



Citation: *YL v Canada Employment Insurance Commission*, 2024 SST 313

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant: Y. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: General Division decision dated January 5, 2024
(GE-23-3077)

Tribunal member: Melanie Petrunia

Decision date: March 26, 2024

File number: AD-24-47

Decision

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

Overview

[2] The Applicant, Y. L. (Claimant) was suspended and then dismissed from his job because he did not comply with his employer's 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] Claimant appealed the reconsideration decision to the Tribunal's General Division. The General Division dismissed the appeal, with modification. It found that the Claimant lost his job because of misconduct but that the Commission had not proven that he was suspended due to misconduct. The Claimant's benefits period did not start until after his termination so he 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 based its decision on important factual errors.

[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 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

[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
- 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

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.

⁴ This paraphrases the grounds of appeal.

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. The Claimant requested a religious accommodation, but the employer denied his request.⁶

[13] The Commission decided that the reason for the Claimant's suspension and dismissal was misconduct. The General Division dismissed the Claimant's appeal with modification. It found that the Commission had proven that the Claimant was dismissed for misconduct.⁷ It decided that the Commission did not prove that the reason for the suspension was misconduct.⁸ The General Division found that the Claimant's religious exemption request was still under consideration so he could not have known he would be suspended.⁹

[14] The Claimant was suspended on November 1, 2021 and terminated on April 22, 2022. He did not apply for EI benefits until after his employment was terminated.¹⁰ This meant that even though he would not have been disentitled to benefits during the period that he was suspended, his benefit period did not start until later, when he was found to be disqualified.

– **No arguable case that the General Division made factual errors**

[15] The Claimant argues that the General Division made factual errors in its decision. He says that the General Division was wrong about the original exemption denial letter.¹¹ He also says that the policy does not explicitly state what will happen if an

⁵ *Karadeolian v Canada (Attorney General)*, 2016 FC 615; *Joseph v Canada (Attorney General)*, 2017 FC 391.

⁶ GD2-17

⁷ General Division decision at para 56.

⁸ General Division decision at para 53.

⁹ General Division decision at para 50.

¹⁰ GD3-12

¹¹ ADN1-3

exemption request is denied, contrary to what the General Division found. Finally, the Claimant says that his conduct was not wilful and that 48 hours was not long enough for him to be vaccinated after his exemption request was denied.¹²

[16] 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.¹³

[17] The Claimant argues that the letter dated September 28, 2021 was not a formal denial of his vaccine exemption request. He says that the policy was not clear about what would happen when the exemption request was denied and that he was only given 48 hours to comply when the request was finally denied.

[18] The final denial of the exemption request was issued on November 8, 2021, after the Claimant had been suspended.¹⁴ That letter said that the Claimant had 48 hours to comply or he would remain on an unpaid leave of absence. The letter also clearly stated that he could be terminated if he continued to remain uncompliant with the policy. The Claimant was terminated approximately five months later, on April 22, 2022.

[19] The General Division found that the Claimant was not suspended for misconduct. The facts that the Claimant takes issue with concern the period in which he was suspended. The General Division found that, unlike with the suspension, the Claimant knew that he could be terminated because it was set out in the letter of November 8, 2021.¹⁵

[20] I find that there is no arguable case that the General Division based its decision on a factual error. 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

COVID-19 (No 43).

¹² ADN1-3

¹³ 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.”

¹⁴ GD2-17

¹⁵ General Division decision at para 59.

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.

[21] 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

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

Melanie Petrunia
Member, Appeal Division