Citation: *CI v Canada Employment Insurance Commission*, 2024 SST 546

Social Security Tribunal of Canada
Appeal Division

Leave to Appeal Decision

Applicant:	C. I.
Representative:	Christina Lazier
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	General Division decision dated December 27, 2023 (GE-22-1612)

Tribunal member:	Melanie Petrunia
Decision date:	May 17, 2024
File number:	AD-24-96

Decision

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

Overview

[2] The Applicant, C. I. (Claimant) worked as a teacher. Her employer introduced a policy requiring vaccination against COVID-19 as a result of a provincial mandatory vaccination protocol. The Claimant did not want to be vaccinated or disclose her vaccination status. Her employer placed her on an indefinite unpaid leave of absence.

[3] The Claimant applied for regular employment insurance (EI) benefits after her termination. The Respondent, the Canada Employment Insurance Commission (Commission) decided that the Claimant could not be paid benefits because she voluntarily took a leave of absence from her job without just cause. 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, with modification. It found that the Claimant was suspended and did not voluntarily take a leave of absence. It decided that the reason for her suspension was misconduct so she 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 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.

Preliminary matters

[7] When she filed her application for leave to appeal, the representative for the Claimant asked what the deadline was for filing submissions in support of her application for leave to appeal.[1]

[8] The representative was informed that there was no opportunity to provide additional submissions on an application for leave to appeal. The representative advised that this was incorrect in law and put the Tribunal on notice that legal arguments would be filed on or before April 22, 2024.[2]

[9] The representative wrote to the Tribunal on April 22, 2024, advising that, due to illness, she would now be filing submissions by April 29, 2024.[3] On April 29, 2024, the representative wrote to the Tribunal advising that she had met with the Claimant and received instructions to further develop submissions in support of the application for leave to appeal. She stated that she would be filing the final version no later than May 6, 2024.[4] No further submissions were received.

[10] I have considered the arguments made by the Claimant in her application for leave to appeal.

Issues

[11] The issues are:

a) Is there an arguable case that the General Division failed to follow procedural fairness by not examining and weighing the Claimant's evidence?

b) Is there an arguable case that the General Division made an error of jurisdiction by not applying the *Canadian Bill of Rights* in its analysis?

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[1] AD1-8
[2] AD1B
[3] AD1C
[4] AD1D

c) Is there an arguable case that the General Division made an error of law by relying on an Order of the Provincial Chief Medical Officer?

d) Is there an arguable case that the General Division based its decision on an important factual error when it found that the employer had a vaccination policy?

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?[5]

[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).[6]

[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;

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;[7] or

d) made an error in law.[8]

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[5] 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.
[6] DESD Act, s 58(2).
[7] 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.
[8] This paraphrases the grounds of appeal.

[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.[9]

– **The General Division decision**

[16] The General Division found that the Claimant did not voluntarily take a leave of absence because she did not have a choice whether to continue working or not. She did not provide proof of vaccination or have a valid exemption by the employer's deadline of November 30, 2021, and was placed on an unpaid leave of absence.[10] The General Division noted that this is considered a suspension for the purposes of the EI Act.[11]

[17] The General Division found that the Claimant was suspended because she did not provide proof of vaccination against COVID-19 or have a valid exemption, as required by her employer.[12]

[18] The General Division then considered whether this reason for suspension amounts to misconduct for the purposes of the EI Act. It found that the Claimant was suspended due to her own misconduct for the follow reasons:

- The Claimant knew about the employer's policy and was given time to comply;
- The Claimant deliberately and intentionally chose not to be vaccinated and not to disclose her vaccination status to her employer;
- The Claimant knew that she could be suspended for not complying with the policy; and

[9] *Karadeolian v Canada (Attorney General)*, 2016 FC 615; J*oseph v Canada (Attorney General)*, 2017 FC 391.
[10] General Division decision at para 57.
[11] General Division decision at para 45.
[12] General Division decision at para 60.

