Citation: *MS v Canada Employment Insurance Commission*, 2024 SST 439

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	M. S.
Representative:	L. E.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 19, 2023 (GE-23-3084)

Tribunal member:	Melanie Petrunia
Decision date:	April 28, 2024
File number:	AD-24-78

Decision

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

Overview

[2] The Applicant, M. S. (Claimant) was suspended and then dismissed from her job as a registered nurse. She said that she was dismissed for not becoming fully vaccinated against COVID-19. She said her employer terminated her for not complying with a Provincial Health Order (PHO).

[3] The Claimant applied for regular employment insurance (EI) benefits after her termination. The Respondent, the Canada Employment Insurance Commission (Commission), considered why the Claimant lost her job. It decided that she was suspended and terminated due to her own misconduct and was not entitled to benefits.

[4] The Claimant requested a reconsideration, and the Commission maintained its decision. 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 and 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, she needs permission for her appeal to move forward. The Claimant argues the General Division based its decision on an important factual error.

[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 based its decision on an important error of fact when it found that the Claimant's employer had a vaccination policy?

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

[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;

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

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[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).
[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.

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

– The General Division decision

[12] The General Division first considered the reason that the Claimant was suspended and dismissed. It found that she was dismissed because she refused to be vaccinated against COVID-19 by deadlines set out by her employer.[6] It stated that she failed to comply with the employer's requirements established in response to the PHO.[7]

[13] The General Division then considered whether this reason for the Claimant's suspension and termination is considered misconduct under the EI Act. It acknowledged that the Commission has the burden of proving, on a balance of probabilities, that she lost her job due to misconduct.[8] The General Division reviewed the key principles from caselaw that apply to a misconduct analysis.[9]

[14] The General Division found that the Claimant was suspended and then dismissed for misconduct for the following reasons:

- The employer had established a policy in response to the PHO which required that all employees be fully vaccinated against COVID-19.[10]

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[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] General Division decision at para 16.
[7] General Division decision at para 15.
[8] General Division decision at para 20.
[9] General Division decision at paras 22 to 25.
[10] General Division decision at para 31.

- The Claimant was aware of the employer's requirement to be vaccinated in order to continue working.[11]

- The Claimant willingly chose not to comply with the requirement to be vaccinated.[12]

- The Claimant was aware of the consequences of not getting vaccinated, which included suspension and termination.[13]

[15] The General Division considered the Claimant's arguments that her employer did not have its own policy concerning vaccination, and that she was in compliance with the PHO as a casual employee because she did not have to accept any shifts and did not attend any of the employer's facilities.[14] The Claimant had also argued that her Collective Agreement did not require vaccination.

– **No arguable case that the General Division made a factual error**

[16] The Claimant argues that the General Division based its decision on an important factual error. She says that her appeal was dismissed because the General Division found that she breached her employer's policy. She argues that there was no evidence that her employer had a policy, so there was no breach, and she should be entitled to benefits.

[17] The Claimant points to the fact that her termination letter only references the PHO, and not its own policy.[15] She says that the General Division ignored her testimony that there was no policy. She argues that the General Division's finding that the employer established vaccination requirements is based on pure speculation as to what the employer might do in response to the PHO.[16]

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[11] General Division decision at para 37.
[12] General Division decision at para 39.
[13] General Division decision at para 40.
[14] General Division decision at paras 42 and 43.
[15] AD1-10
[16] AD1-11.

[18] I find that there is no arguable case that the General Division based its decision on an important factual error. The General Division did not find that there was a formal written policy created by the employer in response to the PHO. It stated:

> Although the employer did not send the Appellant a copy of a formal written policy, I find that it is more likely than not that the employer established a "policy" in response to the PHO. This is because there is no dispute that the employer clearly set out the requirements (policy) in response to the PHO. Namely, the Appellant was aware that all employees must be fully vaccinated against COVID-19 (the expressed or implied duty), and it is more likely than not that she knew the consequences for non-compliance.[17]

[19] The General Division notes throughout the decision the employer's requirements and deadlines for vaccination, which it refers to as the employer's policy.

[20] The Claimant's points to a lack of evidence of a formal policy created by the employer in response to the PHO. She says that she was dismissed for not being vaccinated, which was a requirement of the PHO, not a requirement of any employer policy.

[21] The Claimant does not dispute that the PHO applied to her employer. Whether or not the employer created a formal policy to indicate its compliance with the PHO, it is clear that it chose to follow it and required its employees to be vaccinated in accordance with the PHO. This requirement was communicated to employees and established an express or implied duty.

[22] The termination letter states, "Over the past weeks, you have been repeatedly advised of the requirement to be vaccinated against COVID-19 in order to work at Y from October 26, 2021 onward."[18]

[23] The General Division acknowledged and considered the Claimant's argument that the employer did not establish its own policy. It found, on a balance of probabilities,

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[17] General Division decision at para 31.
[18] GD3-21

that it did have a "policy" that was communicated to employees, regardless of whether there was a formal written document.[19]

[24] There was sufficient evidence before the General Division that the employer chose to enforce the terms of the PHO and required its employees to be vaccinated against COVID-19 in accordance with the deadlines set out in the PHO. I find that there is no arguable case that the General Division ignored any relevant evidence in coming to this conclusion and its is not the role of the Appeal Division to re-weigh the evidence.

– **No arguable case that the General Division made any other reviewable errors**

[25] The Claimant also argues that, as a casual status employee, she did not breach any duty owed to the employer by not being vaccinated. She says that the PHO only required vaccination in order to work in a hospital setting or attend the hospital while the mandate was in effect. The Claimant says that she had no duty to pick up shifts and could chose not to work for an extended period of time.[20]

[26] The General Division considered this argument. It found that the employer's policy and the PHO applied to all employees, including those with casual status.[21] The Claimant does not dispute that the PHO applied to her but says that the General Division erred because the employer the policy did not have a policy and she complied with the PHO by not picking up shifts or attending the hospital.[22]

[27] I do not find that this argument has a reasonable chance of success. The employer was clearly aware of the Claimant's casual status and chose to require that she be vaccinated, in accordance with the PHO, in order to continue working. It is not the role of the Tribunal to determine whether the conduct of the employer was justified or reasonable. It set out what it required of the Claimant in order to remain employed, and what the consequences of non-compliance would be.

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[19] General Division decision at paras 31 to 36.
[20] AD1-11
[21] General Division decision at paras 32 and 33.
[22] AD1-11

[28] The Claimant references another Tribunal decision in support of her arguments. As set out by the General Division, it is not bound by other General Division decisions.[23] The Claimant indicated that she had filed a grievance in relation to her termination. If she feels that her employer was not justified in its actions, that is the proper forum for making that determination.

[29] The Federal Court and the Federal Court of Appeal have issued a number of decisions concerning misconduct and vaccine policies.[24] 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 actions in this context.

[30] 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.

[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.

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[23] General Division decision at para 48.
[24] *Milovac v Canada (Attorney General)*, 2023 FC 1120; *Kuk v Canada (Attorney General)*, 2023 FC 1134, appeal to FCA dismissed, 2024 FCA 74; *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.

Conclusion

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

Melanie Petrunia
Member, Appeal Division