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[17] General Division decision at para 30.
[18] General Division decision at paras 32 and 34.
[19] General Division decision at paras 35 to 40.
[20] AD1-3

The General Division explained why it found the Claimant's testimony not credible and referenced documentary evidence in support of this finding. There is no arguable case that the General Division erred when it found that the Claimant's testimony on certain points was not credible.

[26] The General Division may not have referred to all of the documents that the Claimant provided. It is not required to refer to all facts and evidence in its decision. When making findings of fact, the General Division is presumed to have considered all of the evidence before it.[21] I find that there is no arguable case that the General Division ignored relevant evidence.

[27] The Claimant also argues that the General Division misinterpreted the Commission's onus to determine eligibility for benefits. She says that the General Division failed to acknowledge the Commission's errors.

[28] There is no arguable case that the General Division misinterpreted the Commission's onus. The General Division stated that the Commission has the onus of proving, on a balance of probabilities, that the Claimant was terminated because of misconduct.[22] It found that the Commission had met its onus and explained why.

[29] Aside from the Claimant's arguments, I have also considered 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 jurisdiction. I have not identified any errors of law.

[30] 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.

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[21] See *Simpson* v *Canada (Attorney General)*, 2012 FCA 82.
[22] General Division decision at para 19.

[31] 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

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

Melanie Petrunia
Member, Appeal Division