



Citation: *SC v Canada Employment Insurance Commission*, 2022 SST 121

## **Social Security Tribunal of Canada Appeal Division**

# **Leave to Appeal Decision**

**Applicant:** S. C.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** General Division decision dated February 8, 2022  
(GE-21-2587)

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**Tribunal member:** Janet Lew

**Decision date:** March 4, 2022

**File number:** AD-22-101

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## Decision

[1] Leave (permission) to appeal is refused because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

## Overview

[2] The Applicant, S. C. (Claimant) is appealing the General Division decision. The General Division found that the Claimant was placed on a leave of absence from her employment because of her own misconduct.

[3] The Claimant worked for a public hospital that implemented a vaccination policy. The General Division found that the Claimant had been aware of her employer's vaccination policy requirements. The General Division found that the Claimant was aware of what the consequences would be if she did not comply with the policy. The General Division also found that the Claimant voluntarily failed to comply with her employer's vaccination requirements.

[4] The Claimant argues that the General Division made factual errors.

[5] Before the Claimant can move ahead with her appeal, I have to decide whether the appeal has a reasonable chance of success.<sup>1</sup> Having a reasonable chance of success is the same thing as having an arguable case.<sup>2</sup> If the appeal does not have a reasonable chance of success, this ends the matter.

[6] I am not satisfied that the appeal has a reasonable chance of success. Therefore, I am not giving the Claimant permission to move ahead with her appeal.

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<sup>1</sup> Under section 58(1) of the *Department of Employment and Social Development Act* (DESD Act), I am required to refuse permission if am satisfied, "that the appeal has no reasonable chance of success."

<sup>2</sup> See *Fancy v Canada (Attorney General)*, 2010 FCA 63.

## Issues

[7] The issues are:

- i. Is there an arguable case that the General Division failed to give any weight to the fact that the Claimant did not have a family doctor?
- ii. Is there an arguable case that the Claimant's employer failed to provide any guidance or direct her to available resources?
- iii. Is there an arguable case that the General Division failed to consider whether the Claimant's employer acted contrary to the law?

## Analysis

[8] The Appeal Division must grant permission to appeal unless the appeal has no reasonable chance of success. A reasonable chance of success exists if there is a possible jurisdictional, procedural, legal, or certain type of factual error.<sup>3</sup>

[9] Once an applicant gets permission from the Appeal Division, they move to the actual appeal. There, the Appeal Division decides whether the General Division made an error. If it decides that the General Division made an error, then it decides how to fix that error.

### **Is there an arguable case that the General Division failed to give any weight to the fact that the Claimant did not have a family doctor?**

[10] The Claimant argues that the General Division failed to give any weight to the fact that she does not have a family doctor. The Claimant says that, because she did not have a family doctor, she was unable to get an exemption from getting vaccinated. If she had an exemption, she would have been compliant with her employer's

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<sup>3</sup> See section 58(1) of the DESD Act. For factual errors, the General Division had to have based its decision on an error that was made in a perverse or capricious manner, or without regard for the evidence before it.

requirements. As well, she would have been able to continue working and would not have been placed on a leave of absence.<sup>4</sup>

[11] The General Division is the trier of fact. For that reason, it is in the best position to assess the evidence before it and to determine the appropriate amount of weight to assign.<sup>5</sup> The Appeal Division defers to the General Division on issues of the weight of evidence.

[12] The issue of weight is not a ground of appeal. The Claimant does not have an arguable case that the General Division did not give any weight to her evidence that she did not have a family doctor.

[13] Setting aside the issue of weight, the lack of a family doctor was irrelevant to the employer's requirements. From the employer's perspective, the only consideration was whether the Claimant had proof of full vaccination against COVID-19, or had a medical or other permissible exemption.

[14] At no time did the employer suggest that it would exempt an employee from its vaccination policy because of a lack of a family doctor, specialist, or a nurse practitioner.

[15] The lack of a family doctor might have explained why the Claimant had not already obtained a medical exemption. But, it did not excuse the Claimant from having to meet her employer's requirements.

[16] The General Division's focus had to be on whether the Claimant was compliant with her employer's requirements.

[17] On top of that, the General Division found that the Claimant had other options that she could have explored or pursued. The General Division found that if she had

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<sup>4</sup> The Claimant's arguments slightly differ from those she made before the General Division. The Claimant's Notice of Appeal to the General Division did not say anything about not having a family doctor so she could get a medical exemption. She stated that she did not want to make a decision about getting vaccinated without informed consent. Nothing turns on this difference however.

<sup>5</sup> See *Hussein v Canada (Attorney General)*, 2016 FC 1417 and *Simpson v Canada (Attorney General)*, 2012 FCA 82.

pursued these other options, they could have enabled her to meet her employer's requirements. The General Division accepted the Commission's arguments on this point.

[18] The Commission had argued that the Claimant had "made no real attempt to explore the possibility of requesting a medical or human rights exemption".<sup>6</sup> The Commission had argued that the Claimant could have taken steps to obtain a medical exemption, even if the deadline to do so had passed. The Commission had also argued that the Claimant could have asked for an extension of time to submit an exemption request.

[19] The General Division's findings were consistent with the evidence. There was no evidence that showed that the Claimant had taken any steps to, for example, get an extension of time for submitting an exemption.

[20] I am not satisfied that the Claimant has an arguable case that the General Division failed to give any weight to the fact that she did not have a family doctor.

**Is there an arguable case that the Claimant's employer failed to provide any guidance or direct her to available resources?**

[21] The Claimant also argues that her employer failed to provide any guidance or direct her to available resources.