- The Claimant's non-compliance was the direct cause of her suspension.[13]

No arguable case the General Division failed to provide a fair process

[19] In her application for leave to appeal, the Claimant argues that the General Division failed to provide a fair process by failing to examine and weigh her evidence. She points to documents that were referenced in the hearing before the General Division and provided after the hearing.[14]

[20] These materials include: a court decision; an email from the Claimant's employer regarding the Chief Medical Officer's announcements; documents and correspondence relating to the Claimant's grievance; documents relating to the safety and efficacy of the vaccine; and, the Claimant's collective agreement and contract.[15] The Claimant also provided correspondence relating to a FOIPOP request and a brochure concerning the government's vaccine injury support program.[16]

[21] There is no arguable case that the General Division failed to provide a fair process. In its decision, the General Division states that the Claimant filed additional materials which were referenced in the hearing. It states that it has reviewed all of these materials but will not summarize them all.[17]

[22] 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.[18] I find that there is no arguable case that the General Division ignored relevant evidence.

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[13] General Division decision at para 96.
[14] AD1-5
[15] GD31
[16] GD32
[17] General Division decision at para 77.
[18] See *Simpson* v *Canada (Attorney General)*, 2012 FCA 82.

No arguable case that the General Division made an error of jurisdiction

[23] The Claimant argues that the General Division erred by failing to apply the *Canadian Bill of Rights* in its analysis.[19]

[24] There is no arguable case that the General Division made an error of jurisdiction. In a recent decision from the Federal Court of Appeal, the Court stated:

> Before both Divisions of the Social Security Tribunal, the applicant raised the *Canadian Bill of Rights*, S.C. 1960, c. 44. He raises it again here to suggest that his "misconduct" did not legally constitute misconduct. Here again, as explained above, this submission is legally irrelevant to the Social Security Tribunal's task. Under its governing statute, the Social Security Tribunal cannot assess whether the applicant's dismissal from employment was wrongful.[20]

[25] The General Division recognized this argument by the Claimant.[21] It considered it and found that it must apply the legal test for misconduct under the EI Act as established by case law.[22]

No arguable case that the General Division made an error of law

[26] The Claimant submits that the General Division erred in law by relying on an Order of the Chief Medical Officer of Health because it was neither made nor in effect at the time that the Claimant's application for EI was denied.[23]

[27] The Claimant argued before the General Division that there was no evidence of a Public Health Order that applied to her.[24] The General Division considered this argument. It found that the employer communicated its requirements and expectations to the employees.[25] It referred to the Mandatory Vaccination Protocol that was in effect

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[19] AD1-5
[20] *Sullivan v. Canada (Attorney General)*, 2024 FCA 7 at para 7.
[21] General Division decision at para 78.
[22] General Division decision at para 88.
[23] AD1-5
[24] General Division decision at para 78(b).
[25] General Division decision at para 92.

at the time that the Claimant was suspended and included in the material before the General Division.[26]

[28] The General Division also relied on the Claimant's testimony in which she recognized that her employer had a policy requiring vaccination in order to continue working after November 30, 2021.[27] This argument does not have a reasonable chance of success.

No arguable case that the General Division made factual errors

[29] The Claimant says that the General Division made an important error of fact by finding that the employer had a vaccination policy when there was no policy in evidence, and no evidence that a policy was duly created for the unionized employees.[28]

[30] The General Division found that the employer may not have had its own formal vaccination policy, but the evidence showed that it was following the Public Health Order and the Mandatory Vaccination Protocol. It relied on a decision of the Appeal Division which found that an employer adopting a Public Health Order can be considered an employer policy.[29]

[31] There is no arguable case that the General Division based its decision on any important factual errors.

[32] 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.

[33] 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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[26] General Division decision at para 74.
[27] General Division decision at para 92.
[28] AD1-5
[29] General Division decision at para 93.

Conclusion

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

Melanie Petrunia
Member, Appeal Division