[22] A proper ground of appeal involves identifying certain errors that the General Division might have made. The Claimant argues that her employer failed to give guidance and direction to her. This does not represent a proper ground of appeal.

[23] Even if this had been an appropriate ground of appeal, I would have determined that there was no merit to this argument. The employer provided various resources about vaccination. For instance, it provided an education program<sup>7</sup> that included the following components:

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<sup>6</sup> See General Division decision, at para 31.

<sup>7</sup> See employer's policy, at GD3-44 to GD3-45.

- How COVID-19 vaccines work;
- Vaccine safety and effectiveness
- Benefits and effectiveness, and possible risks of vaccination
- Risks of not being vaccinated against COVID-19 and
- Possible side-effects of the COVID-19 vaccination

[24] The employer also provided links to different resources, including to Johns Hopkins Medicine, the Ontario Ministry of Health, Public Health Ontario, and the National Advisory Committee.<sup>8</sup> It also provided a COVID-19 vaccine education page on its website.<sup>9</sup>

[25] The employer also held at least three town hall meetings, two where its head doctor on infectious diseases was available to answer questions about vaccines.<sup>10</sup>

[26] The employer also made occupational health experts available for one-on-one discussions about vaccination and employees' specific concerns.<sup>11</sup>

[27] Series of emails from the employer generally included information on education and confidential supports available.

[28] While the employer's resources may not have satisfied the Claimant's concerns about vaccination, it is very different from alleging that her employer failed to provide any guidance or resources at all.

[29] But, as I have said, complaints about the Claimant's employer do not raise a valid ground of appeal. I am not satisfied that the appeal has a reasonable chance of success on this issue.

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<sup>8</sup> See employer's policy, at GD3-47.

<sup>9</sup> See employer's email update dated September 2, 2021, at GD3-58.

<sup>10</sup> See employer's email update dated August 6, 2021, at GD3-50, and email update of August 19, 2021, at GD3-54.

<sup>11</sup> See employer's email update dated August 6, 2021, at GD3-50.

**Is there an arguable case that the General Division failed to consider whether the Claimant's employer acted contrary to the law?**

[30] The Claimant also argues that the General Division failed to consider that her employer acted contrary to the law. She says that her employer did not have any legal basis to implement a vaccination policy. She argues that, because her employer did not have any legal basis to implement a vaccination policy, she did not have to comply with the policy. And, for that reason, she denies any misconduct on her part.

[31] I do not readily see any evidence that the Claimant raised this argument before the General Division. But, even if the Claimant argued this issue and the General Division failed to address it, there is no merit to the underlying argument, and the Claimant's arguments about the legality of her employer's vaccination policy must fail.

[32] The Chief Medical Officer of Health for the Province of Ontario issued a directive affecting public hospitals. The Chief Medical Officer of Health issued Directive 6 under section 77.7 of the *Health Protection and Promotion Act* (HPP Act), R.S.O. 1990, c. H.7. It is clear that Directive 6 has legal force and effect.

[33] Section 77.7(1) of the HPP Act states that, where the Chief Medical officer of Health is of the opinion that there exists or may exist an immediate health risk to the health of anyone in Ontario, he or she may issue a directive to any health care provider, including a public hospital.

[34] Section 77.7(3) of the HPP Act requires a health care provider that is served with such a directive to comply with it. As a public hospital, the Claimant's employer was required by law to comply with Directive 6.

[35] The directive<sup>12</sup> required the Claimant's employer to establish, implement, and ensure compliance with a COVID-19 vaccination policy requiring its employees, staff, contractors, volunteers and students to provide:

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<sup>12</sup> See Directive #6 for Public Hospitals, issued August 17, 2021, and effective September 7, 2021, at GD3-25 to GD3-28.

- a) Proof of full vaccination against COVID-19; or
- b) Written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or
- c) Proof of completing an educational session.

[36] The directive allowed the Claimant's employer to remove this option and require all employees, staff, contractors, volunteers and students to either provide the proof required in paragraph (a) or (b).

[37] The employer established and implemented a COVID-19 vaccination policy that was consistent with the terms of the directive. The employer removed the option that allowed an employee to provide proof of an educational session.

[38] The Claimant relies on the terms of her collective agreement. She says that, under the terms of her collective agreement, she had the right to refuse vaccination.

[39] The General Division did not address this argument about the Claimant's collective agreement. But, I find that the issue regarding the Claimant's rights arising under the collective agreement irrelevant regarding the legality of the directive. The existence of a collective agreement did not somehow invalidate or supersede the directive.

[40] Even so, the Claimant's employer respected the Claimant's rights under the collective agreement. The employer made it clear that the Claimant could choose to become vaccinated. In its communications dated October 4, 2021, the employer wrote, "It remains your individual choice as to whether or not you choose to become vaccinated against COVID-19."

[41] The Claimant was entitled to exercise her right not to become vaccinated, but vaccination (or obtaining an exemption) had become a fundamental condition of her



employment, in the face of Directive 6. The law required the employer to ensure compliance with the directive.

[42] I am not satisfied that there is an arguable case that the General Division failed to consider whether the employer's vaccination policy was contrary to the law because the issue does not appear to have been before it. I am also not satisfied either that there is an arguable case that the employer's vaccination policy was unlawful.

## **Conclusion**

[43] I am refusing leave (permission) to appeal because the appeal does not have a reasonable chance of success. The appeal will not be going ahead.

Janet Lew  
Member, Appeal Division